Windfall Equity and
the Joint Endeavour Principle

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Dedicated to my golden retriever Holo who doesn’t care whatsoever and only hindered my progress, but I know she would love to rip this thesis to complete shreds and leave the chewed pieces for me to clean up.
Abstract

In 1985 the High Court of Australia delivered its judgment in Muschinski v Dodds (1985) 160 CLR 583 which awarded a constructive trust as a remedy. This case concerned a joint endeavour between two parties who were in a de facto relationship. The joint endeavour broke down without attributable blame in circumstances not contemplated by either party. A constructive trust was awarded to prevent one party from unconscionably asserting legal title to property obtained due to the joint endeavour without accounting to the other party for their equitable entitlements. The leading judgment by Deane J in this case was based on two principles. The first principle was that a constructive trust may be awarded as a remedy without a breach of fiduciary duty being necessary, but its use as a remedy must be principled, based on legitimate processes of legal reasoning. The second principle was in finding that principled basis by analogy to the general equitable principles that underpin partnership law which do not let property and rights simply lay where they fall if the parties’ arrangements end unexpectedly.

Since 1985, courts across all levels and jurisdictions in Australia have applied the principles in Muschinski v Dodds. In that time, the case has found its principal use in de facto relationships. Some courts have sought to develop those principles in line with family law concepts, which has also drawn criticism from other courts. Eventually, the family law regime around 2009 finally included de facto relationships. However, the principles in Muschinski v Dodds still found use in other areas of law regarding families that family law does not address, such as the property rights of parents and children. Texts and commentators focus predominantly on these issues, claiming that the Muschinski v Dodds-style of constructive trust is purely remedial and applies to parties who cohabit. Further, in being treated as purely remedial, the principles in Muschinski v Dodds are often used to award any remedy in general for a failed joint endeavour, seemingly without a constructive trust being necessary, such as in Henderson v Miles (No 2) [2005] NSWSC 867 which coined the term ‘windfall equity’.

However, that is only one aspect. During those thirty-plus years, the principles in Muschinski v Dodds have also applied to many cases that involve third parties, ranging from loose family arrangements to sophisticated contractual joint ventures. In these scenarios, whilst the Muschinski v Dodds-style of constructive trust is used as a remedy, it does so by taking advantage of its institutional characteristics: as a trust exists over property, the owner has no beneficial title to the property. This means that a claim by a third party against the property of a party to a joint endeavour may not succeed, as that property may in fact be beneficially owned by another.

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Texts and commentators overlook this prominent use of the constructive trust in favour of viewing it as purely remedial. In light of thirty-plus years of case law, this view cannot be sustained. The Muschinski v Dodds-style of constructive trust is not purely remedial: there is, in fact, no distinction between ‘remedial’ and ‘institutional’. A constructive trust arises by operation of law during a joint endeavour. The relevance of joint endeavours is also overlooked, despite joint endeavours being crucial to the Muschinski v Dodds-style of constructive trust.

There has been no discussion on the mechanism for how this constructive trust operates beyond as a purely remedial device, nor has there been discussion on joint endeavours in general. From the case law, the constructive trust is inseparable from the joint endeavour in which it arises. Equity acts when it would be unconscionable for a party to assert their legal rights – this does not require wrongdoing. Further, as these trusts may afford higher priority to property than a third party, there must be some intrinsic character of a joint endeavour that gives rise to a constructive trust. This intrinsic character is of special relevance as, given that a joint endeavour can range from loose family arrangements to sophisticated contractual joint ventures, there is an underlying fabric connecting joint endeavours and joint ventures that has not yet been identified. These questions can be analysed and answered through the lens of corrective justice and unconscionability in Australia.

In actuality, Muschinski v Dodds provides two crucial things. The first is that it provides the grounds for the cause of action of the ‘windfall equity’, which operates when a joint endeavour has broken down without attributable blame in circumstances not contemplated by the parties, and where one party has unconscionably retained property to the exclusion of the other. The second is that it provides a set of unifying principles called the ‘joint endeavour principle’ which governs how Equity assists joint endeavours, regardless of their formality, which includes the regulation of fiduciary duties and the construal of trusts.

Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

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This thesis analyses, critiques, and restates the ‘windfall equity’ and ‘joint endeavour principle’. The windfall equity, amongst many other different terms, is a term that courts have used interchangeably to refer to both an equitable principle and an equitable cause of action which unwinds joint endeavours based on the principles in the 1985 High Court of Australia decision Muschinski v Dodds. These joint endeavours can be formal or informal, contractual or equitable, commercial or familial, and everything in between. This wide purview may also include so-called contractual ‘joint ventures’.

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1 Muschinski v Dodds (1985) 160 CLR 583.

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As a principle, the joint endeavour principle operates to regulate fiduciary duties in a joint endeavour by determining if and when they may be owed by the parties and to determine when a trust is construed to exist over property related to the joint endeavour. This has ramifications for contractual joint ventures and may lead to a number of other causes of action, such as breach of fiduciary duty, breach of trust, and knowing receipt. These principles may be relied upon by the parties as they arise by operation of law.

As a cause of action, the windfall equity operates when a joint endeavour cannot continue. The windfall equity seeks to restore contributions made to the joint endeavour and any profits back to the parties. This occurs without needing to attribute any blame to any party, meaning fiduciary duties may not be relevant. This cause of action is enlivened when a joint endeavour fails, enabling the parties to institute legal proceedings to wind up their joint endeavour.

The operation of the windfall equity and joint endeavour principle will be summarised as a flowchart at the culmination of the thesis. This flowchart shows that the joint endeavour principle regulates fiduciary duties and construes trusts in a joint endeavour, and that the windfall equity is only one possible cause of action that may arise out of a joint endeavour:

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Despite the approach taken in the cases as represented by the above flowchart, it seems that courts have historically failed to expressly distinguish between the windfall equity and the joint endeavour principle. This has led to confusion in the development of Equity in this area. There has also been little academic treatment of the windfall equity and the joint endeavour principle beyond the discussion of constructive trusts, and even then, that discussion is usually limited to remedial constructive trusts. Likewise, only two texts in Australia explicitly mention the windfall equity, and these also do so in the context of constructive trusts.² The principles in Muschinski v Dodds have ramifications beyond constructive trusts and also provide the mechanism by which contractual joint ventures may involve fiduciary duties. It is also important to distinguish the windfall equity as a cause of action, as it may only arise when a joint endeavour has collapsed – but the joint endeavour principle does not always lead to the windfall equity as a cause of action.

A The Start

In 1985, the High Court delivered its judgment in Muschinski v Dodds. A de facto couple, Ms Muschinski and Mr Dodds, purchased a dilapidated cottage from which Mr Muschinski was to run a crafts business. She provided 10/11ths of the purchase price and Mr Dodds provided the remaining 1/11th on the basis that he would undertake extensive renovations to the cottage.

However, the parties took the legal title to the property as tenants in common in equal shares. This was because Mr Dodds wanted recognition of the contribution that he was going to be putting in regarding the renovations. After some time, the relationship between them broke down and Mr Dodds did not undertake the renovations as he had intended. He asserted his legal half-interest in the property. Ms Muschinski disagreed, and sought a share in the house that was higher than his legal half-interest, given the disproportionately higher contribution she had made to the property.

The majority of the High Court held 3:2 that a constructive trust existed over the property in proportion to each party’s contributions. The house was to be sold, and each party was to be paid out their initial contributions, being 10/11ths to Ms Muschinski and 1/11th to Mr Dodds. Surplus proceeds of sale were to be distributed equally in accordance with the legal title.

² G E Dal Pont, Equity and Trusts in Australia (Lawbook Co, 6th ed, 2015) 1196; Peter W Young, Clyde Croft and Megan Louise Smith, On Equity (Lawbook Co, 2009) 230–232. These texts will be discussed later in this thesis.

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This decision was a novel constructive trust case which differed from previous case law in many respects. The High Court just one year prior delivered its judgment in *Calverley v Green* which was a similar case where the parties’ contributions were not reflected in their legal interests. However, in that case, principles of resulting trusts applied based on the fact that the party who provided the full purchase price had always intended to take full legal title. This was not the case in *Muschinski v Dodds*: Ms Muschinski had explicitly intended to give Mr Dodds a legal half-interest in the property and she would assume the disproportionate burden on the basis that he would perform the work that he said he would undertake. It was not possible for a resulting trust to apply.

Instead, the High Court found that, despite Ms Muschinski’s intention to give Mr Dodds a legal half-interest and her assumption of the disproportionate burden, a constructive trust should apply to return these contributions back to the respective parties. This operated regardless of the parties’ intentions – it was not a common intention constructive trust, so it operated *contrary* to the parties’ intentions. This was because Ms Muschinski’s and Mr Dodds’ actions were not based on giving and receiving unconditional gifts. Their actions formed part of a larger overall arrangement: a joint endeavour. The parties’ actions were taken pursuant to that joint endeavour, and once the joint endeavour could not be completed due to their separation, the apparent ‘gifts’ by Ms Muschinski to Mr Dodds became unsupportable. Based on analogies to joint venture and partnership law, the High Court applied similar principles to wind up the parties’ relationship by restoring their contributions and distributing any surplus.

Another important aspect of *Muschinski v Dodds* is that the constructive trust did not rely on any breach of fiduciary duty. The issue of whether a fiduciary duty existed or not was irrelevant as the collapse of the parties’ joint endeavour was “without attributable blame”. Blame was not a necessary element to find in order for the High Court to restore the parties’ contributions when their joint endeavour could no longer operate. This means that the High Court did not rule on whether fiduciary duties may or may not exist in joint endeavours.

B The Terms ‘Windfall Equity’ and ‘Joint Endeavour Principle’

The term ‘windfall equity’ refers to the principles espoused in *Muschinski v Dodds*, and the similar High Court case two years later, *Baumgartner v Baumgartner*. It was coined by Young CJ

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4 *Baumgartner v Baumgartner* (1987) 164 CLR 137.

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in Eq in the New South Wales case of *Henderson v Miles (No 2).* Another term was the ‘joint endeavour principle’, used in the Western Australian case of *Lloyd v Tedesco.*

Both cases recognised the importance of the windfall equity as a distinct ‘principle’ and made attempts to expand upon it. However, whereas the ‘joint endeavour principle’ received criticism by the High Court upon hearing an application for special leave, the ‘windfall equity’ is yet to receive adverse comment. The same Young CJ in Eq who coined the term is also the co-author of one of the texts identified above that classifies the windfall equity within the category of constructive trusts.

Given the conflation of principle and cause of action, this thesis will primarily use the phrase “principles in *Muschinski v Dodds*” until it becomes necessary to specifically talk about the cause of action of the ‘windfall equity’ and the general ‘joint endeavour principle’.

### C The Purpose

The purpose of this thesis is to unravel the history of case law since *Muschinski v Dodds* was decided in 1985 until the present day, including the case law that was relied on by the High Court in *Muschinski v Dodds*. It will be shown that the development of the principles in *Muschinski v Dodds* is confusing and must be addressed and put in distinct terms that are readily understandable.

### II The Methodology

The methodology of this thesis is based on a case analysis with reference paid to secondary materials such as articles and textbooks where appropriate. The method espoused by Hall and Wright in their article ‘Systematic Content Analysis of Judicial Opinions’ has been adapted wherein a set of codes are developed which are then applied to cases in order to categorise them for analysis. The purpose of this coding is to aid in the analysis of over 600 separate cases, allowing for the categorisation of each case by certain themes across various aspects, such as principles, timelines and court hierarchy.

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5 *Henderson v Miles (No 2)* [2005] NSWSC 867.

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A Selection of Cases

The cases selected are separated into three categories. These are the cases cited within *Muschinski v Dodds*, the cases that cite *Muschinski v Dodds*, and the cases that cite *Henderson v Miles (No 2)*. Cases analysed end at 2017 as analysis began in 2018, and a cut-off point was necessary given the significant time required to analyse the large volume of cases.

The cases examined, and the cases that cite the examined cases, are Australian cases. The full list of cases that comprise the case analysis are listed in Appendix A, and a comprehensive bibliography of all sources considered by this thesis is contained in Appendix B.

The first method of case analysis involves looking at all authority cited in *Muschinski v Dodds* by the High Court of Australia. The purpose of this is to examine the principles relied upon by the High Court to grant relief in *Muschinski v Dodds*. Although “equity is not yet past the age of child bearing”, “her progeny must be legitimate – by precedent out of principle.”^9^ It follows that the subsequent development of the principles in *Muschinski v Dodds* must logically follow from the principles relied upon in *Muschinski v Dodds*.

The second method involves a case analysis of all Australian cases citing *Muschinski v Dodds*. Not all of these cases will be relevant, as some may only cite *Muschinski v Dodds* with approval without much discussion or may simply mention it in passing without any substantial application. Regardless, as Young CJ in Eq describes it as the first windfall equity case and it is the preeminent High Court case on the subject, its influence through case law must be examined.

The third method is similar to the case analysis to be undertaken for *Muschinski v Dodds*. In *Henderson v Miles (No 2)*, the court applied the windfall equity as a cause of action without any mention of constructive trusts. An investigation into how this case has been applied will shed insight on how the principles in *Muschinski v Dodds* may be developing.

As another factor, the two cases of *Baumgartner v Baumgartner* and *Lloyd v Tedesco* will also be examined specifically. This is because *Baumgartner v Baumgartner* was the first (and only) High Court case to consider the principles in *Muschinski v Dodds*, and *Lloyd v Tedesco* was a failed attempt at consolidating the principles in *Muschinski v Dodds* into a cause of action. It was

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^9^ *Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd* [2012] VSCA 103, [134] (Neave JA).

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also discussed before the High Court in seeking special leave to appeal before being denied leave.

The cases selected were obtained by using three separate citators: AustLII’s LawCite, LexisNexis’s CaseBase, and WestLaw’s FirstPoint. LawCite was used to obtain a comprehensive list of cases, which returned a high number of unreported decisions. Unreported decisions are vital as these vastly outnumber reported decisions, and these unreported decisions are no less important in understanding the development of the principles in Muschinski v Dodds. The use of CaseBase and FirstPoint were used to catch any citations (particularly any reported decisions) that may have been missed by LawCite, in an attempt to cover the field as much as possible.

B Coding

As raised earlier, the cases examined were tagged in a database for ease of categorisation and analysis. This was a manual exercise of typing each code word into the database as a keyword tag. From there, it was a simple matter of searching specifically for a code to automatically retrieve each relevant case.

This coding, or tagging,\textsuperscript{10} of cases involved manual analysis of each case to determine which code would apply to which case. There was no scripting or automated method used beyond searching for broad keywords within cases for significant manual review. Although this process was time-intensive, it was done for the sake of accuracy. Without knowing the cases beforehand, it is impossible to tell what type of terminology and reasoning a court will use, for example, ‘windfall equity’, ‘joint endeavour principle’, ‘constructive trusts’, etcetera. The language used in the cases is very fluid and was not conducive to an automated approach. To enable an automated approach would require knowing the boundaries by reading the cases beforehand, so the cases were simply read to begin with.

The codes developed fall into two categories. These categories are for ‘Context’ and ‘Court Level’. There are multiple codes within each category. The tags are preceded by a ‘#’ symbol in order to make them stand out. Whilst all care was taken to tag every case with the appropriate codes, the fuzzy delineation in the ‘context’ category may have resulted in some minor miscategorisation, but as the cases were analysed manually, any miscategorisation (if it occurred) would have had no substantial effect on the research.

\textsuperscript{10} The terms ‘codes’ and ‘coding’ are used here interchangeably with the terms ‘tags’ and ‘tagging’.

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1. **Context**

This category of tags is the most important category for this thesis. These tags indicate the overall circumstances of a matter, such as whether the matter involves a marriage, a business, insolvency, or any combination thereof. There are six context tags that are applied to cases in order to discover in what types of cases the principles in *Muschinski v Dodds* are being raised. These contexts are important to identify as the principles in *Muschinski v Dodds* are often treated by texts and commentators as being confined to cohabitation. As will be seen later in the thesis, this treatment by texts and commentators has detrimentally affected the development of the principles in *Muschinski v Dodds*.

1. #family indicates a familial context to the case, including marriage, de facto relationships (same-sex or otherwise), and other general family relationships, including family farms, which overlap with #commercial.
2. #commercial indicates a commercial context, including businesses, corporations and partnerships, and may overlap at times with #family.
3. #tax is for taxation cases. These cases take a variety of forms and may overlap with any of the categories above or below.
4. #criminal involves cases almost exclusively involving confiscation of proceeds of crime or other related property.
5. #socialsecurity is a tag applied to cases involving almost exclusively social security assets test appeals against the Secretary of the Department of Social Security. These often overlap with #family and #commercial.
6. #insolvency involves personal bankruptcy or corporate insolvency. It may involve many of the other tags at times, particularly #family when family members attempt to save assets from another family member’s insolvency.

Of particular interest here is the distribution of cases in the family law jurisdiction that cite *Muschinski v Dodds* both before and after the *Family Law Act 1975* (Cth) was amended to address de facto relationships. Further, the wide categories of cases show definitively how wide the application of the principles in *Muschinski v Dodds* might be. These context tags inform the structure for the main content of Chapters 4 and 5: the #family and #commercial tags form

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11 See *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) which allowed parties to a de facto relationship to avail themselves of the *Family Law Act 1975* (Cth) in much the same way that married people can.

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the ‘cause of action’ cases in Chapter 4 and the #tax, #criminal, #socialsecurity, and #insolvency cases form the ‘principle’ cases in Chapter 5.

2 Court Level

These tags indicate which level of court heard the case. These tags did not substantially affect the research, but did provide insight into the frequency of decisions across court levels in Australia.

1. #trial indicates trials at first instance.
2. #appellate indicates appellate cases not heard in the High Court of Australia.
3. #highcourt indicates a decision of the High Court of Australia.

These tags are mutually exclusive, as each level would be a separate reported (or unreported) decision. These tags show which type of court deals most prevalently with certain issues. For example, although the High Court of Australia is the court of highest authority, the High Court hears nowhere near the volume of cases that the trial or appellate courts do.

Further, trial and appellate courts continually build upon High Court authority until the High Court revisits the issue. This is even more important with the increase in the volume of, and ease of access to, unreported decisions in recent times. Therefore, although trial and appellate courts do not hold the authority of the High Court, the sheer volume of cases that they hear allows iterative judicial application and development of principles at a much faster rate compared to only relying on reported decisions. These unreported decisions have been cited with media-neutral citations as they appear in AustLII for ease of reading and research.

C Textbook Treatment

Textbooks as of 2017 were analysed to see how they treat the principles in Muschinski v Dodds, including the term ‘windfall equity’. This analysis included texts prescribed by universities in Australia as well as practitioner-focused texts not otherwise used to teach Equity and trusts in Australian universities. The analysis of prescribed texts was limited to Australian universities that contained law schools. Some of these universities unfortunately did not publish details of prescribed texts for their Equity and trusts courses.

The methodology here was to examine these texts to determine the treatment of the term ‘windfall equity’. The only texts that addressed the windfall equity were the prescribed text
Equity and Trusts in Australia\textsuperscript{12} and the practitioner text On Equity\textsuperscript{13} This lack of treatment by textbooks was surprising and speaks to the need for a proper restatement on the windfall equity and joint endeavour principle. Further, other literature on the topic appears to treat the Muschinski v Dodds-style of constructive trust as purely remedial. However, the case law does not support this view as will be seen in this thesis.

D Philosophical Context

The philosophical context chosen to examine the windfall equity and joint endeavour principle is corrective justice. The principal jurist who will be cited is Ernest Weinrib, a Canadian jurist. Although the Canadian jurisdiction adopts unjust enrichment theories of restitutionary liability, this framework will be modified and adapted to the Australian Equity approach that is based on unconscionability, not unjust enrichment.

It is not intended to address unjust enrichment in any more detail than is required. This is because unjust enrichment is not a general doctrine that can found a cause of action in Australia. Unjust enrichment in Australian law only covers the old forms of quasi-contract and indebitatus assumpsit.\textsuperscript{14} Likewise, unconscionability does not give rise to a cause of action; rather, it underpins the operation of rules and principles of Equity.\textsuperscript{15} As such, Weinrib’s theories on corrective justice will be adapted to suit the Australian jurisdiction.

Further, any inherent references to Kantian or Hegelian concepts in Weinrib’s work are kept general. The thesis presupposes that, regardless of philosophical position, a judge must make a judgment, and the norms and values of Equity can be discerned from those judgments that a judge makes in Equity. It will be shown in the thesis that the basic idea of free agency and autonomy is explicable from Equity’s operation in practice and one need not subscribe to any particular philosophical idea to understand the expression of these concepts generally in the case law.

This thesis is not intended to be a predominantly theoretical work. As such, the philosophical context as discussed above will only be discussed and applied to aid in the analysis of the issues that the thesis will identify in the case law. The purpose of this approach is to analyse the issues

\textsuperscript{12} Dal Pont, above n 2.
\textsuperscript{13} Young, Croft and Smith, above n 2.
\textsuperscript{14} See generally Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221; Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516; Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89.
\textsuperscript{15} Muschinski v Dodds (1985) 160 CLR 583, 616–617 (Deane J).
identified, rather than postulating a completely new theory to which the cases should conform. This preference for the bottom-up approach will be explained in greater detail in the theory chapter.

III Chapter 2: Foundation

This chapter begins by looking at the term ‘windfall’ itself and examines its meaning and its legal and equitable significance. In doing so, it will briefly examine Muschinski v Dodds, Lloyd v Tedesco and Henderson v Miles (No 2) before examining the significance of the windfall equity and potential problems in its development.

The next part delves into the High Court’s decision in Muschinski v Dodds. This analysis will be split into four sections. These are contribution, gifts with conditions, partnerships and joint ventures, and trusts and general equity. Contribution deals with the judgment of Gibbs CJ, gifts with conditions deals with the judgments of Brennan and Dawson JJ, and partnerships and joint ventures deals with the judgments of Deane and Mason JJ. The section on trusts and general equity relates to all of the judgments of the High Court as relevant. The analysis in this chapter will examine the reasoning of each judgment and every relevant case cited by the High Court, drawing out the principles that Muschinski v Dodds espouses.

It will be seen in this chapter that, although Muschinski v Dodds involved the breakdown of a joint endeavour in the context of a de facto relationship, the case law that the High Court relied on is drawn predominantly from joint venture and partnership cases. The basis of Muschinski v Dodds in joint venture and partnership cases will prove to be important for discussion in the later chapters.

IV Chapter 3: Development

In much the same vein as the previous chapter, this chapter examines the development of the principles in Muschinski v Dodds in relation to three seminal cases that followed Muschinski v Dodds. Each case and the principles espoused will be analysed and critiqued.

The first case is Baumgartner v Baumgartner, a decision in the High Court of Australia in 1987. To date, this is the first and only case in the High Court to consider Muschinski v Dodds since 1985. It is an important case to analyse given its expansion upon principle espoused only two years prior.

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The second case is *Lloyd v Tedesco*, a decision in the Supreme Court of Western Australia in 2002. This case used the term ‘joint endeavour principle’ to refer to the principles stated by the High Court in *Muschinski v Dodds* and *Baumgartner v Baumgartner*. This case is important for two reasons. The first reason is that it attempted to expand upon the High Court’s formulation of the principles in *Muschinski v Dodds* and *Baumgartner v Baumgartner*. The second reason is that the parties had an appearance before the High Court, albeit in an application for special leave to appeal, which was denied. This is particularly important for the discussion between the parties and the High Court which further clarified principle and gave context to the application of the principles in *Muschinski v Dodds*, especially given how the *Family Law Act 1975* (Cth) was beginning to apply to de facto relationships, supplanting the principles in *Muschinski v Dodds* in relation to de facto partner property disputes.

The third and final case to be discussed in this chapter is *Henderson v Miles (No 2)*, a decision in the Supreme Court of New South Wales in 2005. This case coined the term ‘windfall equity’ and, unlike *Lloyd v Tedesco*, has received favourable treatment in other Australian jurisdictions. It also highlights the difference in how the principles in *Muschinski v Dodds* operate compared to other equities such as equitable estoppel and goes into detail regarding the calculation of quantum of the final remedy. Most importantly, unlike other cases, this case is a seminal decision in which constructive trusts were not mentioned at all. This is one of the important cases where the windfall equity appears to be treated completely independently from constructive trusts derived from the principles in *Muschinski v Dodds*, and is treated as a cause of action rather than a principle that construes a trust.

This chapter will then summarise the state of the principles in *Muschinski v Dodds* given the above cases and contrast this position with the analysis and summary of principles in the previous chapter in order to highlight the current position of and problems with the principles in *Muschinski v Dodds*. The outcome of this chapter is that the principles used in *Henderson v Miles (No 2)* and *Lloyd v Tedesco* have diverged from *Muschinski v Dodds*, seemingly allowing for claims for equitable compensation for the breakdown of a joint endeavour without a constructive trust being necessary.

V Chapters 4 and 5: Shear – Sword and Shield

These two chapters undertake a significant case analysis of over 600 cases that cite *Muschinski v Dodds*. Given the conclusion in the previous chapter that the windfall equity appears to have taken on a life of its own as a cause of action distinct from principles that construe a trust, this
case analysis is undertaken in order to determine how the principles in Muschinski v Dodds have developed and whether that development is correct. Under each heading in these chapters, a table that summarises principles and the relevant cases will be used to provide a brief summary of the outcome of the case analysis in relation to that particular section.

In analysing the 600+ cases, two contrasting themes emerge. It appears that when the principles in Muschinski v Dodds are used as a principle they are most often used in order to shield property behind a constructive trust. When the principles in Muschinski v Dodds are used to justify a cause of action, then rather than seeking to shield property behind a constructive trust, they appear to be used to recover property from a party through a number of equitable remedies.

The case analysis identifies these themes clearly. When the principles in Muschinski v Dodds are used as a ‘sword’ – the windfall equity – a cause of action, they are most prevalent when used against parties to a joint endeavour in a combination of family and commercial contexts. This usage will be termed the ‘windfall equity’. When the principles in Muschinski v Dodds are used as a ‘shield’ – the joint endeavour principle – a principle, they are most prevalent when used by a party of a joint endeavour against an unrelated third party, in order to deny that third party any claim to property by virtue of the principles of trusteeship. This shield context also seems to be related to how fiduciary duties may or may not arise in a joint endeavour. This usage is in various contexts such as taxation, criminal confiscation, social security, and insolvency, and will be termed the ‘joint endeavour principle’. The terminology ‘sword’ and ‘shield’ was chosen as a reference to how equitable estoppel was used proactively as a ‘sword’, instead of reactively as a ‘shield’, in Waltons Stores (Interstate) Ltd v Maher.16

These chapters will conclude with a summary of the principles identified in the development of the principles in Muschinski v Dodds since 1985 to 2018. From this summary, it will be shown how the conflation of ‘cause of action’ and ‘principle’, or ‘sword’ and ‘shield’ respectively, has confused how the windfall equity and joint endeavour principle truly operate, and the consequences that flow from that confusion. Chapter 4 addresses the ‘sword’ category of cases which relate to the use of the windfall equity as a cause of action, and Chapter 5 addresses the ‘shield’ category of cases which relate to the joint endeavour principle regulating fiduciary duties and construing trusts.


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VI  Chapters 6 and 7: Theory and Application

Having identified the dichotomous treatment of the principles in *Muschinski v Dodds* as a principle and as a cause of action, these two chapters will examine how the windfall equity and the joint endeavour principle operate. It is in these chapters that the proposed terms ‘joint endeavour principle’ for the principle and ‘windfall equity’ for the cause of action will be used.

The theory chapter will begin at the outset by discussing literature regarding the ‘remedial’ constructive trust. This discussion will highlight how many commentators take the view that the *Muschinski v Dodds*-style of constructive trust is purely remedial and arises upon curial order, and will then contrast that view with the case law identified in previous chapters to show how that view is not sustainable.

The theory chapter adapts a corrective justice approach based on Professor Ernest Weinrib’s writings on corrective justice. This approach will be adapted to suit the Australian jurisdiction’s preference for unconscionability, rather than Weinrib’s approach based on unjust enrichment.

The principles identified by this theoretical discussion will then be applied in the application chapter to the problems and elements of the windfall equity and joint endeavour principle as identified in the previous chapters. This synergy of theory and practice will identify how the joint endeavour principle and the windfall equity truly operate, and the consequences of that operation.

The result of this analysis will be a harmonious unification of the courts’ history of disparate treatment of the windfall equity and joint endeavour principle, examining how they operate respectively as a cause of action and set of general principles. It will be seen that there is no distinction at all between ‘remedial’ or ‘institutional’ constructive trusts, and that likewise the ‘sword’ and ‘shield’ distinction should not exist. Instead, the joint endeavour principle regulates fiduciary duties and construes trusts in joint endeavours, and the windfall equity may operate as a cause of action if a joint endeavour fails.

VII  Chapter 8: Conclusion and Restatement

This chapter concludes the thesis with a framework for a restatement of the principles in *Muschinski v Dodds* as the joint endeavour principle and windfall equity. This summary is based
on all the principles discussed in this thesis and synthesised within the framework established in the theory chapter.

The joint endeavour principle is an unconscionability-based unifying theory of fiduciary duties and constructive trusts as they relate to joint endeavours. This unifying theory will also subsume the various principles that relate to fiduciary duties in contractual ‘joint ventures’. The principles that construe trusts and regulate fiduciary duties in certain relationships are the same principles that construe trusts and regulate fiduciary duties in many contractual joint ventures. The joint endeavour principle can lead to a number of other causes of action, such as breach of fiduciary duty, breach of trust, and knowing receipt.

Another cause of action that the joint endeavour principle gives rise to is the windfall equity. The windfall equity operates only if the joint endeavour principle has been enlivened, and if the relevant joint endeavour has collapsed. A party to the joint endeavour may then have a cause of action in the windfall equity to compel the return of their contributions that were made to the joint endeavour. This may operate without attributable blame. This means that it is not necessary to find fault to have a cause of action in the windfall equity. It also means that, even if there was a breach of fiduciary duty, the windfall equity may still be pleaded as an alternative cause of action in the event that such a breach of fiduciary duty cannot be proven.

The distinction between the joint endeavour principle and the windfall equity is important. This is because the joint endeavour principle only construes trusts and regulates fiduciary duties. It does not compel the return of property – it merely compels the proper use of property for the purposes of the joint endeavour. By virtue of the constructive trust, the property of the joint endeavour has some level of protection against external parties who might otherwise claim that property. Only when the joint endeavour has collapsed does the windfall equity step in as a cause of action, which does compel the return of property.

Although the joint endeavour principle regulates fiduciary duties in joint endeavours, it is clear that the windfall equity does not require a fiduciary duty to be found or to be breached. This approach is consonant with *Muschinski v Dodds*. The High Court did not say that fiduciary duties do not arise: it said that a breach of fiduciary duty was not necessary to provide relief.

The end result of this thesis is a restatement of two important separate, but linked, aspects. The first is a restatement of the joint endeavour principle for when fiduciary duties and constructive trusts arise in joint endeavours, and what joint endeavours are. The second is a restatement of the windfall equity and how property is returned after a joint endeavour has collapsed.

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The Windfall Equity: Cause of Action, Principle, or Both?

The term ‘windfall’ is not a legal term of art. Its literal definition once referred to wood or fruit blown down by the wind, which could be gathered by anyone. A windfall now figuratively refers to any unexpected gain, benefit, acquisition, win, or anything else of the sort.¹

A number of examples show that the figurative usage of ‘windfall’ has found its way into some areas of law. In the winding up of a company, a court may declare that surplus funds from the winding up may constitute a windfall and may instead be used for a charitable purpose, rather than disbursing that money to a creditor who would otherwise receive an undeserved windfall far in excess of their original entitlement.² In contractual subrogation, an insurer can sue a tortfeasor using the name of the insured so that the tortfeasor does not have a ‘windfall’ in avoiding their legal obligation to pay compensation.³ Likewise, if an insured party is paid by an

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² Re Melbourne Co-Operative Book Shop Ltd [2015] VSC 69, [12], [20].
³ See generally Randal v Cockran (1748) 1 Ves Sen 98; Mason v Sainsbury (1782) 99 ER 538

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insurer, any action the insured takes against a tortfeasor will have any successful judgment held on trust for the insurer to avoid double recovery by the insured. Finally, restitution will prevent any ‘windfall’ gain received by an undeserving party under a contract due to a failure of consideration.

However, the above usages of the term ‘windfall’ do not have any specific legal significance. But there is one usage of ‘windfall’ which does appear to have legal significance. This is the ‘windfall equity’.

A The Windfall Equity and Joint Endeavour Principle

The ‘windfall equity’ has also been called the ‘joint endeavour principle’. It is possible that this is a cause of action, or a principle, or both. The windfall equity and joint endeavour principle operate in the context of a joint endeavour: that is, parties to a joint endeavour may have obligations to one another, including when the joint endeavour fails.

The windfall equity was first coined by Young CJ in Eq in 2005 in the Supreme Court of New South Wales in Henderson v Miles (No 2). This case is an archetypical ‘granny flat’ case. A mother had built a dwelling on property legally owned by her daughter and son-in-law. The relationship broke down between the mother and her daughter and son-in-law, and the mother moved out of the granny flat. The daughter and son-in-law asserted beneficial ownership of the dwelling that the mother had built on their property. As the dwelling was built on the property legally owned by the daughter and son-in-law, the mother had no legal title to the dwelling. Chief Judge Young in Equity found that it was unconscionable for the daughter and son-in-law to not compensate the mother for her expenditure in improving the land. To prevent the daughter and son-in-law receiving a windfall, an equitable charge was awarded commensurate with the mother’s contribution to the extent that the property’s value increased.

Chief Judge Young in Equity referred to this equity as arising where “a family joint venture breaks down without attributable blame”, and where “it is unconscionable for one of the parties to retain a windfall which the parties never contemplated that that party would receive.”

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4 Yates v Whyte (1838) 4 Bingham New Cases 272; Randal v Cockran (1748) 1 Ves Sen 98.
5 As the term used by the court, see Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, 522 [5] (Gleeson CJ, Gaudron and Hayne JJ), 559–561 [114]–[118] (Kirby J).
6 Henderson v Miles (No 2) [2005] NSWSC 867.
8 Henderson v Miles (No 2) [2005] NSWSC 867, [13].

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Honour said that this equity was first identified in modern times by Deane J in *Muschinski v Dodds*, drawing by analogy upon commercial partnership cases such as *Atwood v Maude* and *Lyon v Tweddell*. His Honour referred to this equity as “the Windfall Equity”, and called it a “general equity”, comparing it to proprietary and promissory estoppel, but distinguishing it from estoppel. Whereas estoppel is based on an unfulfilled promise, the windfall equity “is quite different: the promise has been fulfilled, but the resultant arrangement has come to an end in circumstances not contemplated by the parties, leaving the legal interests in one party who, if equity were not to intervene, would obtain an unconscionable benefit.”

His Honour then discussed various estoppel cases on the question of finding the minimum equity to do justice. After considering a number of ways in which to calculate a sum that represents the windfall, His Honour concluded that the unconscionably retained windfall amount was $39,000, and that the minimum equity to do justice would be satisfied by granting an equitable charge over the property in that amount (subject to an adjustment for contingencies such as life expectancy for her life estate).

*Henderson v Miles (No 2)* was the case originating the term ‘windfall equity’. However, the type of equity this term describes is based on the type of equity present in the High Court decision of *Muschinski v Dodds*, and has arisen independently in the Supreme Court of Western Australia in the case of *Lloyd v Tedesco* where it was termed the “joint endeavour principle”. The ‘joint endeavour principle’ is also used to describe the type of equity present in *Muschinski v Dodds*.

The ‘joint endeavour principle’ appears to be most authoritatively stated in *Lloyd v Tedesco* in the Supreme Court of Western Australia. The case concerned a de facto relationship which broke down, leading one party to have allegedly increased wealth due to the contribution of the other party during the relationship. There was a claim for a constructive trust based on the principles

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9 *Muschinski v Dodds* (1985) 160 CLR 583; *Henderson v Miles (No 2)* [2005] NSWSC 867, [14].
10 *Atwood v Maude* (1868) LR 3 Ch App 369.
11 *Lyon v Tweddell* (1881) 17 Ch D 529.
12 *Henderson v Miles (No 2)* [2005] NSWSC 867, [19].
13 Ibid [20].
14 Ibid [23].
15 Ibid [106] and generally therein.
16 Ibid [109].
18 The term ‘joint endeavour principle’ appears to have arisen independently to the term ‘windfall equity’, as the Western Australian cases cited by the Supreme Court of Western Australia in *Lloyd v Tedesco* (2002) 25 WAR 360 concerning the joint endeavour principle were not cited in *Henderson v Miles (No 2)* [2005] NSWSC 867.
in *Muschinski v Dodds*, which were later affirmed in the High Court decision of *Baumgartner v Baumgartner*. The court considered that *Muschinski v Dodds* and *Baumgartner v Baumgartner* can allow the imposition of a constructive trust as a remedial tool to address the unconscionable retention of assets by one party to the exclusion of the other.\(^{20}\)

The court considered a number of aspects that would lead to the imposition of a constructive trust for an unconscionable retention of benefit. One aspect was whether there was a ‘pooling’ of funds towards a common purpose. Another aspect was that the contribution should have been intended for the benefit of both parties, or at least for the contributing party to have had expected an interest in specific property. Ultimately, the guiding principle was found to be unconscionability, and in the case of a de facto relationship, the trigger for unconscionability had to be the breakdown of a joint endeavour between the parties where both parties intended to increase the wealth of both of them. Simply providing “loving care and support” was not enough, as that is considered to be “a normal incident of a de facto relationship”. The court found that the joint endeavour had to be more in the nature of a “commercial venture”. Justice Pullin expressly disagreed with the decision of *Parij v Parij* where it was considered that the contribution of a homemaker was enough to trigger a claim for this equity. However, *Parij* was decided on different grounds based on *Baumgartner v Baumgartner* and a slew of other family law cases, which included discussions on the appropriateness of developing the law regarding de facto relationships by reference to the provisions contained in s 79 of the *Family Law Act 1975* (Cth) and its associated cases.

The appeal in *Lloyd v Tedesco* was dismissed, so there was no remedy awarded. However, the court did discuss remedies briefly. In doing so, the court quoted the High Court decision of *Giumelli v Giumelli* as the authority that Equity must tailor its remedies to the circumstances of the case, and should, if possible, award a remedy that falls short of the imposition of a trust. *Giumelli v Giumelli* is an important authority which will be considered later as, although it

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\(^{19}\) *Baumgartner v Baumgartner* (1987) 164 CLR 137.
\(^{22}\) Ibid 365 [16] (Murray J).
\(^{23}\) Ibid 368–369 [30]–[31] (Murray J).
\(^{24}\) Ibid 378–379 [83]–[86] (Pullin J).
involved estoppel, it concerned the imposition of a constructive trust, and *Muschinski v Dodds* contains significant discussion on the remedial constructive trust.

B The Significance of the Windfall Equity and Joint Endeavour Principle

The significance of the windfall equity and joint endeavour principle lies in the courts’ confusing application of the principles in *Muschinski v Dodds* as both a principle and a cause of action. The windfall equity and joint endeavour principle, despite being independently developed in the Supreme Courts of New South Wales and Western Australia in 2005 and 2002 respectively, are not terms that are widely known or discussed. In surveying forty Australian universities in 2017 to identify their texts on equity and trusts, most prescribed texts fail to address *Henderson v Miles (No 2)* and *Lloyd v Tedesco*. Rather, they tend to address *Muschinski v Dodds* in the context of constructive trusts generally, or if they are more specific in their treatment, by citing *Muschinski v Dodds* as authority to impose a constructive trust in circumstances where there has been some mixture of funds, often in the context of cohabitation.

As of 2017, only two texts, prescribed or otherwise, have been identified which recognise the existence of the windfall equity. One text is the 2015 edition of Dal Pont’s *Equity and Trusts in Australia*, which is an Australian university-prescribed text for teaching trusts and equity. The second text is *On Equity*, which appears to be a practitioner-focused text, or is at least not prescribed by any university courses that could be identified in Australia. In Dal Pont’s text, *Muschinski v Dodds* is referred to as the “windfall equity” which is discussed in the context of constructive trusts. *On Equity* also places the windfall equity within the context of constructive trusts, but specifically refers to it as “constructive trusts arising from windfalls”. This text also treats the windfall equity as arising within the context of cohabitation where a constructive trust may be imposed if a lesser remedy will not suffice. It should be noted here that the primary author is Young CJ in Eq of the Supreme Court of New South Wales who first coined the term “windfall equity”.

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30 For example, the universities as of 2017 that prescribe this text include Australian National University, Griffith University, Queensland University of Technology, University of Adelaide, University of Tasmania and University of Technology Sydney.
31 Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook Co, 2009).
32 Dal Pont, above n 29, 1196.
33 Young, Croft and Smith, above n 31, 445–451.
34 Ibid 230–232, also discussing the principles in *Baumgartner v Baumgartner* (1987) 164 CLR 137.
There are some ongoing themes in the treatment of the windfall equity. The first theme is that it is only recently that the windfall equity has been the focus of any discussion and, even then, its appearance has been scarce in texts. The second theme is that it always appears to be categorised under the topic of constructive trusts and treated as a principle that gives rise to a constructive trust, rather than a cause of action generally, despite its use as a cause of action. The joint endeavour principle is very rarely discussed, as the term ‘windfall equity’ appears to be more common, especially given the treatment of the two cases, but the phrase “principles in Muschinski v Dodds” appear to be the most common expression.

This second theme of constructive trusts is curious. Lloyd v Tedesco considered a claim for a constructive trust, and although the appeal was ultimately dismissed, the court did consider that, citing Giumelli v Giumelli, a lesser remedy short of a trust may suffice. However, in Henderson v Miles (No 2) (and its first hearing) there was no reference to constructive trusts at all. This begs the question as to what the windfall equity actually is. Is it a cause of action? Is it a principle? Is it both? How does it work in both ways, and what about the term ‘joint endeavour principle’?

Why Constructive Trusts?

It is surprising that the few texts on the topic categorise the principles in Muschinski v Dodds and the windfall equity under constructive trusts, even in the text co-authored by Young CJ in Eq, as Henderson v Miles (No 2) does not discuss constructive trusts in any way. The connection to constructive trusts is found in Muschinski v Dodds, which Young CJ in Eq described as the first windfall equity case. It is important to note that the term ‘windfall equity’ was only coined in 2005 and was not used by the High Court in Muschinski v Dodds.

Given the use of differing terminology in case law, this thesis will predominantly use the phrase “principles in Muschinski v Dodds” unless it becomes necessary to explicitly use the terms ‘windfall equity’ or ‘joint endeavour principle’. It will be seen later that these two terms should respectively refer to a cause of action for failed joint endeavours and a general set of principles that underpin various joint endeavours.

The basic facts in Muschinski v Dodds were set out in Chapter 1. Although the arrangement between the parties changed many times along the way, such as whether they would build or

renovate, or whether or not the purchase price would be supported by a loan, what is important is that the parties took an equal interest in the property despite Ms Muschinski providing 10/11ths of the purchase price. This was because the parties understood that Mr Dodds would undertake renovation work on the property, but he wanted his name on the legal title to the property to reflect the work he was going to be putting in. Not longer after, their relationship broke down. Mr Dodds had not performed the renovation work that he assured Ms Muschinski he would undertake. Mr Dodds asserted his legal half interest in the property.

Ms Muschinski claimed to be beneficially entitled to a resulting trust over Mr Dodds’s half interest, or in the alternative, a constructive trust over his half interest. The resulting trust argument was unanimously rejected, as the usual presumptions of the existence of a resulting trust were rebutted. However, Ms Muschinski’s claim for a constructive trust over Mr Dodds’s half interest succeeded.

Justices Brennan and Dawson, in dissent, dismissed Ms Muschinski’s claim for a constructive trust on the basis that no unconscionability was demonstrated. Her claim was described as being “on the grounds of fairness”, which did not attract the intervention of Equity.

In the majority, Deane and Mason JJ found that a constructive trust would be imposed in these circumstances. Chief Justice Gibbs considered that an equitable charge should be ordered, but otherwise deferred to the judgment of Deane J. Justice Deane therefore delivered the leading judgment in the case. The main argument, relied on by cases since, is that a constructive trust would arise when:


38 Muschinski v Dodds (1985) 160 CLR 583, 608 (Brennan J), 624–625 (Dawson J).

39 Ibid 620 (Deane J), 598–599 (Mason J).

40 Ibid 598 (Gibbs CJ).

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relevant property to the extent that it would be unconscionable for him so to do...41

As Muschinski v Dodds is the first ‘windfall equity’ case and discusses remedial constructive trusts so heavily, it is easy to see why the windfall equity has been slotted into the same constructive trust category in texts (if it appears at all). Yet Henderson v Miles (No 2) does not address constructive trusts at all.

This is because there is another substantial argument made by Deane J in Muschinski v Dodds. In discussing the removal of the substratum of a joint endeavour and the analogy of partnership cases, Deane J considered that, had the facts involved a purely commercial relationship rather than a mixture of commercial and personal relationships, “there would be little room for argument” as to Mr Dodds’s unconscionable retention of his legal half interest.42 However, beyond making an allowance for a refund of each party’s capital contribution, he made it clear that there was no unconscionability on the part of Mr Dodds in asserting his legal half interest in any surplus from the proceeds of sale after each party’s initial contributions had been repaid.43 He then said that the question remaining is “whether there should be a declaration that the Picton property is held by the parties upon constructive trust”.44 As to this question, he found in the affirmative, with the result that each party held their interests on trust for each other in order to refund each party their contributions and to then equally share in any surplus.

In discussing the surplus, Deane J considered that there could be a case for someone who contributes a greater proportion to receive a greater share in any proceeds, but could not see how that could apply to the facts before him. This was not elaborated on. As such, he only found unconscionability in not refunding each party’s capital contributions, and not in asserting a half interest in any surplus proceeds of sale disproportionate to the parties’ contributions. This may not accord with the partnership principles that Deane J draws upon in calling for a proper accounting in the dissolution of a partnership. This will be discussed later in this thesis. There does not appear to be any explicit consideration of the principles in Muschinski v Dodds leading to a cause of action either, but only as a principled basis for awarding a constructive trust.

41 Ibid 620 (Deane J).
42 Ibid 621 (Deane J).
43 Ibid 623 (Deane J). See also 608 (Brennan J) finding the claim to be simply based on the grounds of fairness.
44 Ibid 623 (Deane J).
The cases following *Muschinski v Dodds* largely involve the discussion of constructive trusts. It is only after the decision of the High Court in *Giumelli v Giumelli* that courts, in following *Muschinski v Dodds*, begin to shy away from the imposition of constructive trusts in favour of the minimum equity to do justice.

It appears now that modern cases often eschew considerations of constructive trusts entirely.\(^{45}\) The seminal ‘windfall equity’ cases post-*Giumelli v Giumelli*, being *Lloyd v Tedesco* and *Henderson v Miles* (No 2), exemplify this shift. Whereas the former considers the possibility of a constructive trust existing before stating that a remedy short of a trust should be preferred,\(^{46}\) the latter is completely devoid of constructive trust terminology. The principles in *Muschinski v Dodds* are still applied today in various different circumstances involving joint endeavours.\(^{47}\)

The origins of the windfall equity provide an explanation as to why it is still categorised as a subset of constructive trusts in texts: the discussion in *Muschinski v Dodds* of the breakdown of a joint endeavour was ancillary to the discussion of principles relating to constructive trusts. But is that really the true nature of the principles in *Muschinski v Dodds*?

A number of questions arise from the principles in *Muschinski v Dodds*. For example, how much do the principles of constructive trusts apply to the ‘windfall equity’? Is it a necessary precondition to a remedy that a constructive trust must be found at any point? What is the relevance of the remedial versus institutional nature of the constructive trust? If a constructive trust is necessary, what are the implications of that constructive trusteeship?

Further, despite not referring to a constructive trust, is *Henderson v Miles* (No 2) really a constructive trust case, and did the consequential equitable charge actually arise from a constructive trust having first been found? If the imposition of an equitable charge can arise from a constructive trust being found, then how is the decision reconciled with the judgment of Deane J in *Muschinski v Dodds* in which there could be no remedy for retaining an equitably

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\(^{45}\) Especially the coining case *Henderson v Miles* (No 2) [2005] NSWSC 867.

\(^{46}\) The previous decision also had scant reference to constructive trusts. See *Lloyd v Tedesco* [2001] WASC 99, [8] (Wheeler J). See also [3] which refers to the “joint endeavour principle” being raised in *Stowe v Stowe* (Unreported, Supreme Court of Western Australia, 4 July 1996).

\(^{47}\) See *Stavrianakos v Western Australia* [2016] WASC 64, which applied the windfall equity to circumstances where, 20 years prior to the hearing, a literal windfall was received in the form of a lottery win. The case concerned ‘Tony’, the lottery winner, being arrested for possession of methamphetamines and having his property confiscated. The claim by his family members related to a claimed interest in part of the seized property due to his application of funds from that lottery win for his family members’ benefit 20 years prior to the case.
disproportionate share in the proceeds of sale after the parties’ initial contributions were repaid. These questions concern the entire legitimacy of the ‘windfall equity’.

In short, what principles truly govern the windfall equity? The windfall equity appears to have become a cause of action in its own right through *Henderson v Miles (No 2)* awarding an equitable charge, but it appears to also be a principle that operates in an entirely different manner to find a constructive trust. The windfall equity has not yet fully crystallised in case law, given the uncertainty surrounding the questions raised above. As the first windfall equity case, the basis of the court’s reasoning in *Muschinski v Dodds* must be analysed, particularly the leading judgment of Deane J where his Honour delves into historical case law in an attempt to find an equity that could grant relief to the plaintiff.

**II The Founding Principles**

As identified in *Henderson v Miles (No 2)*, *Muschinski v Dodds* is the first windfall equity case in modern times. The reasoning of the High Court gives various bases for accepting or dismissing the appeal, and so must be closely examined before the windfall equity can be meaningfully discussed.

On the facts stated earlier, Ms Muschinski pleaded relief in the form of a resulting trust, or in the alternative, a constructive trust. The High Court was tasked with deciding the issue on those two grounds. The High Court unanimously dismissed the argument for a resulting trust, holding that the presumption giving rise to a resulting trust was rebutted by the evidence. It was always the intention of Ms Muschinski to give Mr Dodds an immediate interest in the property without risk of forfeiture. In relation to constructive trusts, the High Court was divided. In the majority, Gibbs CJ and Deane and Mason JJ found that Mr Dodds held his interest on constructive trust for Ms Muschinski. In the minority, Brennan and Dawson JJ found that Ms Muschinski’s claim

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was nothing but a plea on the grounds of fairness which was incapable of supporting a constructive trust.

The reasoning of the High Court can be divided into three broad categories with a fourth general category. The first three categories are equitable contribution, gifts with conditions, and joint ventures and partnerships, and the fourth general category is Equity and trusts in general. It is necessary to discuss the three approaches of the High Court and how those conclusions were reasoned in relation to Equity and trusts in general. From there, the cases that the High Court cites will be examined to tease out the principles that *Muschinski v Dodds* ultimately espouse.

There are a number of problems with the judgments of the High Court in *Muschinski v Dodds*, as demonstrated through analysing the cases that the High Court cited. This analysis serves to distil the principles that were used to award a constructive trust. Although the judgments may be separated into the three categories of contribution, gifts with conditions, and joint ventures and partnerships, the judgments are also linked in various ways. For example, Gibbs CJ’s judgment based on contribution was rejected by Deane J; the application of the constructive trust by Gibbs CJ and Deane and Mason JJ was rejected by Brennan and Dawson JJ; the analogy to partnership cases by Deane J was rejected by Brennan J; and the inability to find that Mr Dodds acted unconscionably was shared by Brennan and Deane JJ, albeit entirely by Brennan J and only in part by Deane J in relation to any surplus from the proceeds of sale of the property.

Of the 54 cases cited by the High Court, four were cited in relation to a court’s ability to depart from concurrent findings of fact by lower courts, and as such are not relevant. The remaining 50 cases can be broadly apportioned between the four categories of contribution, gifts with conditions, partnership and joint venture cases, and principles of trusts and Equity. Some of the cases cited involve discussions across multiple categories.

The first three categories reflect the three different arguments raised by the court by Gibbs CJ, Brennan and Dawson JJ, and Mason and Deane JJ respectively, and as such, analysing these categories of cases is necessary to discover what the principles in *Muschinski v Dodds* are. The fourth category includes trusts cases (resulting and constructive) and general principles of Equity. Resulting trust cases are included despite being unanimously dismissed as an argument by the High Court in *Muschinski v Dodds*, as they are still relevant to understand how the

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principles in *Muschinski v Dodds* are distinguished from a case where a resulting trust may apply. This category also includes cases concerning principles of constructive trusts and general equitable principles, which were cited by the High Court to justify their application of a constructive trust as a remedy (or their refusal to find as such). These cases will be analysed to the extent that they are relevant to the thesis.

**A Contribution**

Chief Justice Gibbs delivered his judgment in favour of Ms Muschinski on the basis that she had a right of contribution against Mr Dodds. Although he ultimately deferred to the judgment of Deane J,\(^{52}\) this was only after he had penned his own judgment. In general, Gibbs CJ’s argument was based on the concept that if two or more people are jointly responsible for a liability, and one person pays more than the other, the one who paid more may claim contribution from the other person to the extent that the payment was proportionately higher than their liability to make that payment.\(^{53}\) The principle of contribution operates whether or not the coordinate liability is voluntary, but its operation can be excluded by express or implied agreement and will not operate contrary to the parties’ intentions.\(^{54}\)

The point was made by Gibbs CJ that, by both parties signing the contract to purchase the property, the parties became jointly and severally liable for the purchase price of the property under the contract that they had both signed.\(^{55}\) Further, they had intended to borrow jointly from the bank, but that was rendered unnecessary as the purchase price ending up being financed by the sale of Ms Muschinski’s former property.\(^{56}\) Although the parties could have disclaimed a right to contribution, Gibbs CJ considered that, given the facts and circumstances, there was nothing to show that the parties had intended to exclude a right of contribution.\(^{57}\)

Given the lack of intention to exclude a right of contribution, Gibbs CJ did not impute such an intention. He considered that Ms Muschinski was entitled to contribution from Mr Dodds to the extent that she paid more than half of the purchase price, and that she would be entitled to an

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\(^{52}\) *Muschinski v Dodds* (1985) 160 CLR 583, 598 (Gibbs CJ).


\(^{54}\) *Muschinski v Dodds* (1985) 160 CLR 583, 597 (Gibbs CJ); *Anson v Anson* [1953] 1 QB 636, 645; *Gadsden v Commissioner of Probate Duties (Vic)* [1978] VR 653, 661.

\(^{55}\) *Muschinski v Dodds* (1985) 160 CLR 583, 596 (Gibbs CJ).

\(^{56}\) Ibid 597 (Gibbs CJ).

\(^{57}\) Ibid 597–598 (Gibbs CJ).
equitable charge in respect of that amount.\textsuperscript{58} Unfortunately for this argument, the parties did not make any claim on the basis of principles of contribution, despite suggestions from the Bench that an equitable charge may have been appropriate.\textsuperscript{59} As the parties did not argue their case based on contribution, Gibbs CJ deferred to the judgment of Deane J.\textsuperscript{60}

Ultimately, equitable contribution was not a principle relied upon by the High Court in \textit{Muschinski v Dodds}. However, the principles relating to equitable contribution are still relevant. The main reason for this is that equitable contribution relates to the joint liability of the parties. This liability is necessarily tied to a specific source of liability, and it is that source of liability and the circumstances surrounding it which determines the right to equitable contribution.

As was the case in \textit{Muschinski v Dodds}, take the example of a contract to purchase a house. When both parties become purchasers as tenants in common in equal shares, they each undertake a joint liability to pay the purchase price. The seller does not care who pays the purchase price, so long as the price is paid. If the purchase price is unpaid, the seller is entitled to sue either of the purchasers to recover the purchase price. This liability to pay the purchase price is a legal obligation, one borne by contract.

Whilst it is not fair that a party may only obtain a half-interest despite assuming full liability, this does not affect the conscience of the seller. Equity instead operates to compel the conscience of the other purchaser to contribute. The other purchaser is compelled to reimburse the first purchaser to the extent that they paid proportionately more than their legal interest would otherwise entitle them to. In the case of tenants in common in equal shares, if a purchaser contributed more than 50 per cent of the purchase price, they would be entitled to compel the other purchaser in Equity to contribute as much as necessary to ensure that the first purchaser is reimbursed for any amount paid in excess of 50 per cent.

Assume two tenants in common in equal shares paid 9/10ths and 1/10th respectively. The party who paid 1/10th would be compelled by Equity to pay 4/10ths to the party who paid 9/10ths in order to ensure that both parties equally bare 5/10ths of the purchase price.

However, the source of this liability is the purchase contract. Other matters such as intention and agreement may, on the cases cited, waive a right to contribution. But in the context of a

\textsuperscript{58} Ibid 598 (Gibbs CJ).
\textsuperscript{59} Ibid.
\textsuperscript{60} Ibid. Also note 617 (Deane J) where Deane J addressed the issue of contribution and came to the opposite conclusion of Gibbs CJ.
joint endeavour, that source of liability (whether waived or otherwise) falls within a larger scheme, an overall arrangement. For the purposes of that larger scheme, a right to contribution may be waived in furtherance of the overall arrangement. This was clearly the case in Muschinski v Dodds, wherein Ms Muschinski unequivocally assumed full liability for the purchase price in furtherance of the overall arrangement between herself and Mr Dodds. The right to contribution (whether waived or otherwise) may in fact be conditional upon that overall arrangement coming to fruition. It is that larger scheme where the right to contribution must be considered.

Further, there is a significant conceptual difference when comparing equitable contribution to when a joint endeavour breaks down. Whereas contribution seeks to align the equitable interests of the parties so that they reflect their legal interests, the principles in Muschinski v Dodds operate in the opposite way to align the parties’ legal interests so that they reflect their equitable interests.

In equitable contribution, Equity compels another party to contribute in some way so that each party’s contributions align with their legal interests. Take again the example in Muschinski v Dodds. Each party was jointly liable for the purchase price, and each party was to receive a 50 per cent legal interest in the property. When Ms Muschinski pays 100 per cent of the joint liability, she is entitled to compel Mr Dodds to equitably contribute up to 50 per cent so that each party’s payments ultimately reflect the legal interests vested in them. Equity seeks to ‘finalise’ the relationship between the joint debtors by making them liable to contribute in a manner proportionate to their own interest and liability.

The principles in Muschinski v Dodds operate in the opposite direction. Although Equity still looks at the parties’ contributions and whether they align with the parties’ legal interests, it does not compel any one party to contribute so that their equitable and legal interests align. Rather, instead of ‘finalising’ the parties’ relationship, the relationship is unwound to the beginning. It requires the parties to account to one another for any legal interest received in excess of what their equitable interest would entitle them to. Rather than a party being compelled to contribute to ensure that they pay what they should, the party is, in effect, compelled to disgorge their legal interest to the extent that it disproportionate to their actual contribution. This was done at least in part in Muschinski v Dodds whereby Ms Muschinski and Mr Dodds were required to account to one another for their contributions of 10/11ths and 1/11th respectively.

In this way, equitable contribution is distinguished. Contribution may still, however, have a role to play if it is not otherwise excluded within the overall arrangement between the parties. If a
potential right to contribution arises in the context of a joint endeavour, that right may still be relevant in determining the parties’ overall contributions to the joint endeavour and their subsequent entitlements if the joint endeavour breaks down. This is apparent in the resulting trust scenario, whereby a resulting trust may be imposed in proportion to the parties’ initial contributions, with a subsidiary right of equitable contribution being supported by an equitable charge on the other party’s interest.61

The particular principles to be drawn from the contribution cases cited in Muschinski v Dodds relate to the exclusion of the right of contribution and whether that exclusion is conditional. While it is established that a right to contribution may be excluded by intention,62 the true nature of the circumstances must always be considered. The surrounding context of a joint endeavour not only informs the court as to whether or not the waiver of a right of contribution is present, but also whether, in the larger scheme of things, that waiver was conditional upon the joint endeavour coming to fruition.

The argument given by Gibbs CJ was founded on there being a default right to equitable contribution and, absent any intention which expressly excluded that right, Ms Muschinski must have continued to have had a right of contribution against Mr Dodds, the joint co-debtor.63 This approach was rejected by Deane J, citing the circumstances of the case that make it abundantly clear that, due to the overall arrangement, it was clearly the intention of Ms Muschinski that she be entirely responsible for the purchase price of the house, thereby excluding any right to contribution.64

This was as far as the High Court decided the issue of contribution. What is relevant is the ‘overall arrangement’ between the parties which expressly excluded a right to contribution. As the exclusion was in furtherance of that overall arrangement, it is clear that the exclusion was conditional upon the parties’ joint endeavour coming to fruition. The problem here is that, before Muschinski v Dodds, there was no way to claim a remedy in this situation. It is certain that Ms Muschinski excluded her right to contribution in reliance on Mr Dodds’s assurances, but there can be no relief in equitable estoppel as there is no attributable blame. There can also be

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63 Muschinski v Dodds (1985) 160 CLR 583, 597–598 (Gibbs CJ). See also Calverley v Green (1984) 155 CLR 242, 265 (Murphy J) where it was mooted that the parties should resolve any issue of contribution between themselves. Further, note that there is no imputation, but rather a reliance on the default right to contribution.
64 Muschinski v Dodds (1985) 160 CLR 583, 617 (Deane J).
no equitable fraud on the part of either party simply because they are no longer capable of continuing their relationship.

So, whilst a right to contribution may be waived, such a waiver is not determinative of the matter. There are two instances in which the waiver may differ. These are whether or not the waiver is conditional upon the joint endeavour that the parties are engaged in coming to fruition.

If the waiver is conditional upon the joint endeavour coming to fruition, then any rights to contribution become relevant in determining the contributions of each of the parties in unwinding the endeavour, as it was in *Muschinski v Dodds*. If, however, the waiver cannot be considered to be a part of that overall arrangement, then that waiver is likely unconditional and will be considered a gift.

The best way to phrase this may be by borrowing from the words of Deane J in *Muschinski v Dodds* in that, if a right to contribution is waived in the context of a joint endeavour, it must be investigated as to whether the joint endeavour was the substratum of that waiver. If the joint endeavour fails, then if a waiver of a right to contribution was based on that joint endeavour, then the waiver too must fail. If the waiver did not have the joint endeavour as its substratum (for example, a gift from parents to children during a joint endeavour) then it does not matter if the joint endeavour fails. Such waiver would not be based on the joint endeavour, and thus it would not be affected by the joint endeavour collapsing. It is this conditional distinction in the context of the joint endeavour where a right of contribution may be relevant. Such a conditional waiver could also be framed as a conditional gift, which was how Brennan and Dawson JJ framed the equity present in *Muschinski v Dodds*.

B Gifts with Conditions

There were ten cases cited by the High Court in relation to gifts with conditions.\(^{65}\) These cases were cited entirely by Brennan and Dawson JJ.

Justice Brennan based his judgment upon the characterisation of the case being one of enforcement of a condition annexed to a gift.\(^{66}\) Justice Dawson followed Brennan J, further

\(^{65}\) *Scot v Haughton* (1706) 2 Vern 560; *Gibson v Dickie* (1815) 3 M&S 463; *Messenger v Andrews* (1828) 4 Russ 478; *Gregg v Coates* (1856) 23 Beav 33; *Rees v Engelback* (1871) LR 12 Eq 225; *Gill v Gill* (1921) 21 SR (NSW) 400; *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417; *Re Hodge; Hodge v Griffiths* [1940] Ch 260; *Re Brace; Gurton v Clements* [1954] 1 WLR 955; *Zapletal v Wright* [1957] Tas SR 211.

\(^{66}\) *Muschinski v Dodds* (1985) 160 CLR 583, 604–606 (Brennan J).
elaborating upon the principles relating to gifts with conditions. The arguments by Brennan and Dawson JJ were that Mr Dodds’s interest was a gift that he received from Ms Muschinski, but with a condition annexed. That condition comprised his assurances that he would contribute to the property. This in turn created a personal obligation upon him to perform that condition and, when not performed, entitled Ms Muschinski to claim compensation for his breach of that personal obligation.

Whilst Mr Dodds’s assurances fell short of creating a contract, Ms Muschinski as the donor could still regulate the disposal of a gift in Equity, either as an inter vivos or testamentary gift. When Ms Muschinski gave the interest in the property to Mr Dodds, it was given in return for Mr Dodds’s assurances. Mr Dodds’s assurances were then annexed as a condition to that gift. The condition has one of two effects on the gift: the condition acts as a forfeiture, whereby a failure to perform the condition involves a forfeiture of the gift; or the condition acts as a personal obligation, whereby the donee has an equitable obligation to fulfil the condition. Forfeiture is self-explanatory, whereas unfulfillment of the personal obligation entitles the donor to compensation or specific performance of the condition.

Although there may have been other avenues open to Ms Muschinski to regulate her interest, such as requiring Mr Dodds to take his interest on trust for Ms Muschinski, this was perhaps not possible given the overall arrangement between them. Nor was Ms Muschinski “moved by disinterested generosity” to give Mr Dodds a beneficial interest in the property “merely in the hope that his assurances would be fulfilled”: it was clearly intended to act as a gift with Mr Dodds’s assurances annexed as a condition.

In considering how the gift was intended to operate, Brennan J considered the intentions of the parties when the gift was accepted. He considered that, as Mr Dodds would only give his assurances after he obtained a beneficial interest in the property, then the condition was not

67 Ibid 624–625 (Dawson J).
68 Ibid 604 (Brennan J), 624–625 (Dawson J).
69 Ibid 607 (Brennan J), 624–625 (Dawson J).
70 Ibid 605 (Brennan J).
71 Ibid.
72 Ibid; Countess of Bective v Federal Commissioner of Taxation (1932) 47 CLR 417; Re Williams; Williams v Williams [1897] 2 Ch 12.
73 Muschinski v Dodds (1985) 160 CLR 583, 606–607 (Brennan J), 625 (Dawson J); Gill v Gill (1921) 21 SR (NSW) 400; Gregg v Coates (1856) 23 Beav 33; Re Hodge; Hodge v Griffiths [1940] Ch 260.
74 Muschinski v Dodds (1985) 160 CLR 583, 605 (Brennan J).
75 Ibid 604 (Brennan J).
76 Ibid 606 (Brennan J); Calverley v Green (1984) 155 CLR 242, 262.
intended to operate as a forfeiture,\textsuperscript{77} nor was forfeiture contemplated by either party if the relationship broke down.\textsuperscript{78} It would not have been correct to infer from the evidence an intention that the gift would be forfeit upon failure to fulfil the condition, so the gift was held to have created a personal obligation on Mr Dodds.\textsuperscript{79}

When the circumstances of the case are viewed in this light, Ms Muschinski would be entitled to a remedy for that unfulfilled condition. However, she would not be entitled to a proprietary remedy. The appropriate remedy in these circumstances would be a personal remedy of either compensation or an order for specific performance.\textsuperscript{80} However, just as the parties did not plead their case on contribution, nor did they plead their case around gifts with conditions. The plea for relief by way of constructive trust, as a proprietary remedy, had no application to a gift with an unfulfilled condition.\textsuperscript{81}

Justice Brennan (with whom Dawson J agreed) further elaborated on whether a constructive trust could apply, despite a proprietary remedy not being appropriate on the facts. To award a constructive trust, Brennan J considered that Mr Dodds’s retention of his beneficial interest in the property must not simply be shown to be unfair; it must be shown that his retention of his beneficial interest was \textit{unconscionable}.\textsuperscript{82} It is not enough to simply say that Mr Dodds should hold his beneficial interest as a constructive trustee for Ms Muschinski because it would be fair to do so: there is no jurisdiction for an Australian court to so hold.\textsuperscript{83} Further, to hold Mr Dodds as a constructive trustee and to deprive him of his beneficial interest in the property would be to say that he took his interest subject to a condition subsequent, which was a finding rejected on the evidence.\textsuperscript{84} There was nothing to suggest that the foundation of the parties’ relationship should be changed if it ceased.\textsuperscript{85}

\textsuperscript{77} Muschinski v Dodds (1985) 160 CLR 583, 606 (Brennan J).
\textsuperscript{78} Ibid 606–609 (Brennan J).
\textsuperscript{79} Ibid 606–607 (Brennan J), comparing with Re Brace; Gurton v Clements [1954] 1 WLR 955 and Gill v Gill (1921) 21 SR (NSW) 400.
\textsuperscript{80} Muschinski v Dodds (1985) 160 CLR 583, 607 (Brennan J), 624–625 (Dawson J); Messenger v Andrews (1828) 4 Russ 478; Gregg v Coates (1856) 23 Beav 33; Rees v Engelback (1871) LR 12 Eq 225; Gill v Gill (1921) 21 SR (NSW) 400; Re Hodge; Hodge v Griffiths [1940] Ch 260; Countess of Bective v Federal Commissioner of Taxation (1932) 47 CLR 417.
\textsuperscript{81} Muschinski v Dodds (1985) 160 CLR 583, 609 (Brennan J), 625 (Dawson J).
\textsuperscript{82} Ibid 608 (Brennan J).
\textsuperscript{83} Ibid; Wirth v Wirth (1956) 98 CLR 228; Hepworth v Hepworth (1963) 110 CLR 309; Bloch v Bloch (1981) 180 CLR 390.
\textsuperscript{84} Muschinski v Dodds (1985) 160 CLR 583, 608 (Brennan J).
\textsuperscript{85} Ibid 609 (Brennan J).
Absent any unconscionability on the part of Mr Dodds, Brennan J could not identify any equitable obligation that Mr Dodds had breached. The case for Ms Muschinski was merely “a plea for the return of the interest given on the grounds of fairness”. Although this result is perhaps unfair, unfairness is not a sufficient basis to find a constructive trust.

As with equitable contribution not being the deciding factor in *Muschinski v Dodds*, neither were principles relating to gifts with conditions. However, gifts with conditions may still be relevant in the same way that contribution might be, especially as the waiver of a right to contribution may also be framed as a conditional gift.

There are a number of principles that can be derived from the cases cited by Brennan and Dawson JJ that are relevant. The main principle identified is that, if a gift is given on a condition (falling short of a contract), there is an equitable obligation to perform that condition. That condition is enforceable by an order for specific performance, or if the condition is no longer able to be performed, an order for compensation in lieu.

An equitable maxim is that one who seeks equity must do equity, taking the form of one who takes the benefit must also bear its burden. The principle appears to be applicable to both the donor and the donee of the gift. For the donee, any benefit taken must also be taken with its burden, for example, by accounting to genuine creditors with a legal or equitable interest. For the donor, if a donee expends their own money to comply with a condition which subsequently increases the wealth of the donor which was otherwise not envisaged, it appears that the donor may be obliged to contribute to the cost of the donee’s compliance with that condition to the extent of the extra benefit received.

Further, a gift cannot be renounced once the condition becomes relevant. The gift must always be subject to that condition or, in the context of a joint endeavour between the parties, subject to that joint endeavour. The conduct of the parties is determinative of compliance with the condition, whether or not the condition is legally enforceable, as it may still be enforceable in

86 Ibid.
87 *Scot v Haughton* (1706) 2 Vern 560; *Gibson v Dickie* (1815) 3 M&S 463; *Rees v Engelback* (1871) LR 12 Eq 225; *Gill v Gill* (1921) 21 SR (NSW) 400; *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417.
88 *Gill v Gill* (1921) 21 SR (NSW) 400.
89 *Messenger v Andrews* (1828) 4 Russ 478; *Gregg v Coates* (1856) 23 Beav 33; *Re Hodge; Hodge v Griffiths* [1940] Ch 260.
90 *Messenger v Andrews* (1828) 4 Russ 478.
91 *Gregg v Coates* (1856) 23 Beav 33.
92 Ibid.

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Equity.\textsuperscript{93} There may be times where the condition is unenforceable due to public policy such as illegality, so when the gift is perfected, it takes effect as an unconditional gift.\textsuperscript{94} This latter point about a gift vesting unconditionally is relevant in the context of a joint endeavour.

A gift and its associated condition may form part of the overall arrangement of the parties, and thus must be considered within the context of that joint endeavour. In \textit{Muschinski v Dodds}, the assurances that Mr Dodds gave became the conditional aspect of the gift given to him by Ms Muschinski. Whilst this is prima facie correct, this approach ignores the overall arrangement in which Mr Dodds’s assurances were to take effect. For example, as noted by Deane J, had the personal relationship continued, there would be less room for finding unconscionability on the part of Mr Dodds’s retention of his beneficial interest in the property without performing his own assurances.\textsuperscript{95} Similarly, such future behaviour would impact on the terms of the condition upon which Mr Dodds took his beneficial interest.

There was, in fact, such a change in circumstances after the beneficial interest was bestowed upon Mr Dodds. The couple had planned to erect a pre-fabricated house on the property after purchasing it, but this plan was abandoned as they could not obtain the relevant permits. The couple instead chose to renovate the dilapidated cottage already on the property.\textsuperscript{96} If a gift is given on a condition, full heed must be paid to the overall arrangement between the parties. Justice Brennan did find that the change in circumstances between Ms Muschinski and Mr Dodds still took effect as a gift with a condition;\textsuperscript{97} however, there are further problems with this finding.

Justice Brennan notes that, from the outset, the assurances given by Mr Dodds had a “lack of specificity”:\textsuperscript{98} he was to be “putting his contribution in”, to “build a home and pay for it for the rest of his life”, “to provide whatever he had and whatever he was going to earn after”, to “set up a craft business”, “have a cottage built on the land and pay for it”, and to “contribute to … future home and happiness.”\textsuperscript{99} This lack of specificity was taken by Brennan J to go to the

\textsuperscript{93} \textit{Re Hodge; Hodge v Griffiths} [1940] Ch 260.
\textsuperscript{94} \textit{Zapletal v Wright} [1957] Tas SR 211.
\textsuperscript{95} \textit{Muschinski v Dodds} (1985) 160 CLR 583, 621–622 (Deane J).
\textsuperscript{96} Ibid 607 (Brennan J).
\textsuperscript{97} Ibid.
\textsuperscript{98} Ibid.
\textsuperscript{99} Ibid 604 (Brennan J).
question of whether the condition was intended to work as a forfeiture or a personal obligation to fulfil it.\(^\text{100}\)

*Re Brace; Gurton v Clements* cited by Brennan J addressed the issue of specificity, but it was not to the question of whether a condition was a forfeiture or a personal obligation: instead, it involved a testamentary bequest that involved a condition which had no intelligible or ascertainable significance.\(^\text{101}\) The condition was void for uncertainty because it was not specific enough. The ‘condition’ was merely precatory only and could not operate as a condition.\(^\text{102}\)

Mr Dodds’s assurances were similarly held by Brennan J to lack specificity.\(^\text{103}\) However, Brennan J did not follow *Re Brace; Gurton v Clements* for the above reasoning. It was cited by Brennan J to illustrate whether a gift’s condition should be treated as a forfeiture or a personal obligation. He did not cite it for the important principle expressed therein, that is, a condition lacking intelligible significance should be treated as void. The assurances given by Mr Dodds could have been treated as similarly lacking in intelligible significance. The couple were not in a partnership at all, and this form of relationship was rejected by the parties upon seeking legal advice.\(^\text{104}\) There was also nothing to the overall arrangement between them, other than a number of assurances in furtherance of an overall shared goal. Although there were some steps worked out along the way, such as the purchase of the property, the rest of the arrangement between them lacked specificity, and even changed along the way. Justice Brennan did note that the parties did omit a way to wind up their relationship,\(^\text{105}\) but the process to undertake the overall arrangement between them was similarly lacking.

The lack of specificity of the condition seems to be tied to the remedies available to be granted. From the cases cited by Brennan and Dawson JJ, a condition always appears to be enforced if it is still possible to do so, such as in *Gill v Gill*. However, all of these cases except *Re Brace; Gurton v Clements* involve a condition that *is* specific enough to be specifically enforced, whether or not it is practically possible to do so. From these authorities, it appears that a remedy is only available if the condition annexed to the gift is specific enough. If the condition is not specific enough to be specifically enforced, then it is not specific enough to enforce by way of

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\(^{100}\) Ibid 607 (Brennan J).
\(^{101}\) *Re Brace; Gurton v Clements* [1954] 1 WLR 955, 960–961 (Vaisey J).
\(^{102}\) Ibid 962 (Vaisey J).
\(^{103}\) *Muschinski v Dodds* (1985) 160 CLR 583, 607 (Brennan J).
\(^{104}\) Ibid 609 (Brennan J).
\(^{105}\) Ibid.
compensation. The ‘condition’ must simply be precatory and imposes no obligation upon the donee, whereby the donee then takes the gift unconditionally.

Whilst *Muschinski v Dodds* was framed by Brennan and Dawson JJ as Ms Muschinski giving a gift to Mr Dodds with a condition annexed, the overall arrangement between the parties, which involved changing circumstances and a lack of specificity, weighed against the condition forming any intelligible obligation upon Mr Dodds. The overall arrangement cannot be specifically enforced as the assurances given by Mr Dodds may not have been concrete enough to definitively identify his obligations. This is especially so as the overall arrangement between the parties would involve both parties undertaking various actions, not just Mr Dodds.

This is not to say that there cannot be a gift with a valid condition within the context of a joint endeavour. It just so happens that the overall arrangement in *Muschinski v Dodds* cannot be properly characterised as a gift with a condition. There was clearly something more, which was discussed by Deane J. So although the principles in *Muschinski v Dodds* are not determined by reference to principles of gifts with conditions, in much the same manner as equitable contribution, gifts with conditions are still relevant in determining the matter.

C Partnerships and Joint Ventures

The leading judgment in *Muschinski v Dodds* was delivered by Deane J, with whom Mason J agreed. The judgment of Deane J focused on the development of the constructive trust and its application to new and emerging categories of case. Justice Deane relied on an analogy to partnership and joint venture cases, and the equitable principles therein, to provide a basis for a constructive trust to act upon the facts in *Muschinski v Dodds*. In the summarising words of Mason J, “the general principle underlying the proportionate repayment of capital contributions to joint venturers on the failure of a joint venture is wide enough to support this aspect of the constructive trust.”106

Justice Deane came to the opposite conclusion to Brennan J on the application of the constructive trust. Whereas Brennan J considered that Ms Muschinski’s claim was based on the grounds of mere appeal to fairness,107 Deane J considered that the constructive trust’s

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106 Ibid 599 (Mason J).
107 Ibid 609 (Brennan J).
application in this case was founded by an analogy to well-established principles that are present in partnership and joint venture cases.108

Justice Deane considered that, had the relationship between the parties been a purely commercial relationship, there would have been “little room for argument” that Mr Dodds’s retention of his beneficial interest in the property would be unconscionable without accounting to Ms Muschinski’s disproportionately greater contribution.109 Of course, this was not the case. The relationship between the parties was both personal and commercial because the parties were in a personal relationship and a business relationship with one another. The factors constituting unconscionable conduct in respect of their commercial relationship would be greatly influenced by what would happen with respect to their personal relationship. An example given was whether or not they continued to live together as a couple.110

The relevant factors in Muschinski v Dodds were that the parties did not intend to have the property serve as their home, nor did they continue with their personal relationship. Absent these factors, there was no other factor that could hinder the analogy to partnership and joint venture cases. Mr Dodds’s assertion of his interest (albeit in unforeseen circumstances) remained unconscionable.111

At the very least, the parties were entitled to be repaid their respective contributions to the extent possible from a sale of the property. This was based on those general equitable principles underpinning partnership and joint venture cases whereby initial contributions are to be refunded.112 However, once the initial contributions were repaid, Deane J did not find any unconscionability on the part of Mr Dodds in asserting his legal interest in half of the proceeds of sale.113 The order of Deane J took effect as requiring the parties to hold the property on trust for each other and themselves in proportion to their respective contributions. The proceeds from the sale of the property were to be applied to repay their contributions, and then any surplus was to be apportioned equally according to their legal interests.114

It is important to note that Deane J did not explicitly find a general cause of action to sue for a return of contributions for a failed joint endeavour. Rather, he found that constructive trusts as

108 Ibid 620 (Deane J).
109 Ibid 621 (Deane J).
110 Ibid 621–622 (Deane J).
111 Ibid 622 (Deane J).
112 Ibid 623 (Deane J).
113 Ibid.
114 Ibid 623–624 (Deane J).
a remedy can be applied in this scenario, supported by the principles that restore contributions to parties to a failed partnership or joint venture.115

The six cases cited by Deane J are neatly separated into two categories: partnership cases in the UK116 and joint venture cases in the US.117 The former partnership cases are binding precedent in Australia. They were cited by Deane J to demonstrate the existence of an equitable principle which requires the refund of contributions that were paid for the purposes of a partnership if the partnership cannot continue to operate. The latter joint venture cases, as US law, are not binding in Australia, but were cited by Deane J for the same reason that he cited the partnership cases. Unfortunately, there are two big problems with the analogy that Deane J sought to draw between the facts and circumstances before him in Muschinski v Dodds and the cases he cited relating to partnerships and joint ventures. The first problem is that partnerships and joint ventures tend to involve good faith and the existence of fiduciary duties. The second problem is that the US cases that were cited have their operation based upon unjust enrichment.

 Justice Deane notes that the “principal operation of the constructive trust in the law of this country has been in the area of breach of fiduciary duty”, but also that no authority or principle requires the constructive trust to be limited to circumstances involving a breach of fiduciary duty.118 To avoid applying a constructive trust based on “idiosyncratic notions of fairness and justice”, he sought an established equitable principle that could be developed by legitimate processes of reasoning, particularly analogy, to be applied to the facts before him.119 He resorted to an analogy to partnership and joint venture cases to find an established equitable principle. However, in his own words, the legal reasoning must be legitimate. A fundamental feature of partnerships and joint ventures is the presence of fiduciary duties, which the US cases expressly espouse. It is this fiduciary duty, at least as explicitly stated in the US cases, which justifies the return of contributions upon dissolution of a joint venture.120

If the principles in Muschinski v Dodds rely on an analogy to the principles in partnership and joint venture cases, why is the existence of a fiduciary duty discarded, whilst the duty to account remains? This segues into the second concern, in that the US joint venture cases are based in

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116 Hirst v Tolson (1850) 2 Mac&G 134; Atwood v Maude (1868) LR 3 Ch App 369; Lyon v Tweddell (1881) 17 Ch D 529.
117 Allen v Kent, 136 A 2d 540 (1957); Ewen v Gerosky, 382 NYS 2d 651 (1976); Legum Furniture Corporation v Levine, 232 SE 2d 782 (1977).
118 Muschinski v Dodds (1985) 160 CLR 583, 616 (Deane J).
119 Ibid 615 (Deane J).
120 Allen v Kent, 136 A 2d 540 (1957); Ewen v Gerosky, 382 NYS 2d 651 (1976).
unjust enrichment. Is the remedial constructive trust awarded by Deane J in *Muschinski v Dodds* really just a vehicle to remedy an unjust enrichment? Is it really a principled outcome?

For his part, Deane J acknowledged that, whilst unjust enrichment is a general doctrine in other countries, it is not a general doctrine in Australia.\(^{121}\) He did acknowledge that, through case-by-case development of the law in Australia, a general doctrine of unjust enrichment may in time be introduced.\(^{122}\) Having said that, he searched for a “narrower” basis than unjust enrichment by settling on the analogy to partnership and joint venture cases, basing his decision on unconscionability.\(^{123}\) Unfortunately for this argument, as stated, half of the cases cited in support of awarding a constructive trust were US cases, being a jurisdiction where a constructive trust can be awarded to remedy an unjust enrichment. There was no argument made to distinguish his finding of unconscionability from that of unjust enrichment. It was only two years later in *Baumgartner v Baumgartner* that Toohey J did mention there would be no distinction between an approach based on unconscionability or an approach based on unjust enrichment in the operation of the principles in *Muschinski v Dodds*.\(^{124}\) This comment requires further investigation, especially as the cases cited by Deane J are equally split between unconscionability and unjust enrichment. This concept will be explored later in Chapter 6.

In any event, the six cases cited give rise to a number of discrete principles. The main principle is that, once the substratum of a joint endeavour is removed and it comes to an end then, at the very least, initial contributions are to be refunded, insofar as those contributions were reliant upon that substratum.\(^{125}\) These initial contributions must be refunded before any account of profits can be taken.\(^{126}\) The parties to a joint endeavour owe one another duties of good faith and confidence, and potentially fiduciary duties.\(^{127}\) If a party makes a contribution in furtherance of the joint endeavour (or its negotiations), that contribution cannot be retained by the other party if the joint endeavour (or its negotiations) fail.\(^{128}\) The retention of that contribution made by the other party can be equally explained in terms of unconscionability\(^ {129}\) or unjust

\(^{121}\) *Muschinski v Dodds* (1985) 160 CLR 583, 617 (Deane J); *Allen v Kent*, 136 A 2d 540 (1957); *Pettkus v Becker* [1980] 2 SCR 834; *Hayward v Giordani* [1983] NZLR 140.

\(^{122}\) *Muschinski v Dodds* (1985) 160 CLR 583, 617 (Deane J).

\(^{123}\) Ibid 617–618 (Deane J).


\(^{125}\) *Atwood v Maude* (1868) LR 3 Ch App 369; *Hirst v Tolson* (1850) 2 Mac&G 134; *Lyon v Tweddell* (1881) 17 Ch D 529.


\(^{128}\) *Ewen v Gerafsky*, 382 NYS 2d 651 (1976).

\(^{129}\) *Atwood v Maude* (1868) LR 3 Ch App 369.

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enrichment. The court also has discretion as to when a remedial constructive trust should take effect, either to not prejudice third parties, or to assist in taking account upon the winding up of the endeavour.

A number of questions are then raised for the development of the principles in Muschinski v Dodds. These questions include whether unconscionability or unjust enrichment underpins the operation of those principles; whether a fiduciary relationship and duties of good faith and confidence should be present; and whether an account should be taken of property acquired in the joint endeavour, or only refunding initial contributions.

D Trusts and General Equity

The High Court directly addressed principles of Equity in their judgments, particularly the development of Equity, the applicability of constructive trusts to new categories of case, and trusts in general. Whilst the argument for a resulting trust was considered by the High Court and was unanimously rejected, the principles that can be drawn from resulting trust cases are still relevant. These principles and the arguments of the High Court, particularly those of Deane and Brennan JJ, must be discussed.

The crux that spurred Deane J’s argument is that the constructive trust, as also affirmed by Brennan J, cannot be used as a remedy simply because it would be fair to do so. A constructive trust is only available “when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles”. This is required to ensure that proprietary rights are not subject to “some mix of judicial discretion” and the “formless void of individual moral opinion”.

As a principle must exist to grant a constructive trust, Deane J searched for that principle and found it by drawing upon analogies to partnership and joint venture cases. While he noted that the main operation of the constructive trust has been in relation to a breach of fiduciary duty, he considered that there is no principle or authority that requires a constructive trust to be

130 Ewen v Gerofsky, 382 NYS 2d 651 (1976).
131 Lyon v Tweddell (1881) 17 Ch D 529.
132 Muschinski v Dodds (1985) 160 CLR 583, 615 (Deane J).
133 Ibid.
134 Ibid 616 (Deane J).
restricted to cases involving a pre-existing fiduciary duty. He concluded that a constructive trust can be applied in any circumstance where some principle of law or Equity requires another to hold or apply property for the benefit of another – regardless of intention.136

Unlike Deane J, it appears that Brennan J did not consider that an analogy to partnership and joint venture cases was appropriate. Although Brennan J did think that the winding up of Ms Muschinski’s and Mr Dodds’s relationship would have been fairer had it been a partnership, that was a finding rejected on the evidence, and “no analogy can be drawn between a partnership and the present case”.137 He appears to base this view on the fact that, when the parties initially sought legal advice, the idea of a partnership was rejected.138

Regardless, Deane J went on to elaborate on the principle that restores initial contributions in failed partnership and joint venture cases. He noted the prima facie rule is that partners and joint venturers are entitled to a proportionate return of their capital contributions upon dissolution of the partnership or collapse of the joint venture. He termed this a general principle of Equity.139 He further noted that this general principle is related to the general equitable notions inherent in the common law action for money had and received,140 and for restitution upon frustration of a contract or failure of consideration.141

Justice Deane considered that the common law and Equity both recognise that it would often be inappropriate to simply “draw a line” in the sand leaving assets and liabilities lie where they fall when a consensual joint relationship or endeavour fails.142 Having identified a general principle of Equity that addresses this concern, he then considered whether Ms Muschinski had a claim against Mr Dodds for a constructive trust in light of that general principle.

In considering how that general principle operates, Deane J noted that unjust enrichment is the basis for finding the existence of a constructive trust in the US, Canada and New Zealand.143 He

135 Ibid.
136 Ibid 617 (Deane J).
137 Ibid 609 (Brennan J).
138 Ibid.
139 Ibid 619 (Deane J).
141 Muschinski v Dodds (1985) 160 CLR 583, 618–619 (Deane J); Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32; Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd [1944] AC 265.
142 Muschinski v Dodds (1985) 160 CLR 583, 618 (Deane J).
143 Ibid 617 (Deane J); Ewen v Gerofsky, 382 NYS 2d 651 (1976); Pettkus v Becker [1980] 2 SCR 834; Hayward v Giordani [1983] NZLR 140.

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considered that this was not the case in Australia, but did note that such a general principle of unjust enrichment might yet develop.\textsuperscript{144} As such, the main question then was whether Mr Dodds’s conduct was such as to make his beneficial interest in the property unconscionable to retain.\textsuperscript{145}

A lot of the cases cited by the High Court in this category go towards enunciating principles about the development of the law and other evidentiary requirements relating to the imposition of trusts.

The main principle identified by the High Court (particularly Deane J) is that there is a general equitable principle which compels restitution in a number of categories of case, rather than leaving losses and gains lie where they fall. This was demonstrated by reference to joint venture\textsuperscript{146} and partnership cases,\textsuperscript{147} and actions for money had and received and frustration of contract.\textsuperscript{148} This principle is also apparent in resulting trust cases when, rather than one party being the sole contributor to some asset or debt, both parties have contributed albeit in a disproportionate amount. This general equitable principle appears to underpin a resulting trust being imposed proportionate to those initial contributions. There may also be a subsidiary right of equitable contribution for any subsequent contributions towards a joint debt, which may be remedied by an equitable charge for any disproportionate discharge of a party’s liability for that joint debt.\textsuperscript{149}

The resulting trust cases also illuminate how intentions between the parties are to be gleaned. It appears that intention is everything, and that the courts will not presume advancement simply by reference to the relationship of the parties.\textsuperscript{150} A court will not presume a gift unless the context indicates that that is the case and will instead presume a resulting trust was intended. This presumption can also be rebutted if the facts of the case do show an intention to bestow a

\textsuperscript{144} Muschinski v Dodds (1985) 160 CLR 583, 617 (Deane J).
\textsuperscript{145} Ibid 620 (Deane J) using the terms ‘benefit’ and ‘expense’, and Baumgartner v Baumgartner (1987) 164 CLR 137, 152–154 (Toohey J) suggesting unconscionability and unjust enrichment are equally applicable.
\textsuperscript{146} Allen v Kent, 136 A 2d 540 (1957); Ewen v Gerafsy, 382 NYS 2d 651 (1976); Legum Furniture Corporation v Levine, 232 SE 2d 782 (1977).
\textsuperscript{147} Atwood v Maude (1868) LR 3 Ch App 369; Hirst v Tolson (1850) 2 Mac&G 134; Lyon v Tweddell (1881) 17 Ch D 529.
\textsuperscript{150} Mercier v Mercier [1903] 2 Ch 98.

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beneficial interest on the other party.\textsuperscript{151} However, this intention relates to the initial contributions only. If subsequent contributions are made that are not legally required to be made, then these must be disregarded. Subsequent contributions may only alter the parties’ beneficial interests if it can be shown that the parties intended for those subsequent contributions to alter the parties’ beneficial interests.\textsuperscript{152} That intention must also be clear from the evidence. It may be express or implied, and it must be as all the relevant parties understand it to be or otherwise were led to believe.\textsuperscript{153}

Importantly, at no point will a court impute an intention when it is factually clear that no such intention was formed. Nor will there be an inquiry into what the parties might have intended.\textsuperscript{154} If there is no intention to be found one way or the other, then no intention will be imputed.\textsuperscript{155} The refusal to impute an intention is to ensure that legal and equitable interests are not disregarded simply because it would “seem fair” to do so.\textsuperscript{156}

Likewise, a remedial constructive trust cannot be imposed due to idiosyncratic notions of fairness and justice. A remedial constructive trust must be applied according to established principles, or by a legitimate process of legal reasoning to develop new categories of case.\textsuperscript{157} Resorting to unjust enrichment as a ‘general doctrine’ is not the correct approach in finding a remedial constructive trust.\textsuperscript{158} Whilst an appeal to ‘fairness’ and ‘justice’ does not form a cause of action in Equity, those notions are still relevant to determining whether circumstances may be unconscionable. Unconscionability, like the “general principle of equity” identified by Deane J

\textsuperscript{151} Russell v Scott (1936) 55 CLR 440; Charles Marshall Pty Ltd v Grimsley (1956) 95 CLR 353; Martin v Martin (1959) 110 CLR 297.
\textsuperscript{152} Russell v Scott (1936) 55 CLR 440.
\textsuperscript{153} Eves v Eves [1975] 1 WLR 1338.
\textsuperscript{155} See, eg, Heseltine v Heseltine [1971] 1 WLR 342 where simple acquiescence to a request to give property, without any other factor, is not indicative of intent. If there is no intent either way, none should be drawn.

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that underpins many other equitable principles, is at the heart of the principles in *Muschinski v Dodds* which operate to prevent an unconscionable retention of benefit.159

III Summary of Principles and Concerns

The principles drawn from the cases cited by the High Court in *Muschinski v Dodds* and the High Court’s reasoning form the basis of what has been called the windfall equity, but as will be seen later in this thesis, this is a shallow understanding of the underlying mechanisms. The principles in *Muschinski v Dodds* have been further developed by the courts in the intervening years, as will be discussed in the following chapters. What follows is a summary of the principles analysed above.

A Principles

There is a general equitable principle which does not let a gain or loss lie where the wind has let it fall if it would be inequitable to leave it there. For example, if someone receives a benefit beyond what was expected by someone’s expenditure, it would be equitable to account for that gain to the extent it exceeds expectations.160 One who seeks equity must do equity, or one must take a benefit with its burden, and vice versa. However, unlike equitable contribution, the principles in *Muschinski v Dodds* serve to unwind the parties’ joint endeavour by putting them back in their original position as far as possible.

In that regard, the principles in *Muschinski v Dodds* serve to prevent an unconscionable retention of benefit when the substratum of a joint endeavour is removed without attributable blame. However, there is no fraud or blame in simply being unable to continue with a personal relationship. Although it appears that unconscionability is the basis for the principles in *Muschinski v Dodds*, it must be noted that the six cases cited by Deane J regarding partnership law and joint venture law are equally split between approaches based on unconscionability and approaches based on unjust enrichment.

Because a joint endeavour may be a complicated arrangement, there may be issues such as equitable contribution, equitable estoppel, and conditional gifts arising during the joint endeavour. In unwinding the joint endeavour, these principles are taken into account as a whole,

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159 See also *Legione v Hateley* (1983) 152 CLR 406; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

160 *Gregg v Coates* (1856) 23 Beav 33.

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rather than being individually determinative.\textsuperscript{161} However, for such a principle to be applicable, it must be based upon the substratum of the joint endeavour. For example, the exclusion of a right to equitable contribution will only be relevant if that exclusion was made in furtherance of the joint endeavour. If an equitable principle arises in a way in which its creation was not dependent on the joint endeavour, then that principle will be treated separately from the overall joint endeavour.

Given the importance of the joint endeavour between the parties, it must be ascertained what the actual intentions of the parties were at various stages of the joint endeavour. This is because it must have been agreed by the parties that such a contribution to the joint endeavour would found a proprietary interest. This is integral to determining whether the property was contributed based on the substratum of the joint endeavour, or if it was intended to be beneficially bestowed upon another party. The parties’ intentions must be the same, as one party’s subsequent contributions cannot alter the rights between them without agreement.

Because the parties’ intentions are so important, they must be clear. The parties’ intentions may be express or implied, but an intention can only be found by direct evidence or inference. It is never appropriate to impute an intention where one factually does not exist. The court will not undertake an inquiry into what the parties ‘might’ have intended had they given thought to the matter. If an intention cannot be found, then no intention exists.

In unwinding the joint endeavour, initial contributions are to be refunded before an account of profits can be had. The identification of what value should be restored to the parties is relevant in determining the correct remedial response to each case. These contributions may be returned by resort to a constructive trust, as the constructive trust may also be a remedial tool that is not limited to circumstances involving a breach of fiduciary duty. Although the constructive trust is a flexible remedy to be moulded by the courts to suit the circumstances of each case, its application must be principled, and not idiosyncratic: legal and equitable rights cannot be discarded simply because it would be ‘fair’ to do so. Such a principled basis was found by Deane J to exist by reference to general equitable principle that underpins partnership and joint venture law. However, despite constructive trusts not being limited to circumstances involving a breach

\textsuperscript{161} This is because the ultimate outcome is to determine the property interests of the parties and wind up the joint endeavour, akin to dissolving a partnership. A parallel may also be drawn with the court’s ability to determine and alter the property interests of a married couple under s 79 of the \textit{Family Law Act 1975} (Cth).

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of fiduciary duty, the six partnership and joint venture cases cited by Deane J all involve the existence of fiduciary duties.

B Concerns

In light of the above principles, there are a number of concerns with how the High Court in Muschinski v Dodds came to its conclusions. There are three particular concerns. The first concern is whether the principles in Muschinski v Dodds operate based on unconscionability or unjust enrichment. In either case, is there actually a difference?

The second concern is whether the High Court in Muschinski v Dodds correctly reasoned by analogy to partnership and joint venture cases. This calls into question what relevance duties of good faith, confidence, and fiduciary duties have to a joint endeavour. Do the principles in Muschinski v Dodds form a cause of action, or is there something more? Are the principles of broader application?

The third concern is whether the court approached the application of a remedial constructive trust correctly, particularly by limiting its operation to initial contributions rather than the full property which was the subject of the joint endeavour. Another problem is whether it was correct to hold that the date of operation of the constructive trust should have been at the date of order: does that mean that the constructive trust arose at an earlier date, and if so, when, and why? Further, is there any real distinction between a ‘remedial’ and a ‘constructive’ trust, or is that distinction ephemeral? If a trust is construed by circumstances, then trusts may be relevant before the breakdown of a joint endeavour.

Case law that follows and expands upon Muschinski v Dodds sheds further light on these questions and shows how these principles have evolved since 1985. It will be seen later in this thesis just how these concerns have or have not been addressed. It will be shown that the principles in Muschinski v Dodds provide authority for a cause of action for failed joint endeavours and a principle that gives rise to constructive trusts in joint endeavours. However, no real effort has been made to distinguish between the two.

In general, the principles in Muschinski v Dodds seem to operate to restore the contributions of the parties and to account for any profits between the parties. The principles in Muschinski v Dodds are different from other principles in Equity in that, rather than finalising the relationship between the parties, they seeks to ‘unwind’ the relationship of the parties and to put them back to their original positions as far as is possible.
This unwinding of the relationship may involve the operation of many equitable principles, but these principles are not individually determinative of the final remedy. This is because everything done in the context of a joint endeavour must be examined by reference to that joint endeavour. The principles in *Muschinski v Dodds* seek to unwind a joint endeavour by examining all the facts and circumstances and determining who is entitled to what by reference to that joint endeavour. If some act falls beyond the scope of the joint endeavour, then as it is not based on the substratum of the joint endeavour, it has no relevance on determining any issues involved with the joint endeavour.

The principles in *Muschinski v Dodds* appear to be derived from that “general principle of equity” given life specifically in relation to failed joint endeavours that are otherwise not caught by any other existing law, at common law, in Equity, or in statute. The next chapter will discuss how this conception has evolved from being a novel principle that gives rise to a remedial constructive trust in failed joint endeavours into a cause of action that may award an equitable remedy for a failed joint endeavour, without a constructive trust being necessary, and the problems that this evolution has raised.
I The Development

The previous chapter highlighted the importance of the constructive trust in the development of the principles in *Muschinski v Dodds*. The main idea in *Muschinski v Dodds* is that a constructive trust will be awarded as a remedy if a party to a failed joint endeavour has received an unconscionable windfall as a result of that failed joint endeavour. This was the state of the law in 1985. In the 30-plus years since then, the principles in *Muschinski v Dodds* have developed considerably, including the term “windfall equity” being coined 20 years after *Muschinski v Dodds*. An analysis of the development of the principles in *Muschinski v Dodds* shows a discrepancy in the reasoning and application of the courts in the intervening decades.

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1 *Muschinski v Dodds* (1985) 160 CLR 583.

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The uncertainty with the principles in *Muschinski v Dodds* as they currently stand lies with the link to constructive trusts. Whereas Deane J identified the principles that make it unconscionable for someone to retain a benefit, this exposition of equitable principle is separate to his discussion on the constructive trust as a remedial device. What is the current interplay between the principles in *Muschinski v Dodds*, the windfall equity, and constructive trusts, and is that approach correct?

As will be seen in this chapter, the windfall equity appears to have developed as a distinct cause of action that does not necessarily lead to the imposition of a constructive trust as a remedy. This will be further examined in the next two chapters to highlight the distinction between the use of the principles in *Muschinski v Dodds* to find a constructive trust as a remedial device in order to recover property, and their use to find a constructive trust as an institutional device to protect property.

Since the High Court case of *Giumelli v Giumelli* in 1999, courts have increasingly been reluctant to impose a trust, instead preferring a remedy that falls short of the imposition of a trust, or the minimum equity to do justice. Whereas the remedial constructive trust was the default device to remedy the breakdown of a joint endeavour, current cases seem divided on the correct approach. Does a constructive trust need to be found before a remedy may be given, or is the windfall equity a cause of action for which a constructive trust is only one possible remedy?

There are three touchstone cases on the principles in *Muschinski v Dodds* that serve as helpful starting points for analysis. These cases are the High Court decision of *Baumgartner v Baumgartner* (1987), the Western Australian case of *Lloyd v Tedesco* (2002), and the New South Wales case of *Henderson v Miles (No 2)* [2005]. The next two chapters will then discuss the development of the principles in *Muschinski v Dodds* and the windfall equity in the larger context since 1985, including the joint endeavour principle.

II Baumgartner v Baumgartner

The first major case to analyse is *Baumgartner v Baumgartner*. This case is notable as it is the first, and last, High Court case to revisit *Muschinski v Dodds* in the context of a joint endeavour.

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3 *Baumgartner v Baumgartner* (1987) 164 CLR 137.
5 *Henderson v Miles (No 2)* [2005] NSWSC 867.
Baumgartner v Baumgartner was decided in 1987, two years after Muschinski v Dodds and, at the time of writing, no High Court decision has revisited Muschinski v Dodds since 1987.

Whilst Baumgartner v Baumgartner is the latest High Court decision on the windfall equity, it does not enunciate new principle to the degree that Muschinski v Dodds did. Rather, it applies the principles set out in Muschinski v Dodds in a more manner-of-fact way, as Muschinski v Dodds had already delved deeply into the principles underlying the windfall equity, although it was not termed as such by the High Court. It is important to see how the High Court of Australia considered the principles in Muschinski v Dodds.

A    The Case

Baumgartner v Baumgartner is very similar to Muschinski v Dodds in that the parties were involved in a de facto relationship which broke down. However, unlike Muschinski v Dodds which involved property purchased as tenants in common with unequal contributions to the purchase price, Baumgartner v Baumgartner involved property purchased solely in the name of one person, with contributions made to the property at a later date, separate from the purchase price.6

The parties met in June 1978, and in September 1978 the woman left her husband and children to begin a de facto relationship with the man, living in his unit. He later sold the unit and purchased property at Leumeah for both of them to live in. The purchase price was paid solely by the man, with help from a mortgage obtained in his sole name. The property was then registered in his sole name. The woman did not contribute to the purchase of the property in any way and was not liable, at law or in Equity, to contribute for anything in relation to the purchase of the house.

During their relationship, the parties both pooled their income together. From this pooled fund, they paid various joint household expenses, including the mortgage debt owed by the man. There was no formal arrangement that determined how these pooled funds were to be used.

The parties had a child together in February 1980, and the woman took time off work to look after the child. The woman wanted to marry, but the man, who had been married twice previously, did not want to. The woman also wanted to have her name on the title to the

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6 Although the parties’ surnames are the same, this is due to deed poll, not marriage. As only the man’s name is identified in the proceedings, without disrespect the parties will be referred to as ‘the man’ and ‘the woman’ to better identify them.

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Leumeah property, but the man said that the “Building Society” would not accept both of their names, as they were unmarried in a de facto relationship. He frequently assured her that the house was “theirs” and that it was their joint home. He also conceded that, if they were ever married, he would arrange for her to take a legal interest in the Leumeah property, and that he would also execute a will to that effect. The parties never married, but in 1981, the woman changed her surname to Baumgartner by deed poll.

The relationship began to break down. In August 1982, the woman left the house, taking their child and the furniture (purchased from the pooled funds) with her. The relationship then fully broke down in March 1984 and the woman started proceedings against the man in the Supreme Court of New South Wales, seeking recognition of her contributions during the relationship by way of a constructive trust.

She was unsuccessful at trial. Justice Rath could not find an intention to create a trust, and he did not find any circumstances that would have given rise to a constructive trust. There was no promise to marry that could have affected the decision of the court and, even if there was, there would not have been a remedy for it. Mere fairness was considered to be an insufficient ground to claim a constructive trust. There was nothing unconscionable or inequitable for the man to assert his legal title. She then appealed to the New South Wales Court of Appeal.

She was successful in the Court of Appeal. The Court of Appeal considered that, as the evidence between the parties was largely similar, the court could draw its own inferences from the evidence on appeal. The Court of Appeal instead found that a common intention could be inferred from the parties’ conduct, rather than from their oral representations alone. However, Mahoney JA in dissent could not infer such a common intention, as he considered it would not be an inference, but an imputation of intention, which would be contrary to Pettitt v Pettitt and Gissing v Gissing. Despite Mahoney JA’s objection, Priestley JA imputed an intention on behalf of the parties to take the house as tenants in common, rather than joint tenants. This was because he considered

8 Ibid 143 (Mason CJ, Wilson and Deane JJ); Baumgartner v Baumgartner (1985) 2 NSWLR 406, 416 (Kirby P).
that this would have been the case “if they had been asked”. This is despite the parties never having turned their minds to that question.\(^{12}\)

Ultimately, the appeal was allowed, following *Calverley v Green*\(^ {13}\) and *Allen v Snyder*,\(^ {14}\) finding that the Leumeah property was held on trust as tenants in common in equal shares for both of the parties due to an inferred common intention. The form of the order and the effect of the taking of furniture was left to the parties to sort out.\(^ {15}\) The man then appealed to the High Court.

The man’s appeal to the High Court was successful, but only in relation to law. The High Court overturned the reasoning of the Court of Appeal, replacing it with reasoning based on *Muschinski v Dodds*, which was not available at the time the trial and appellate courts delivered their judgments,\(^ {16}\) but the practical effect was substantially unchanged. In substance, the woman’s claim largely stood uncontested on the High Court’s new analysis, and the man was ordered to pay her costs as he was not substantially successful, only technically successful.

The High Court found that it was incorrect to depart from the trial judge’s evidentiary findings. This meant the Court of Appeal’s inference of a common intention was not correct and this basis could not sustain relief.\(^ {17}\) The High Court then considered whether a constructive trust was the appropriate remedial response, in the absence of any common intention.\(^ {18}\) The High Court affirmed that a constructive trust may be imposed contrary to the parties’ intentions when one party is asserting a legal right unconscionably to the detriment of another’s equitable interest.\(^ {19}\) The High Court then referred to *Muschinski v Dodds* for the authority that Equity will refund contributions to a failed joint endeavour in circumstances where it was not envisioned that another party should have the benefit of those contributions.\(^ {20}\)

The High Court found that a joint endeavour between the parties existed in relation to the pooling of funds for joint expenditure. This pooling was in the context of a definite long-term

\(^{12}\) *Baumgartner v Baumgartner* (1987) 164 CLR 137, 144 (Mason CJ, Wilson and Deane JJ); *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 430 (Mahoney JA), 446 (Priestley JA). Note also Kirby P, who went on to become Kirby J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, who addressed the issues involved in imputing an intention to parties who had never turned their mind to the question involved.

\(^{13}\) *Calverley v Green* (1984) 155 CLR 242.

\(^{14}\) *Allen v Snyder* [1977] 2 NSWLR 685.

\(^{15}\) *Baumgartner v Baumgartner* (1985) 2 NSWLR 406, 420 (Kirby P).

\(^{16}\) *Baumgartner v Baumgartner* (1987) 164 CLR 137, 144 (Mason CJ, Wilson and Deane JJ).

\(^{17}\) Ibid 145–146 (Mason CJ, Wilson and Deane JJ).

\(^{18}\) Ibid 146 (Mason CJ, Wilson and Deane JJ).

\(^{19}\) Ibid 146–147 (Mason CJ, Wilson and Deane JJ).

\(^{20}\) Ibid 147–148 (Mason CJ, Wilson and Deane JJ).

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relationship between the parties for their mutual benefit and security.\textsuperscript{21} The woman’s contribution to the pooled funds was not simply that of someone paying rent.\textsuperscript{22}

As the case fell within the principles in \textit{Muschinski v Dodds}, the High Court considered what form of constructive trust would be appropriate. The maxim ‘Equity is equality’ was referred to as a useful starting point, subject to any adjustments for any disparity in contributions.\textsuperscript{23} On the facts, such a disparity did exist, so the High Court did not start at a position of equality but started at 55 per cent to the man and 45 per cent to the woman. The High Court urged “practical equality” in coming to this view, wherein a court should not “pursue complicated factual inquiries which will result in relatively insignificant differences”.\textsuperscript{24} From the starting point of 55/45, this was further adjusted in the man’s favour due to his initial contributions in purchasing the house and the mortgage repayments that he made after the woman left, with a lien to secure the value of furniture taken from the property which was purchased from the pooled funds.\textsuperscript{25} The exact value of these adjustments and the form of the constructive trust was left up to the parties to sort out. Justices Toohey and Gaudron delivered separate judgments but agreed with the joint conclusions reached by Mason CJ and Wilson and Deane JJ.

B The Principles

Ultimately, whilst the appeal to the High Court was allowed, the practical effect was unchanged. \textit{Baumgartner v Baumgartner} effectively affirmed \textit{Muschinski v Dodds} in circumstances where the courts at earlier instances did not have the benefit of \textit{Muschinski v Dodds}. The principles in \textit{Baumgartner v Baumgartner} closely follow that of \textit{Muschinski v Dodds} but the High Court this time had the benefit of not needing to delve into the historical case law that was already laid out in \textit{Muschinski v Dodds}. This enabled the court to further refine the principles in \textit{Muschinski v Dodds} but has not been revisited by the High Court since.

An important factor is how the case was framed at trial. It appears that the woman framed her case in equitable estoppel in that there was a promise to marry and, when they married, the property would be transferred into joint names. However, the evidence showed that there was

\begin{footnotesize}
\begin{enumerate}
\item Ibid 148–149 (Mason CJ, Wilson and Deane JJ).
\item Ibid 148 (Mason CJ, Wilson and Deane JJ).
\item Ibid 149–150 (Mason CJ, Wilson and Deane JJ).
\item Ibid 150 (Mason CJ, Wilson and Deane JJ).
\item Ibid 150–151 (Mason CJ, Wilson and Deane JJ).
\end{enumerate}
\end{footnotesize}
no such promise, and that the man had only said that he would arrange such things if they married, which was something he frequently dismissed as often as the woman inquired.\footnote{26}{Ibid 145 (Mason CJ, Wilson and Deane JJ).}

The Court of Appeal addressed the argument from estoppel, particularly proprietary estoppel.\footnote{27}{Baumgartner v Baumgartner (1985) 2 NSWLR 406, 414–415 (Kirby P).} The court found that proprietary estoppel may provide relief, usually in the form of an equitable charge.\footnote{28}{Ibid 415 (Kirby P).} However, the use of proprietary estoppel in de facto relationship situations where expectations and contributions might not be discernible is limited.\footnote{29}{Ibid.} Two other bases were raised by the court whereby a partner to a de facto relationship could claim the property of another, being a “contractual licence” or implied agreement, or quantum meruit.\footnote{30}{Ibid.} These bases were mentioned in passing as the parties did not argue their case on these bases, thus did not form the basis for the court’s judgment.\footnote{31}{Ibid.} Ultimately, estoppel was not applicable in any sense, and was not mentioned by the High Court.

The maxim ‘Equity is equality’ was raised by the High Court and was used as a guide in determining the parties’ contributions.\footnote{32}{Baumgartner v Baumgartner (1987) 164 CLR 137, 149 (Mason CJ, Wilson and Deane JJ).} The High Court considered that “there is much to be said” for starting at a position of equality when parties have been living together in a relationship for some years, subject to any adjustments for substantial disparate contributions.\footnote{33}{Ibid 150 (Mason CJ, Wilson and Deane JJ).} However, the High Court noted that the case before them was “borderline”, and the facts made it not possible to treat the contributions of the parties as equal.\footnote{34}{Ibid 149 (Mason CJ, Wilson and Deane JJ).} This is evident in the court finding the parties’ contributions as being 55 per cent and 45 per cent from the man and woman respectively.\footnote{35}{Ibid.}

The maxim ‘Equity is equality’ is particularly poignant in these circumstances. In determining property proceedings between parties under the Family Law Act 1975 (Cth), one factor the court must take into account is that any order made (if made) must be just and equitable.\footnote{36}{Family Law Act 1975 (Cth) s 79(2).} Three years prior to Baumgartner v Baumgartner, the High Court decided the case of Mallet v Mallet (1984)\footnote{37}{Mallet v Mallet (1984) 156 CLR 605.} which involved an application for property settlement under s 79 of the Family Law Act.

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1975 (Cth). The High Court in *Mallet v Mallet* confirmed that the maxim ‘Equity is equality’ is not to be assumed as the starting point for deciding what is just and equitable. Equality is not the starting point, as the purpose of the Act is not to equalise the financial strengths of each party.\(^{38}\) If the court assumed equality as the starting point, then the court’s discretion to determine what is just and equitable would be fettered by that assumption of equality, which is not a feature of the *Family Law Act 1975* (Cth).\(^{39}\) Whilst equality might be the correct starting point, it does not mean that equality is a general rule\(^{40}\) as the facts and circumstances of the case may well require *inequality* as the starting point.\(^{41}\)

Whilst de facto relationships were not recognised by the *Family Law Act 1975* (Cth) at the time of *Baumgartner v Baumgartner*, it appears that the High Court kept in mind its previous decisions in relation to similar questions under the *Family Law Act 1975* (Cth) when it considered the de facto relationship in *Baumgartner v Baumgartner*. In this case, the High Court started at the appropriate position of inequality as 55 per cent and 45 per cent based on the parties’ contributions.

These contributions were arrived at by reference to the parties’ contributions to the pooled funds.\(^{42}\) Importantly, it was the pooled funds which comprised the ‘joint endeavour’ between the parties. Of particular note is the woman’s ‘non-financial’ contribution of raising their new child, which was given a monetary value equivalent to what she would have earned had she continued working.\(^{43}\)

It appears that the mixture of funds was critical to the joint endeavour found in *Baumgartner v Baumgartner* and that the parties’ direct contributions, financial and non-financial, were included if they were applied to the furtherance of the parties’ joint endeavour. This was so even if some contributions (such as taking care of the child) were not directly related to property, so long as they were done in furtherance of the overall joint endeavour between the parties.\(^{44}\) The adjustment for non-financial contributions by the High Court are also found in family law cases

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\(^{38}\) Ibid 610 (Gibbs CJ), 625 (Mason J), 636–638 (Wilson J), 640–641 (Deane J), 647 (Dawson J).

\(^{39}\) Ibid 639 (Deane J).

\(^{40}\) Ibid 636 (Wilson J), 639 (Deane J).

\(^{41}\) See, eg, *Black v Black* (1991) 15 Fam LR 109; *Ferraro v Ferraro* (1992) 111 FLR 124. See generally the unreported decision of *Brown v Manuel* [1996] QCA 65 involving the windfall equity where a 60/40 split in relation to real estate was considered as the proper starting point.

\(^{42}\) *Baumgartner v Baumgartner* (1987) 164 CLR 137, 150 (Mason CJ, Wilson and Deane JJ).

\(^{43}\) Ibid 142 (Mason CJ, Wilson and Deane JJ).

\(^{44}\) Ibid 149 (Mason CJ, Wilson and Deane JJ).
whereby contributions as a homemaker or parent may be included in the overall contribution of the parties.\textsuperscript{45}

Similarly, the High Court noted that, where possible, the notion of practical equality should be given effect.\textsuperscript{46} That is, the court should not pursue complicated factual inquiries that would result in relatively insignificant and inconsequential differences in beneficial interests. This principle is present in windfall equity cases and family law cases.\textsuperscript{47} It was this notion of practical equality that led the court to arrive at the starting point of 55 per cent and 45 per cent to the man and woman respectively, being the parties’ contributions to the joint endeavour. It was after arriving at this practical division of contributions were specific adjustments made, although apart from the man’s initial contribution from the sale of his house, the specific amounts of these adjustments were left to the parties to determine.\textsuperscript{48}

The High Court treated \textit{Muschinski v Dodds} effectively as authority that a constructive trust may be awarded when it would be unconscionable to retain a benefit to the exclusion of another.\textsuperscript{49} The exact phrase used to justify the grant of a constructive trust was in “applying the general principle which restores to a party contributions which he or she has made to a joint endeavour which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them.”\textsuperscript{50}

Where \textit{Baumgartner v Baumgartner} begins to break new ground compared to \textit{Muschinski v Dodds} is when Toohey and Gaudron JJ delivered their own separate judgments after agreeing with the joint judgment of Mason CJ, Wilson and Deane JJ.

Justice Toohey began talking about the ways in which a constructive trust may arise.\textsuperscript{51} Although he accepted that unconscionable conduct is the appropriate basis, he asked whether unconscionability is any more principled than unjust enrichment.\textsuperscript{52} In this regard he explicitly rejected the approach taken by Lord Denning MR in which a constructive trust may be imposed

\textsuperscript{45} See, eg, \textit{Black v Black} (1991) 15 Fam LR 109, 118 (Clarke JA).

\textsuperscript{46} \textit{Baumgartner v Baumgartner} (1987) 164 CLR 137, 150 (Mason CJ, Wilson and Deane JJ).


\textsuperscript{48} \textit{Baumgartner v Baumgartner} (1987) 164 CLR 137, 150–151 (Mason CJ, Wilson and Deane JJ).

\textsuperscript{49} Ibid 147–149 (Mason CJ, Wilson and Deane JJ).

\textsuperscript{50} Ibid 148 (Mason CJ, Wilson and Deane JJ).

\textsuperscript{51} Ibid 151 (Toohey J).

\textsuperscript{52} Ibid 152 (Toohey J).
whenever justice and good conscience would require it,\textsuperscript{53} so he does not appear to say that an unjust enrichment is all that is required.

Although Toohey J noted that unjust enrichment is not a “general doctrine”, it is still a “unifying concept”.\textsuperscript{54} He said that the development of a general doctrine for unconscionable conduct is just as important as the development of a general doctrine for unjust enrichment, and that the case law may now be sufficiently developed to support a general doctrine for unjust enrichment.\textsuperscript{55} In this regard he cited matrimonial disputes in Canada where unjust enrichment is the basis for awarding a constructive trust in these situations.\textsuperscript{56} He said that the mere fact someone received a benefit is not enough: the acquisition of that benefit must have been assisted or enabled by the other party.\textsuperscript{57} However, he does not elaborate on the circumstances that would make the retention of an assisted or enabled benefit unjust.

Regardless, Toohey J considered that a constructive trust can remedy both unconscionable conduct and unjust enrichment and gave a number of factors relevant to the imposition of a constructive trust.\textsuperscript{58} He considered that although there does not need to be a precise accounting, disproportionate contributions cannot be ignored; each party first receives what they put into the venture; and that the approach by Mason CJ, Wilson and Deane JJ is consonant with an approach based either on unconscionable conduct or unjust enrichment.\textsuperscript{59} In this regard, Toohey J echoed much of the joint leading judgment but posited that unconscionable conduct may not necessarily be any more principled than unjust enrichment.\textsuperscript{60}

The judgment of Gaudron J was more practical in that it focused more on the operation of the principles in \textit{Muschinski v Dodds} and the practical realities of the facts and circumstances that they apply to. In agreeing with the majority, Gaudron J acknowledged the applicability of \textit{Muschinski v Dodds} and that the case before her was another instance of where the substratum of a joint endeavour had been removed without attributable blame.\textsuperscript{61} She then began to look at how a constructive trust might be tailored to suit the circumstances.

\begin{itemize}
\item \textsuperscript{53} Ibid. See also \textit{Hussey v Palmer} [1972] 1 WLR 1286; \textit{Eves v Eves} [1975] 1 WLR 1338.
\item \textsuperscript{54} \textit{Baumgartner v Baumgartner} (1987) 164 CLR 137, 152–153 (Toohey J) citing \textit{Pavey & Matthews Pty Ltd v Paul} (1987) 162 CLR 221.
\item \textsuperscript{55} \textit{Baumgartner v Baumgartner} (1987) 164 CLR 137, 153 (Toohey J).
\item \textsuperscript{56} Ibid citing \textit{Rathwell v Rathwell} (1978) 83 DLR (3d) 289 and \textit{Pettkus v Becker} [1980] 2 SCR 834.
\item \textsuperscript{57} \textit{Baumgartner v Baumgartner} (1987) 164 CLR 137, 153 (Toohey J).
\item \textsuperscript{58} Ibid 153–154 (Toohey J).
\item \textsuperscript{59} Ibid 154 (Toohey J).
\item \textsuperscript{60} Ibid 154–155 (Toohey J).
\item \textsuperscript{61} Ibid 157 (Gaudron J).
\end{itemize}
Justice Gaudron first began by examining the applicability of a resulting trust. In this regard, she raised the point that had this been a resulting trust case and given no presumption of advancement or other intention to the contrary, the house would have been held on resulting trust proportionate to each party’s contributions. Of course, this was not the case, as the woman did not contribute to the purchase price of the house.

It is this point that Gaudron J addressed. She noted that, whilst a resulting trust cannot arise due to the nature of financing the purchase of the house, a resulting trust still operates to prevent an unconscionable retention of benefit, as does a constructive trust. In fashioning a constructive trust to meet the circumstances of this case, she considered the points regarding resulting trusts mentioned earlier. She noted that, in Australia, the usual method of financing the purchase of houses is through a “crédit foncier” arrangement whereby “equity” is built up in the house over time by paying off the mortgage debt, in effect deferring the purchase price. On this view, the payments towards the mortgage debt may be construed as a contribution to the purchase price of the property, albeit after the fact. Therefore, in fashioning the constructive trust, Gaudron J considered that the joint payments towards the mortgage debt would attract the same principles at play in resulting trusts as if those payments were in fact towards the purchase price, and as such those payments should be held on trust in proportion to each party’s contributions. This analysis speaks more to Equity looking at the substance of the parties’ interactions rather than relying on strict formality.

Justice Gaudron considered this factor to be relevant in fashioning the constructive trust to suit the case, along with two other factors. These two other factors included whether the asset sought to be the subject of a trust was acquired for the purpose of the joint relationship (or joint endeavour), and whether non-financial contributions should be taken into account.

Ultimately, Gaudron J agreed with the majority in that the contributions should be 55 per cent and 45 per cent to the man and woman respectively, with the woman’s non-financial contributions in caring for their child given equivalent weight as if she had continued working during that time. In coming to this conclusion, rather than tracing the woman’s contributions through to the “equity” gained in the house via the “crédit foncier” arrangement, the

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62 Ibid 155 (Gaudron J).
63 Ibid 156 (Gaudron J).
64 Ibid.
65 Ibid.
66 Ibid 157 (Gaudron J).
constructive trust was granted in proportion to the woman’s contributions to the joint funds, the pooled resources, of the parties.\textsuperscript{67} This latter point is particularly interesting, as although the remedy sought was a proprietary remedy against the house, the constructive trust awarded had the effect of \textit{unwinding} the relationship between the parties. Rather than securing a party’s interest in a house to which their funds were applied, the court wound back the relationship as best as possible to restore each party’s contributions, both financial and non-financial. This is because the joint endeavour was not the purchase of a house, but the mutual pooling of funds, of which some of those funds were applied towards the mortgage.

\textbf{III \ Lloyd v Tedesco}

\textit{Lloyd v Tedesco}\textsuperscript{68} was an appeal heard in 2002 by the Supreme Court of Western Australia from the case heard at first instance in the Supreme Court.\textsuperscript{69} This case used the term ‘joint endeavour principle’ to describe the principles in \textit{Muschinski v Dodds} in Western Australia. It is an important case as the pleadings of the plaintiff/appellant, Ms Lloyd, attempt to formularise the principles in \textit{Muschinski v Dodds}. It also had an appearance in the High Court, albeit as an application for special leave to appeal, which was refused. She was not successful at any stage in the proceedings. Given the appearance of the matter before the Supreme Court,\textsuperscript{70} Court of Appeal\textsuperscript{71} and High Court,\textsuperscript{72} it is worth looking at this matter at every instance.\textsuperscript{73}

\textbf{A \ The Case}

\textit{Lloyd v Tedesco} involved the breakdown of a de facto relationship between Ms Lloyd and Mr Tedesco. In July 1981 the parties came to live together in a property owned solely by Ms Lloyd. Shortly afterwards, Mr Tedesco purchased a property in his sole name with his own funds. Ms Lloyd did not contribute in any way to this purchase. The parties then lived together in the new property purchased by Mr Tedesco. During this period of cohabitation, Mr Tedesco conducted a market gardening business and Ms Lloyd performed domestic duties. Ms Lloyd had also lent a sum of money to Mr Tedesco for his business.

\textsuperscript{67} Ibid.

\textsuperscript{68} \textit{Lloyd v Tedesco} (2002) 25 WAR 360.

\textsuperscript{69} \textit{Lloyd v Tedesco} [2001] WASC 99.

\textsuperscript{70} Ibid.

\textsuperscript{71} \textit{Lloyd v Tedesco} (2002) 25 WAR 360.


\textsuperscript{73} Excluding \textit{Lloyd v Tedesco} [2001] WASCA 288, which only concerned procedural issues.

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In 1984, the parties separated for a period of time. Ms Lloyd sued Mr Tedesco to recover the sum of money she had lent to him for his business. This action was settled privately wherein Mr Tedesco repaid the money to Ms Lloyd, and the separation was short-lived. They continued in an off-and-on relationship until December 1990, when the relationship fully broke down. Ms Lloyd sought an interest by way of a constructive trust in Mr Tedesco’s property and business due to her non-financial contributions and started proceedings in the Supreme Court of Western Australia.

In interlocutory proceedings, Ms Lloyd framed her case in six steps to claim under the ‘joint endeavour principle’. These steps were that a joint endeavour existed between the parties; that valuable contributions were made to the joint endeavour; that the defendant’s wealth increased as a result of the joint endeavour; that retention of wealth to the exclusion of the plaintiff is unconscionable; the plaintiff is then entitled to compensation; and that compensation may be secured over property by way of an equitable charge.\(^{74}\)

The pleadings were framed in this way due to the previous decision of Stowe v Stowe (No 2)\(^{75}\) in which the ‘joint endeavour principle’ was coined, and subsequently used in the previous interlocutory hearing.\(^{76}\) It was used to describe the type of equity present in Muschinski v Dodds and Baumgartner v Baumgartner. As such, Ms Lloyd’s pleadings were framed formulaically to emulate Stowe v Stowe (No 2).

In order to claim compensation under the joint endeavour principle, Miller J referred to Stowe v Stowe (No 3)\(^{77}\) wherein Owen J noted that there must be something “over and above” a de facto relationship or a promise of marriage. However, the starting point for consideration is the relationship between the parties. Although there may have been domestic contributions, these contributions are not enough by themselves to form an entitlement to compensation secured by a proprietary remedy, but those same contributions may be indicative of a pooling of resources.\(^{78}\)

Of particular note was the contributions and intentions of the parties. Ms Lloyd pleaded that such a joint endeavour existed for their mutual “future financial security and benefit”, and the

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\(^{75}\) *Stowe v Stowe (No 2)* (Unreported, Supreme Court of Western Australia, Owen J, 4 July 1996).

\(^{76}\) *Lloyd v Tedesco* [2001] WASC 99, [3].

\(^{77}\) *Stowe v Stowe (No 3)* (Unreported, Supreme Court of Western Australia, Owen J, 5 August 1997).

\(^{78}\) *Lloyd v Tedesco* [2001] WASC 99, [5]; *Stowe v Stowe (No 3)* (Unreported, Supreme Court of Western Australia, Owen J, 5 August 1997) 8–9.

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intention to do so was particularised in four ways. These were that Mr Tedesco would tell Ms Lloyd that his work was for their joint benefit; that Ms Lloyd would perform domestic duties rather than seek employment; that Mr Tedesco would marry Ms Lloyd; and that Ms Lloyd would be entitled to one-half of any assets they derived from their relationship.\(^79\) In effect, Ms Lloyd claimed that she was entitled to be compensated for her contributions to the joint endeavour when it came to an end by recourse to an equitable charge over the proprietary interests in the companies, businesses and property of Mr Tedesco.\(^80\)

Mr Tedesco only admitted that the de facto relationship existed.\(^81\) Ms Lloyd also accepted that the existence of a de facto relationship alone could not establish a joint endeavour.\(^82\) The court said that only once a joint endeavour was established could someone claim compensation if the parties’ resources were pooled towards that joint endeavour.\(^83\) The existence of the joint endeavour and the contributions must first be established as a matter of fact.

The court instead reframed Ms Lloyd’s case in four steps, rather than six. These are that there must be a joint endeavour between the parties for “permanent” financial security and benefits; that valuable contributions were made to the joint endeavour; that the other party must have accrued wealth as a result of the joint endeavour; and that the accrued wealth must be unconscionably retained to the exclusion of the other party. A joint endeavour must be shown with “proof of an actual intention to pool resources for the purpose of that endeavour”, whether express or inferred.\(^84\)

Ms Lloyd’s evidence was largely unaccepted. It was also held by the court that, although there was no promise to marry on behalf of Mr Tedesco, a promise to marry is irrelevant and a court would not grant equitable compensation to enforce such a promise.\(^85\) It was accepted that on a number of occasions Mr Tedesco made it clear that he had no intention to marry.\(^86\)

Another incident of the relationship was the loan that Ms Lloyd made to Mr Tedesco. Only $61,000 could be substantiated as the amount of money loaned to Mr Tedesco. This money was

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\(^79\) *Lloyd v Tedesco* [2001] WASC 99, [7].
\(^80\) Ibid.
\(^81\) Ibid [8].
\(^82\) Ibid [9].
\(^83\) Ibid.
\(^84\) Ibid [10].
\(^85\) Ibid [16].
\(^86\) Ibid [18]–[20], [36], [40]–[41].

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loaned at his request and was to “stay in the family and be an investment for both of us”.\textsuperscript{87} However, once the relationship temporarily broke down, Ms Lloyd sued for the return of this money. This action was settled by consent whereby Mr Tedesco repaid Ms Lloyd.\textsuperscript{88} This incident, plus later circumstances, were taken to show that both parties kept their finances distinctly separate.\textsuperscript{89} Ms Lloyd’s contribution to Mr Tedesco’s business was limited to being employed for a period of four weeks.\textsuperscript{90} This effectively meant that Ms Lloyd’s contributions were not to any joint endeavour, as the parties’ finances were kept separate. Ms Lloyd’s contributions to the relationship in any ‘joint’ capacity were simply the normal contributions made by those in a de facto relationship, particularly that of a “homemaker”.\textsuperscript{91}

Ultimately, Miller J at trial could not find the existence of a joint endeavour between the parties, the lack of which proved fatal to Ms Lloyd’s claim.\textsuperscript{92} The parties kept their finances distinctly separate and there was no contribution by Ms Lloyd to the property. There was no contribution other than as a ‘homemaker’.\textsuperscript{93} At no time was there any intention for the parties to pool their resources for a joint endeavour for the parties’ “future financial security and benefits”.\textsuperscript{94}

Ms Lloyd appealed this decision and was unsuccessful. Justices Murray and Pullin delivered separate judgments dismissing the appeal, with Hasluck J agreeing. The problem once again became the existence of the joint endeavour, with Ms Lloyd alleging that such an endeavour did exist and that her contributions to the de facto relationship should be taken into account.\textsuperscript{95}

The court found that whilst this was not a ‘common intention’ trust case, a constructive trust may be imposed to remedy unconscionable conduct based on the principles in \textit{Muschinski v Dodds} and \textit{Baumgartner v Baumgartner}.\textsuperscript{96} The existence of a joint endeavour may be shown to exist by pooled earnings, particularly as they relate to specific property, and unconscionable conduct may be more readily shown by the existence of pooled earnings.\textsuperscript{97} A constructive trust can be tailored to suit the facts and circumstances of the case, and financial contributions should

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{87} Ibid [22].
\item\textsuperscript{88} Ibid [23]–[26].
\item\textsuperscript{89} Ibid [26]–[30].
\item\textsuperscript{90} Ibid [32].
\item\textsuperscript{91} Ibid [31]–[34].
\item\textsuperscript{92} Ibid [50].
\item\textsuperscript{93} Ibid [49]–[51].
\item\textsuperscript{94} Ibid [50]–[54].
\item\textsuperscript{95} Lloyd v Tedesco (2002) 25 WAR 360, 362 [2]–[3] (Murray J).
\item\textsuperscript{97} Ibid 363–364 [9]–[12] (Murray J).
\end{enumerate}
\end{footnotesize}
not automatically be granted greater weight than non-financial contributions as a matter of course.\textsuperscript{98}

Non-financial contributions may in fact be pooled towards a joint endeavour, but they must in some way relate to the property of the parties, and not just be the ordinary instances of love and affection in a relationship.\textsuperscript{99} It was this point that Ms Lloyd sought to distinguish on appeal, framing her contributions as being towards a joint endeavour whereby she would assist Mr Tedesco by attending to homemaking and bookkeeping duties, enabling him to undertake work for their “permanent financial security and benefits”.\textsuperscript{100}

Justice Murray did not find the existence of a joint endeavour. The character of Ms Lloyd’s contributions was that of a homemaker with no real involvement or contribution to Mr Tedesco’s business or property that could be thought of as a joint endeavour in which the parties pooled resources.\textsuperscript{101} The parties’ finances were kept separate and there was no promise to marry.\textsuperscript{102} No joint endeavour was found.

The issue of Ms Lloyd’s non-financial contributions was specifically addressed by Pullin J. The question addressed by Pullin J was whether Ms Lloyd’s non-financial contributions were sufficient to find the existence of a joint endeavour.\textsuperscript{103} In this regard, recourse was had to the South Australian case \textit{Parij v Parij}\textsuperscript{104} which involved the principles in \textit{Muschinski v Dodds} in a de facto relationship. This case was raised to support Ms Lloyd’s position that non-financial contributions in a homemaking capacity without an explicit intention to enter into a joint endeavour was enough to find the existence of a joint endeavour.\textsuperscript{105}

Echoing the words of Deane J, Pullin J noted that any alteration of proprietary interests must be principled, not simply because it would seem fair to do so.\textsuperscript{106} He noted that \textit{Parij v Parij} drew upon principle from family law cases such as \textit{Mallet v Mallet}\textsuperscript{107} where the discretion to make a just and equitable order is granted by statute.\textsuperscript{108} He considered that, on the principles in

\begin{itemize}
  \item \textsuperscript{98} Ibid 364 [11] (Murray J).
  \item \textsuperscript{99} Ibid 364–365 [13]–[16] (Murray J).
  \item \textsuperscript{100} Ibid 366 [17]–[20] (Murray J).
  \item \textsuperscript{101} Ibid 367–368 [24]–[28] (Murray J).
  \item \textsuperscript{102} Ibid 370 [35]–[46] (Murray J).
  \item \textsuperscript{103} Ibid 375 [63] (Pullin J).
  \item \textsuperscript{104} \textit{Parij v Parij} (1997) 72 SASR 153.
  \item \textsuperscript{105} \textit{Lloyd v Tedesco} (2002) 25 WAR 360, 375–377 [63]–[71] (Pullin J).
  \item \textsuperscript{106} Ibid 377–378 [76]–[77] (Pullin J).
  \item \textsuperscript{107} \textit{Mallet v Mallet} (1984) 156 CLR 605.
  \item \textsuperscript{108} \textit{Lloyd v Tedesco} (2002) 25 WAR 360, 378 [79] (Pullin J).
\end{itemize}
Muschinski v Dodds and Baumgartner v Baumgartner, there is no such discretion in Equity to decide that homemaker duties are sufficient to find a constructive trust, considering that the court in Parij v Parij gave no justification for the apportionment of contributions.\(^\text{109}\)

Whilst Pullin J noted that there must be unconscionable conduct to trigger the joint endeavour principle, there must in fact be an actual intention to pool funds for a joint endeavour, whether explicit or inferred: a simple relationship is insufficient.\(^\text{110}\) Given this requirement, Pullin J considered that there must have been evidence before the court in Parij v Parij to show that the parties had pooled their resources: otherwise, if that was not the case, then he disagreed with Parij v Parij and refused to apply it.\(^\text{111}\) In either circumstance, he noted that the contributions by Ms Lloyd were of a different character compared to Parij v Parij, Baumgartner v Baumgartner and Muschinski v Dodds.\(^\text{112}\)

Ms Lloyd then applied for special leave to appeal to the High Court of Australia.\(^\text{113}\) The application for special leave to appeal concerned two points regarding intention and contribution. It was first argued that there was no need to show an intention to pool resources for a joint endeavour.\(^\text{114}\) Counsel for Ms Lloyd argued that this was not a necessary requirement to plead as a result of the Stowe v Stowe\(^\text{115}\) litigation and was not a requirement in either Muschinski v Dodds or Baumgartner v Baumgartner.\(^\text{116}\) The second point was that, according to Parij v Parij, non-financial contributions did not need to be made specifically towards any particular property to support a claim for relief.\(^\text{117}\)

Justice Kirby noted that it would be incorrect to confine the intervention of Equity to situations where the parties had pooled their resources.\(^\text{119}\) However, it was noted that this approach by the trial and appellate courts was based on the “formulaic” way of pleading based on Stowe v

\(^{109}\) Ibid 378 [78]–[79] (Pullin J).
\(^{110}\) Ibid 378–379 [83]–[86] (Pullin J).
\(^{111}\) Ibid 379–380 [87]–[91] (Pullin J).
\(^{112}\) Ibid 380–381 [92]–[93] (Pullin J).
\(^{114}\) Ibid 38–43 (C P Shanahan).
\(^{115}\) Stowe v Stowe (1995) 15 WAR 363; Stowe v Stowe (No 2) (Unreported, Supreme Court of Western Australia, Owen J, 4 July 1996); Stowe v Stowe (No 3) (Unreported, Supreme Court of Western Australia, Owen J, 5 August 1997).
\(^{117}\) Ibid 242–298 (C P Shanahan).
\(^{118}\) Ibid 302–311 (C P Shanahan).
\(^{119}\) Ibid 82–87 (Kirby J).
Windfall Equity and the Joint Endeavour Principle

Stowe, and it was upon this basis that the earlier proceedings were conducted. This way of framing the case made it difficult to “reconfigure” it before the High Court. Further, it was noted that legislation has largely overtaken Equity in the current case concerning de facto relationships, and that the Stowe v Stowe decision did not seem to be followed in any other state, but there may still be cases not covered by legislation where Equity will continue to apply.

Despite the concern that the Western Australian courts in Lloyd v Tedesco did not give full effect to the principles in Muschinski v Dodds and Baumgartner v Baumgartner, special leave was refused. It appears that the way Ms Lloyd had pleaded her case by reference to the Stowe v Stowe decisions had influenced the way in which the judges espoused principle and decided the case. Ultimately, the formulaic way in which Ms Lloyd’s case was pleaded made her case “not a suitable vehicle for further elucidation of the principles laid down” in Muschinski v Dodds and Baumgartner v Baumgartner. Further, if special leave was allowed, Ms Lloyd would have had to replead her case and have a second hearing on the matter to determine further facts, to which Mr Tedesco would need to answer. Special leave to appeal was refused, and the litigation ended.

B The Principles

Although the case was not tried before the High Court, the application for special leave did note some issues with the principles espoused by the Western Australian courts.

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122 Ibid 215–217 (Kirby J).
123 Ibid 313–318 (Kirby J).
129 Stowe v Stowe (1995) 15 WAR 363; Stowe v Stowe (No 2) (Unreported, Supreme Court of Western Australia, Owen J, 4 July 1996); Stowe v Stowe (No 3) (Unreported, Supreme Court of Western Australia, Owen J, 5 August 1997).
131 Ibid 415–419 (McHugh J).
132 Ibid 419–424 (McHugh J).
The important point to note is that the ‘joint endeavour principle’ is unequivocally derived from the application of the principles in *Muschinski v Dodds* and *Baumgartner v Baumgartner* where contributions to a failed joint endeavour are returned to the parties. As the guiding principle is unconscionability, its function is to prevent the unconscionable retention of a benefit. If the parties’ wealth had increased due to the joint endeavour between them, then it would be unconscionable to retain that wealth to the exclusion of the other when the joint endeavour breaks down.

Four elements were shown to be essential to succeed in a claim under the ‘joint endeavour principle’. These elements are the existence of a joint endeavour for mutual benefit (but need not be permanent); that valuable contributions were made to the joint endeavour; that the parties’ wealth had increased; and that retaining that wealth to the exclusion of the other party would be unconscionable.

The existence of the joint endeavour is a threshold question wherein if no joint endeavour can be found to exist then the claim must fail. This means that a joint endeavour must be shown to exist as a matter of fact and that the parties must have had the intention to participate in that joint endeavour. A joint endeavour is not shown to exist simply by the parties being in a de facto relationship, but the existence of that relationship may show the pooling of funds towards property in a joint endeavour.

Similarly, the contributions towards the joint endeavour must also be shown to exist as a matter of fact. The pooling of funds for financial security and benefit is also a necessary precondition for the existence of the joint endeavour. These contributions may be non-financial in nature so long as they were pooled for the purpose of the joint endeavour. A separation of funds

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134 *Lloyd v Tedesco* [2001] WASC 99, [4].
139 *Lloyd v Tedesco* [2001] WASC 99, [9].
140 Ibid [4].
142 *Lloyd v Tedesco* [2001] WASC 99, [9].
may lead to a conclusion that the parties did not pool their resources for the purposes of a joint
[41] (Murray J).} Employment by one party in the business of the other party may not be a contribution to any
parents in his family’s business, not a co-venturer.}

If these four elements can be shown to exist, then the question becomes what remedy is
available. This is an important question, as property interests can only be altered according to
principle, not according to what seems fair.\footnote{Lloyd v Tedesco (2002) 25 WAR 360, 377–378 [76]–[78] (Pullin J).}
A constructive trust is commonly imposed regardless of intention in these scenarios to prevent an unconscionable retention of benefit.\footnote{Ibid 362–363 [4]–[6] (Murray J), 373 [49] (Pullin J).}
However, noting the principles laid down by the High Court in \textit{Giumelli v Giumelli},\footnote{Giumelli v Giumelli (1999) 196 CLR 101.} a lesser
remedy should be found in preference to a constructive trust if possible, tailored to suit the facts
and circumstances of the case.\footnote{Lloyd v Tedesco (2002) 25 WAR 360, 381 [94] (Pullin J).} Although Ms Lloyd was ultimately unsuccessful, it was claimed
that equitable compensation secured by an equitable charge on property contributed to within
the joint endeavour was the appropriate remedy.\footnote{Lloyd v Tedesco [2001] WASC 99, [2].}

A number of other ancillary principles can be drawn from the courts’ decisions in \textit{Lloyd v
Tedesco}. A recurring theme was Ms Lloyd alleging that Mr Tedesco had on numerous occasions
promised to marry her and give her an interest in his property. Although a promise to marry may
be relevant in considering an action for estoppel, it is against public policy to enforce such a
It is crucial that any such promises or representations can be shown to have been made in the first place before they can be relevant. Intentions, promises, and representations (and conduct of any other kind) are not to be ascertained solely
by reference to the beginning of the joint endeavour relationship. Any conduct and other actions
in the intervening period between the beginning and end of the joint endeavour are no less
The context of the principles in *Muschinski v Dodds* being used in a de facto relationship is relevant to the development of the law. It was noted that *Parij v Parij* was a ‘marriage-like’ case (like *Lloyd v Tedesco*) which had recourse to ‘marriage’ cases to develop principles by analogy. However, it may not be appropriate to develop equitable principle in this way. At the time these cases were decided, the *Family Law Act 1975* (Cth) did not address de facto relationships. Although the development of Equity by analogy is one of the bases for principled development of the law as noted by Deane J in *Muschinski v Dodds*, it must be noted that the courts in the ‘marriage’ cases had a wide discretion conferred on them by statute, which is a discretion not available to the courts in Equity.

This is a particularly important point as it was raised before the High Court of Australia when Ms Lloyd applied for special leave. It was noted that although the principles in this case are beginning to be superseded by legislation and that the courts may develop equitable principles harmonious with such legislation, there are still cases that will be brought under this joint endeavour principle and those cases are not limited to de facto relationships. It would bear repeating that the development of the law by analogy should also be cogently reasoned to avoid pigeonholing a principle into de facto relationships when it may have a much wider application, especially when at the time the principle was not being applied in the same way in other Australian jurisdictions.

The principles in *Lloyd v Tedesco* are set out coherently and succinctly. Although the High Court had concerns about the Western Australian courts not giving full effect to the principles in *Muschinski v Dodds* and *Baumgartner v Baumgartner*, particularly in requiring the pooling of resources towards the joint endeavour when there was no such requirement, the outcome of *Lloyd v Tedesco* shows the importance that pleadings have on the outcome of cases. This is similar to *Muschinski v Dodds* wherein the parties only argued resulting and constructive trusts, and the potential claims for an equitable charge or relief for an unperformed gift annexed to a condition could not be given effect. This was also the case in *Lloyd v Tedesco* where Ms Lloyd’s

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157 *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J).
159 Ibid 362–392 (C P Shanahan).
161 Ibid 402–413 (McHugh J).
162 Ibid 170–177 (Kirby J), 242–298 (C P Shanahan).
legal advisors drafted her claim formulaically according to precedent.\textsuperscript{163} The importance of pleadings in the development of the principles in \textit{Muschinski v Dodds} will be seen later in this chapter and later in this thesis.

It was said by McHugh J that the Western Australian courts in \textit{Lloyd v Tedesco} had not given full effect to the principles set down in \textit{Muschinski v Dodds} and \textit{Baumgartner v Baumgartner} due to the way the case was formulaically pleaded.\textsuperscript{164} The way in which parties plead their case appears to have a direct effect on the way in which courts elucidate and apply principle. This must be kept in mind when deriving principle from cases, as although \textit{Lloyd v Tedesco} followed precedent, the principles it espouses are not an exhaustive restatement of the principles in \textit{Muschinski v Dodds}.

\section*{IV \ Henderson v Miles (No 2)}

\textit{Henderson v Miles (No 2) [2005]}\textsuperscript{165} was decided in 2005 in the Supreme Court of New South Wales, heard before Young CJ in Eq. This case is the origin of the term ‘windfall equity’, coined by Young CJ in Eq\textsuperscript{166} to describe the equity in \textit{Muschinski v Dodds}. As the origin of the term ‘windfall equity’, as well as the windfall equity being featured in the text co-authored by Young CJ in Eq,\textsuperscript{167} this case and its treatment is an important case to understand the evolution of the principles in \textit{Muschinski v Dodds}. It is also especially important as it does not involve any discussion of constructive trusts in any way.

\subsection*{A The Case}

As briefly discussed in Chapter 2, this case is an archetypical ‘granny flat’ case.\textsuperscript{168} A mother, with her own funds, built a dwelling on property that was owned by her daughter and son-in-law. Before dealing with the case, it is helpful to refer to the earlier hearing of the case, \textit{Henderson v Miles}.\textsuperscript{169} In 1985, the mother was living in emergency accommodation. The parties came to an arrangement whereby the mother could build a house on the daughter’s and son-in-law’s land at Yarramundi. Construction finished in 1986 and the mother moved into the granny flat then.

\begin{thebibliography}{99}
\bibitem{163} Ibid 46–58, 253–238 (C P Shanahan).
\bibitem{164} Ibid 407–424 (McHugh J).
\bibitem{165} \textit{Henderson v Miles (No 2)} [2005] NSWSC 867.
\bibitem{166} \textit{See Delaforce v Simpson-Cook} (2010) 78 NSWLR 483, 492 [53] (Handley AJA).
\bibitem{167} Peter W Young, Clyde Croft and Megan Louise Smith, \textit{On Equity} (Lawbook Co, 2009).
\bibitem{169} \textit{Henderson v Miles} [2005] NSWSC 710.
\end{thebibliography}

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The mother and the daughter and son-in-law had differing views on what this arrangement entailed. The mother alleged that, if she paid for the erection of the house on the land, she could live there until she died, whereupon any interest she had in the house would pass to the daughter and son-in-law. The daughter and son-in-law agreed, but further alleged that it was a condition that only the mother and no other person could occupy the house, and that the arrangement would come to an end if the mother vacated the premises.

During the period of roughly August 1990 to October 1990, the granny flat at Yarramundi was vacant. The mother had left in August 1990 to live with a man she met at Tewantin. In October 1990, she returned to the Yarramundi property. She did not leave at any point thereafter, though some time later she met another man. He moved into the house at Yarramundi with the mother in 1998, and they were married on 8 July 2001 on the Yarramundi property. The daughter and son-in-law consented to the two living together in the property and they attended the marriage ceremony.

In 2002, the parties had a falling out. The daughter and son-in-law alleged that the mother was stealing money, and they “acted so as to cause the maximum inconvenience” to the mother. This made living together untenable for the parties. The mother claimed breach of contract, trespass, nuisance, and a declaration for an equitable charge over the Yarramundi land.

The interesting point here is in relation to the pleadings. Counsel for the mother alleged that a contract existed, and counsel for the daughter and son-in-law also acknowledged the existence of a contract: however, counsel for the daughter and son-in-law later amended the pleadings to refer to an agreement “or arrangement”. This left it uncertain as to whether there was an enforceable contract, which was further made unclear by the fact that the parties did not have anything written down about their arrangement, and that the discussions were short and vague. The daughter said that the mother could live there at her cost, but that she and the son-in-law would keep the property if she were to “pass on or move away to seek greener pastures”. The son-in-law was not involved in these discussions beyond acquiescing to his wife’s request.

There was so little detail that there was a “vague understanding” about what was happening.

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170 Ibid [12].
171 Ibid [13].
172 Ibid [16].
173 Ibid [22].
174 Ibid [20].
175 Ibid [19].
176 Ibid [25].
Given the scant details about the arrangements that the parties had between themselves, Young CJ in Eq characterised the situation as an informal family arrangement rather than a contract.\(^{177}\)

The daughter and son-in-law raised as a defence the part of the arrangement where the mother would abandon her interest if she vacated. For this argument, they pointed to her moving to Tewantin in August 1990, taking her furniture and effects with her.\(^{178}\) Chief Judge Young in Equity considered that the mother’s move to Tewantin did in fact mean she would have left the premises under the terms of the parties’ arrangement. However, this finding was rendered irrelevant as the mother “was taken back” in October 1990.\(^{179}\) It was no longer relevant that the mother had moved out as the parties’ intentions had changed.

Having found no contract, Young CJ in Eq referred to *Muschinski v Dodds* and *Baumgartner v Baumgartner* for the authority that it would ordinarily be contrary to justice and good conscience for a party to retain a windfall upon the collapse of a joint endeavour.\(^{180}\) He considered that the court will order the minimum equity “that is just sufficient to atone for what would otherwise be unconscionable”.\(^{181}\) As the arrangement had come to an end in circumstances not contemplated by the parties, Young CJ in Eq applied these principles.

In coming to the minimum equity to do justice, Young CJ in Eq looked at the evidence to determine how much the property had increased in value. On the evidence he came to the figure of $39,000, representing how much the property had increased in value due to the mother’s construction of a house on the land. He considered that the minimum equity would be an equitable charge over the Yarramundi property, but not for the full value of $39,000. He considered that, although the mother had a life interest in the property, she may well have vacated the premises of her own accord before her death, as she had done so in the past with her temporary move to Tewantin. In this case, he pinned this figure at 75 per cent, being roughly $29,000.\(^{182}\) He then stood the case down pending another hearing to hear submissions as to the final monetary amount, which took place in *Henderson v Miles (No 2)*.\(^{183}\)

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\(^{177}\) Ibid [26].  
\(^{178}\) Ibid [13].  
\(^{179}\) Ibid [29]–[32].  
\(^{180}\) Ibid [34].  
\(^{181}\) Ibid.  
\(^{182}\) Ibid [36].  
\(^{183}\) *Henderson v Miles (No 2)* [2005] NSWSC 867.
In his judgment in *Henderson v Miles (No 2)*, Young CJ in Eq elaborated further on the principles in *Muschinski v Dodds*. He referred to *Muschinski v Dodds* as the first ‘windfall equity’ case. He noted that this equity arises when “a family joint venture breaks down without attributable blame” and when “it is unconscionable for one of the parties to retain a windfall which the parties never contemplated that that party would receive.” He drew upon the same partnership cases that Deane J did in *Muschinski v Dodds*, being *Atwood v Maude* and *Lyon v Tweddell*. In referring to the windfall equity as a ‘general equity’ (similar to Deane J’s identification of a “general equitable principle”), Young CJ in Eq compared the windfall equity to proprietary and promissory estoppel, but distinguished the windfall equity from estoppel. He explained that, whereas estoppel is based upon an unfulfilled promise causing detriment to another, the windfall equity “is quite different: the promise has been fulfilled, but the resultant arrangement has come to an end in circumstances not contemplated by the parties, leaving the legal interests in one party who, if equity were not to intervene, would obtain an unconscionable benefit.”

Chief Judge Young in Equity then began to address the minimum equity to do justice. He noted that the remedy may not be the same across each “general equity”, but there are “unifying processes at work with respect to the different types of estoppel at equity and common law”. Another factor in determining the minimum equity to do justice also depends upon whether there is to be an order that “fulfils expectations” or “atones for detriment”: the courts must distinguish cases based on “promise” and “free acceptance”.

With this in mind, Young CJ in Eq addressed the arguments made by counsel for the mother. The mother wanted the equitable charge to be calculated by reference to expectation, being the potential value of renting the premises out for her life. However, the cases relied upon by counsel for the mother were proprietary estoppel cases. Chief Judge Young in Equity immediately pointed out that such cases “raise equities based on unfulfilled promises”, and that the windfall equity is different: the promise has been fulfilled, but the arrangement has come to

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184 Ibid.
185 Ibid [14].
186 Ibid [13].
187 *Atwood v Maude* (1868) LR 3 Ch App 369.
188 *Lyon v Tweddell* (1881) 17 Ch D 529.
189 *Henderson v Miles (No 2)* [2005] NSWSC 867, [19].
190 Ibid [23].
191 Ibid [20].
192 Ibid [21], referring generally to Professor Birks.
an unanticipated end.\textsuperscript{193} He considered that there should be a reason for drawing a line between estoppel and windfall equity cases.\textsuperscript{194} This is another example of parties’ pleadings shaping the development of the windfall equity.

After considering the cases put before him, Young CJ in Eq considered there were three approaches. These were to compensate for detriment, to fulfil an expectation, or to mould a special remedy to suit the case.\textsuperscript{195} He considered, by analogy to proprietary estoppel cases, that the windfall equity does not look “to the detriment that might be suffered” because the joint endeavour broke down, but rather the detriment in “losing a fund to the other party” through unexpected circumstances, resulting in an unconscionable gain by that other party.\textsuperscript{196} This is then to “compensate for detriment”, but the detriment is related to “losing a fund to the other party” rather than the joint endeavour not being carried out.

In determining what the unconscionable gain would be, Young CJ in Eq looked at the first method, being that the daughter and son-in-law had a property that was now $39,000 more valuable than before the mother had constructed her house, less adjustments for potential vacation of the premises.\textsuperscript{197} Counsel for the mother submitted that the daughter and son-in-law would have the advantage of being able to rent out the house, which they otherwise would not have been able to do for the length of the plaintiff’s life (expected to be 22 years).\textsuperscript{198} However, Young CJ in Eq pointed out that he was unaware of any windfall case which deals with a potential windfall.\textsuperscript{199} He considered that, on the evidence, the daughter and son-in-law would likely sell the property, so the increase in market value would be their gain.\textsuperscript{200} Further, despite the mother’s financial contributions to the increased value of the property, she lived “rent free and virtually rates free” for roughly 17 years, thus the “detriment” is “close to nil”.\textsuperscript{201} The cost of moving was not considered a relevant detriment.\textsuperscript{202}

As such, Young CJ in Eq decided the value of the equitable charge by reference to the mother’s detriment, being the windfall gain that the daughter and son-in-law received by having a higher-

\textsuperscript{193} Ibid [23].
\textsuperscript{194} Ibid [93].
\textsuperscript{195} Ibid [63].
\textsuperscript{196} Ibid [95].
\textsuperscript{197} Ibid [99]–[100].
\textsuperscript{198} Ibid [101].
\textsuperscript{199} Ibid [102].
\textsuperscript{200} Ibid [103].
\textsuperscript{201} Ibid [104].
\textsuperscript{202} Ibid [105].
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value house due to the mother’s contributions. The initial $39,000 figure was held to be the correct starting point. He then reduced this figure to 85 per cent, being the value of the mother’s life estate based on her life expectancy, plus any contingencies. This reduced the $39,000 to $32,000, which was larger than the amount arrived at in the first instance. There were no further hearings of note on the matter.

B  The Principles

Generally, Young CJ in Eq’s treatment of the windfall equity does not depart greatly from Muschinski v Dodds, especially given his citation of Atwood v Maude and Lyon v Tweddell. There were a number of useful additions to the windfall equity that were not mentioned in Muschinski v Dodds. Whereas the High Court of Australia went to great lengths to explain that a remedy does exist for the breakdown of a joint endeavour, this discussion was centred on constructive trusts. Chief Judge Young in Equity, having the benefit of 19 years since Muschinski v Dodds was able to elaborate upon the practical aspects of the windfall equity.

Two of these practical aspects can be discussed. The first aspect is that the windfall equity is treated as another cause of action, as a general equity, like proprietary estoppel is. The windfall equity is “based on the unconscionability of a person who has taken the benefit of a transaction while not assuming its burden”. The second aspect is that whilst the windfall equity is similar to estoppel, it operates differently. Whereas estoppel is triggered by the failure of a promise to be fulfilled, the windfall equity is triggered when a promise is otherwise fulfilled but the arrangement has otherwise failed in circumstances not contemplated by the parties.

This distinction from estoppel is necessary as the plaintiff framed her case by reference to estoppel cases. These estoppel cases were submitted to be authority that the plaintiff should receive the minimum equity, being the value of rental payments. With this in mind, it was said that the remedy should be based on the detriment suffered in “losing a fund” to another party in unexpected circumstances, rather than any detriment in the arrangement not continuing.

203 Ibid [109]–[110].
204 Ibid [111]–[112].
205 Atwood v Maude (1868) LR 3 Ch App 369.
206 Lyon v Tweddell (1881) 17 Ch D 529.
207 Henderson v Miles (No 2) [2005] NSWSC 867, [19].
208 Ibid.
209 Ibid [23].
210 Ibid [22].
211 Ibid [95].
Muschinski v Dodds was then referred to as being a case where the proper remedy was the return of each party’s respective contributions and an equal share in any proceeds of sale.\textsuperscript{212}

Overall, it appears as though the windfall equity as so coined in this case was treated as a distinct cause of action akin to proprietary estoppel, able to support many remedial approaches without needing to refer to constructive trusts at all.

C Further Treatment

The cases that cite Henderson v Miles (No 2) shed further light on the development of the windfall equity. A number of principles become apparent or reinforced.

Whilst the windfall equity is similar to estoppel, it is distinguished from estoppel: the detriment lies in retaining property after the collapse of the joint endeavour, and such remedy must also be the minimum required to do justice, lest the remedy be disproportionate to the unconscionable behaviour.\textsuperscript{213} This is a recurrent theme, and the remedy of an equitable charge appears prevalent.\textsuperscript{214}

A benefit may be contemplated yet may still comprise an unconscionable windfall when received. If a contemplated benefit is received early, then whilst it may not be a dictionary-definition ‘windfall’, it may be unconscionable to retain the benefit when received unexpectedly early.\textsuperscript{215} However, if a benefit was contemplated and provided for under a valid contract, then the contract is the source of rights in any dispute, not the windfall equity.\textsuperscript{216} A voluntary payment like a gift does not trigger the windfall equity,\textsuperscript{217} nor does contributing property above and beyond that considered by the joint endeavour.\textsuperscript{218}

If a joint endeavour fails, then any property in dispute must be related to that joint endeavour. For example, take a married couple who run a business together. If the parties separate but carry on with the business, only the marriage has failed. The business continues to subsist. The joint endeavour founding the substratum of the business is still ongoing: it has not failed. The

\textsuperscript{212} Ibid [96].
\textsuperscript{214} Pennie v Pennie [2010] NSWSC 565, [9].
\textsuperscript{215} Taylor v Streicher [2007] NSWSC 1006, [45]–[59].
\textsuperscript{216} WMJ Attractions Pty Ltd v Ireland [2008] QSC 140, [34]–[35].
\textsuperscript{217} Paulet v Stewart [2009] VSC 60, [279]–[280].
\textsuperscript{218} Darmanin v Cowan [2010] NSWSC 1118, [253].

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failure of the marriage cannot be used to invoke the windfall equity against the continuing joint endeavour relating to the business.\textsuperscript{219}

The windfall equity need not be restricted to domestic relationships or family arrangements. It may appear in many contexts, such as an unformalised agreement between friends,\textsuperscript{220} and the reference to families is due to the many windfall equity cases that concern family members.\textsuperscript{221}

The role of a constructive trust has also been considered. It has been held that whilst the intervention of Equity may construe the existence of a trust, a constructive trust may not necessarily be the final remedy.\textsuperscript{222} This was not mentioned in \textit{Henderson v Miles (No 2)}, whereby Young CJ in Eq opted for an equitable charge rather than discussing the applicability of a constructive trust. In later cases, courts have either opted to consider whether a constructive trust could apply in the circumstances before discussing the minimum equity, or simply refer to the windfall equity in a way that is indistinguishable from constructive trusts.\textsuperscript{223}

A number of things must be shown to succeed in a claim for the windfall equity. There must be a joint endeavour between the parties;\textsuperscript{224} the joint endeavour must have broken down or had its substratum removed;\textsuperscript{225} it must have occurred without attributable blame;\textsuperscript{226} and one party must have retained a benefit that the parties did not both intend for that one party to retain.\textsuperscript{227}

The issue of attributable blame was also addressed in the cases citing \textit{Henderson v Miles (No 2)}. Three cases in particular had a number of things to say: \textit{Boumelhem} [2009],\textsuperscript{228} \textit{Tasevska} [2011],\textsuperscript{229} and \textit{Drayson} [2011].\textsuperscript{230}
In *Boumelhem*, attributable blame was considered in the context of a person who voluntarily entered into bankruptcy, ending a joint endeavour. Justice Ward considered that, voluntary or not, the bankruptcy brought the joint endeavour between the parties to an end. As to whether that impacted the question of ‘attributable blame’, Ward J could not find much to resolve what ‘attributable blame’ meant, noting the High Court would have decided the issue in *Gazzola v Gazzola* if special leave was allowed. Absent this, he looked to other authorities. He considered *Henderson v Miles (No 2)*, noting that equitable relief does not depend on assigning blame to any party. He also cited Patrick Parkinson, noting that the notion of blame may simply cease to be meaningful, or that a claimant may be denied a remedy if blame may be attributed to them.

The court in *Tasevska* made similar observations as Parkinson in that attributable blame is not relevant to the claim as apportioning blame is not an element of the windfall equity. Drayson similarly referred to *Gazzola* and the lack of a definitive ruling on the issue. As it stands, attributable blame, as considered by the cases that cite *Henderson v Miles (No 2)*, appears to echo the sentiment of Parkinson in that, if relevant in any sense, it may simply work to deprive a claimant of a remedy if they are the blameworthy party.

### V The Current Position and Problems

The principles in *Muschinski v Dodds*, for better or worse, have evolved significantly since they were originally set out by the High Court in 1985. Of the principles developed in *Baumgartner v Baumgartner*, *Lloyd v Tedesco* and *Henderson v Miles (No 2)*, and discussing the potential problems therein, it is helpful to start with the principles that have been affirmed before addressing new principles.

Before discussing the affirmed and new principles, it is important to recall how the pleadings of parties has affected the development of principle. Whereas in *Muschinski v Dodds*, Gibbs CJ argued an equitable charge based on equitable contribution and Brennan and Dawson JJ argued...
gifts with conditions, neither of these principles were relevant as Ms Muschinski pleaded only a resulting trust or a constructive trust. It was upon that basis that the High Court in Deane J’s judgment found a constructive trust.

In the same vein, Lloyd v Tedesco could not have been heard before the High Court, as the formulaic pleading was incompatible with a broader approach based on Muschinski v Dodds. This would have required repleading the case, putting Mr Tedesco to expense in answering a new claim. This made the case inappropriate to be heard before the High Court, which may have been the third High Court case on the topic, but now the term ‘joint endeavour principle’ is not used as widely as the term ‘windfall equity’.

In a different vein, Henderson v Miles (No 2) involved not only pleadings based on estoppel, but case law on the appropriate remedy was also based on estoppel. It is for this reason that Young CJ in Eq considered a number of estoppel cases in his approach to working out the proper remedy. This has had an effect on the development of the principles in Muschinski v Dodds and the windfall equity which will be discussed later in this thesis. The principles as discussed above will now be summarised.

A Affirmation of Principles

In the previous chapter, many principles were identified that could be drawn from Muschinski v Dodds and the case law that it cites. A number of these principles continue to be applicable in Baumgartner v Baumgartner, Lloyd v Tedesco and Henderson v Miles (No 2). These principles will be discussed in three general categories.

1 A Cause of Action for when a Joint Endeavour Breaks Down

It was seen from the previous chapter that the principles in Muschinski v Dodds could operate as a cause of action when the substratum of a joint endeavour is removed without attributable blame. This is in order to prevent an unconscionable retention of benefit. However, the remedy to prevent this must be principled: it cannot be done simply because it would seem ‘fair’ to do so.

What is undeniable from the case law is that Muschinski v Dodds stands for the principle that a constructive trust may arise to remedy an unconscionable retention of benefit, but it may not
do so on the basis of mere fairness: the alteration of proprietary interests must be done in a principled way.\textsuperscript{237}

As to the applicable principles, there have been a number of variations on what is required to substantiate a claim based on the principles in \textit{Muschinski v Dodds}. Some of these elements include:\textsuperscript{238}

\begin{enumerate}[a.]
\item the existence of a joint endeavour that was for the parties’ mutual benefit;
\item valuable contributions have been made to the joint endeavour;
\item the joint endeavour breaks down or otherwise has its substratum removed;
\item the breakdown of the joint endeavour was without attributable blame;
\item the parties’ wealth had increased due to the joint endeavour; and
\item retention of wealth to the exclusion of the other party was not contemplated and would be unconscionable.
\end{enumerate}

These principles do not actually say what constitutes a joint endeavour, but the other principles identified to be discussed later will shed light on this question. This question will also be considered in the theory chapter.

The term ‘wealth’ as identified in the elements above should be read more generally to include any type of ‘benefit’ that one might have as a result of another. This is so even if the parties’ ‘wealth’ had \textit{decreased}, as one party may have taken on a greater liability than they should have, leaving the other party with less wealth, but proportionately less liability.

Attributable blame as an element has also not been properly explained. Presently, attributable blame as a concept is not properly defined, but it may affect the principles in \textit{Muschinski v Dodds} in two ways.\textsuperscript{239}


\textsuperscript{239} \textit{Australian Building & Technical Solutions Pty Ltd v Boumelhem} [2009] NSWSC 460, [96], [98]; \textit{Tasevska v Tasevski} [2011] NSWSC 174, [71]–[79]; \textit{Drayson v Drayson} [2011] NSWSC 965, [71]–[75]. See also \textit{Gazzola v Gazzola} (1990) 92 A LR 45; Parkinson, above n 233.

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a. it is not necessary to attribute blame in order to claim under the principles in *Muschinski v Dodds* and the concept of attributable blame may instead cease to be relevant; and

b. if blame can be attributed to a party, it may operate to deny the blameworthy party a remedy.

As there is little guidance on the issue, this will be a topic for discussion in Chapter 6.

2 Other Applicable Principles

The previous chapter noted that, whilst other legal and equitable principles might be relevant, what matters is what role those principles play in the overall context of the joint endeavour between the parties. For example, although elements of contract may also apply, estoppel is a particularly relevant principle. This is so because the windfall equity has been called a general equity akin to estoppel; it is based on the unconscionability of accepting a benefit without accepting its burden.

Although similar to estoppel, the windfall equity is different. Estoppel looks to the detriment of an unfulfilled promise, but the windfall equity looks to the detriment of losing property to another party in circumstances not contemplated by the parties, rather than the detriment in the joint endeavour not continuing. Rather than fulfilling the joint endeavour, the windfall equity seeks to unwind it.

Whilst there may be subsidiary equitable principles within the joint endeavour, they must be considered within the context of a joint endeavour. Estoppel in particular may be limited as expectations and contributions may not be easily discernible. This may also affect other principles, such as equitable contribution and conditional gifts.

From these principles, *Muschinski v Dodds* looks less likely to be a simple cause of action remediable by a constructive trust. The interwoven nature of joint endeavours with other areas of Equity and common law speak to greater overarching principles that affect ‘joint endeavours’, however defined.

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240 See, eg, *Lloyd v Tedesco* (2002) 25 WAR 360 regarding the loan, and *Henderson v Miles (No 2)* [2005] NSWSC 867 where the parties both raised the existence of a contract (albeit later downgraded to an ‘arrangement’).

241 *Henderson v Miles (No 2)* [2005] NSWSC 867, [19].

242 Ibid [22]–[23], [95]–[96].

The parties’ intentions were paramount as identified in the previous chapter. The parties’ intentions must be considered throughout the entire joint endeavour and they must be clear: they cannot be imputed.

The cases discussed in this chapter show that the existence of a joint endeavour is the threshold question. A joint endeavour must be shown to exist as a matter of fact, and it must be shown that the parties had intended to participate in the joint endeavour. This intention must be manifest, either express or implied, but never imputed. The intention of the parties to enter into a joint endeavour is integral as, without identifying that intention, no joint endeavour can be found.

For similar reasons, the existence of a relationship alone is not enough to establish the existence of a joint endeavour. However, the relationship itself may show the existence of a pooling of contributions towards a joint endeavour. Unfortunately, there is no guidance on what actually constitutes a joint endeavour. This “something more” has not been identified and will be discussed later in this thesis.

No matter how many intentions, promises and representations are alleged, they must be shown to exist as a matter of fact. These intentions may change throughout the course of the joint endeavour and are not to be ascertained only at the beginning of the joint endeavour. This is evident in *Henderson v Miles (No 2)* where the joint endeavour was meant to come to an end when the mother vacated the property; however, the parties’ intentions changed during the endeavour when the daughter and son-in-law allowed the mother to resume living on the property, meaning the original intentions were no longer relevant beyond the point that they changed.

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B Development of New Principles

Although a number of the principles identified in the previous chapter were affirmed or expanded upon, a much larger number of principles have been developed since 1985 based on the cases analysed in this chapter.

1 Contributions to the Joint Endeavour

Much like how the existence of a joint endeavour must be shown to exist, contributions (financial or non-financial) to the joint endeavour must be shown to exist as a matter of fact, and the contributions must, in some sense, be mixed for the parties’ mutual benefit. If contributions are kept separate and are not mixed – for example, money is changed hands based on an employment relationship – the separation of contributions may point away from the existence of a joint endeavour.

However, this does not mean that the contributions (financial or non-financial) need to be ‘pooled’ first, nor is the pooling of contributions necessary to find a joint endeavour. If a pooling of contributions exists, then that pooling itself may be the joint endeavour, or it may point towards some joint endeavour between the parties. There must, at some point, be some form of mixture of the parties’ contributions where their rights to those contributions lack clear delineation of entitlement.

The value of contributions made to the joint endeavour are what should be considered, rather than any ‘equity’ or value obtained in property by virtue of that joint endeavour. This is more dependent on the facts and circumstances of the case. This particular principle was noted by Gaudron J in Baumgartner v Baumgartner; however, in this case, the joint endeavour was the pooling of funds, not the acquisition of ‘equity’ in the house. It may be appropriate in other cases to consider property that contributions have been made to if that is part of the joint endeavour, or just a consequence of carrying out the joint endeavour.


251 Baumgartner v Baumgartner (1987) 164 CLR 137, 157 (Gaudron J).

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The practical effects of the parties’ dealings rather than their strict form should be considered when understanding the situation between the parties.\footnote{Ibid 156 (Gaudron J).} This ties in with the applicability of other equitable remedies. For example, a resulting trust may arise when purchasing real property in the name of another, but many purchases are funded by resort to a loan supported by a mortgage. This effectively means that the purchase price is deferred. If it was not deferred, then a resulting trust would apply; by analogy, a deferred purchase price may also be subject to similar principles, which was the basis of the judgment of Gaudron J in \textit{Baumgartner v Baumgartner}.\footnote{Paulet v Stewart [2009] VSC 60, [279]–[280]; Darmanin v Cowan [2010] NSWSC 1118, [253].}

For the principles in \textit{Muschinski v Dodds} to apply, contributions must be made to the joint endeavour as the parties have arranged between themselves, and they must not be gratuitous (for example, a gift or a contribution not contemplated by the parties).\footnote{Summitt v Summitt [2009] FamCA 371, [246].} It is for this reason that, if parties are involved in more than one joint endeavour, the failure of the substratum of one joint endeavour does not mean that the substratum of another joint endeavour has also failed, unless the substratum of both endeavours is somehow linked or dependent upon one another.\footnote{Lloyd v Tedesco (2002) 25 WAR 360, 378 [79]–[82] (Pullin J); Transcript of Proceedings, \textit{Lloyd v Tedesco} [2003] HCATrans 702 (9 May 2003) 313–348 (Kirby J and C P Shanahan), 362–392 (C P Shanahan); cf \textit{Parij v Parij} (1997) 72 SASR 153.}

\section{Not ‘Quasi-Family Law’}

There is a danger in treating the principles in \textit{Muschinski v Dodds} as a form of ‘quasi-family law’ and it may not be appropriate to develop those principles by analogy to marriage cases. This is because those marriage cases have a wide statutory discretion that Equity does not grant, and whilst it may be desirable to develop Equity harmoniously with legislation, the principles in \textit{Muschinski v Dodds} have a wider ambit than any one piece of legislation.\footnote{Lloyd v Tedesco (2002) 25 WAR 360, 378 [79]–[82] (Pullin J); Transcript of Proceedings, \textit{Lloyd v Tedesco} [2003] HCATrans 702 (9 May 2003) 313–348 (Kirby J and C P Shanahan), 362–392 (C P Shanahan); cf \textit{Parij v Parij} (1997) 72 SASR 153.} The principles may equally apply to relations between friends or arm’s-length commercial transactions and it is not appropriate to pigeonhole the development of Equity into a specific form that reflects statute to the exclusion of all else.

This does not mean that equitable principles applied in family law are not relevant to \textit{Muschinski v Dodds}. For example, like family law, non-financial contributions made to a joint endeavour are
not to be given unequal weight to financial contributions.\textsuperscript{257} Further, there is no presumption of equality: ‘Equity is equality’ is not an appropriate reason to presume equal entitlements. The correct starting point is to assess the parties’ contributions, which may very well require the starting point of inequality.\textsuperscript{258} In this regard, ‘practical equality’ should be strived for, without pursuing complicated factual inquiries with little practical benefit.\textsuperscript{259} Although this does not require a precise accounting, disproportionate contributions cannot be ignored.\textsuperscript{260}

3 \textit{Unjust Enrichment and Unconscionability}

Unjust enrichment itself is not a basis to award a constructive trust, but it may be sufficiently developed to be a general doctrine rather than just a unifying concept. Unjust enrichment may not be any less principled than unconscionability, which may also become a general doctrine.\textsuperscript{261} On the authorities discussed in this chapter, unconscionability appears to underpin the principles in \textit{Muschinski v Dodds}.

If an approach based on unjust enrichment was taken, it would require one party to assist or enable the other in obtaining a benefit the subject of the plaintiff’s claim. However, it is not discussed how this can be an ‘unjust’ enrichment.\textsuperscript{262} Without identifying how such an enrichment becomes unjust, then unjust enrichment does not seem to be an adequate explanation. In either case, the question of why a contemplated benefit may still be an unconscionable windfall if it was received in unanticipated circumstances requires an answer.\textsuperscript{263}

At the very least, the source of rights between the parties depends on the relations between the parties. If a benefit is received, provided for, or contemplated by contract, then the contract is the source of rights between the parties, not the principles in \textit{Muschinski v Dodds}.\textsuperscript{264} It appears

\textsuperscript{257} \textit{Baumgartner v Baumgartner} (1987) 164 CLR 137, 157 (Gaudron J).


\textsuperscript{260} \textit{Baumgartner v Baumgartner} (1987) 164 CLR 137, 153–155 (Toohey J).


\textsuperscript{263} \textit{Taylor v Streicher} [2007] NSWSC 1006, [45]–[59].

\textsuperscript{264} \textit{WMJ Attractions Pty Ltd v Ireland} [2008] QSC 140, [34]–[35].

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that unconscionability is the preferred basis for the principles in *Muschinski v Dodds*, and the proper theoretical mechanism behind the principles in *Muschinski v Dodds* and the windfall equity will be discussed later in Chapters 6 and 7.

4 The Remedy

The remedy for a failed joint endeavour has taken the largest shift in approach. In fashioning or tailoring a constructive trust as a remedy, other equitable principles and remedies may be of assistance.265 This was discussed earlier regarding Gaudron J’s judgment in *Baumgartner v Baumgartner* by having resort to similar principles applying to resulting trusts.

However, the biggest shift is in potentially avoiding a constructive trust altogether. If possible, a remedy that falls short of the imposition of a trust or the minimum equity to do justice should be preferred, such as equitable compensation secured by an equitable charge to remedy the detriment suffered.266 Whether a constructive trust exists before the minimum equity is found does not have a conclusive answer.267 Is the constructive trust purely remedial, or does it have a substantive effect on the parties’ relationship during the joint endeavour?

C Problems and Further Development

From the principles that can be derived from *Baumgartner v Baumgartner, Lloyd v Tedesco* and *Henderson v Miles (No 2)*, it appears that the windfall equity has evolved to give greater effect to the principles that *Muschinski v Dodds* espoused. Many of the principles have received further development.

The comparisons to family law have begun to cease, in favour of a broad approach. This appears to foreshadow the inclusion of de facto relationships within the *Family Law Act 1975* (Cth). However, this early comparison to family law has had its effect on the principles in *Muschinski v Dodds*, due to the effect that pleadings have on the development of principle. This explains the

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265 *Baumgartner v Baumgartner* (1987) 164 CLR 137, 156 (Gaudron J).

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lack of independent treatment in textbooks in favour of associating it with de facto relationships and cohabitation.

The use and classification of the principles in *Muschinski v Dodds* has also changed. After *Muschinski v Dodds* and *Baumgartner v Baumgartner*, remedial constructive trusts ruled the day to remedy an unconscionable retention of benefit, although not much care was taken to distinguish principle from cause of action. In *Lloyd v Tedesco*, the ‘joint endeavour principle’ was recognised as a way to impose a constructive trust when a joint endeavour failed but the court cautioned that another remedy that falls short of a trust should be preferred. In *Henderson v Miles (No 2)*, the ‘windfall equity’ was a cause of action which allowed a party to claim an equitable remedy when a joint endeavour broke down, regardless of constructive trusts.

The terms ‘windfall equity’ and ‘joint endeavour principle’ have been used interchangeably to refer to the principles in *Muschinski v Dodds*. However, it will be argued that these two terms should instead refer to two distinct equitable mechanisms present in *Muschinski v Dodds*. The term ‘windfall equity’ should refer to the cause of action that operates when a party unconscionably retains a benefit due to the breakdown of a joint endeavour. The term ‘joint endeavour principle’ should refer to the principles that apply to joint endeavours. From here on, the phrase “principles in *Muschinski v Dodds*” will still be used, but the terms ‘windfall equity’ and ‘joint endeavour principle’ will be used when referring to the cause of action and principle.

The joint endeavour principle is of particular relevance, as it is not a cause of action – its principles apply to all joint endeavours and they do not relate solely to when a joint endeavour breaks down. This concept and the distinction between the terms ‘windfall equity’ and ‘joint endeavour principle’ terms will be discussed in the next two chapters. It will be shown that the windfall equity, as a cause of action, is often used as a ‘sword’ against another party to the joint endeavour, but the joint endeavour principle, as a principle, is often used as a ‘shield’ to ward against third parties who may want to interfere with the joint endeavour.

However, as will be seen in the next two chapters, the *Muschinski v Dodds*-style constructive trust is not purely remedial – its institutional characteristics are integral to both the windfall equity and joint endeavour principle. Further, the attempt to dress the *Muschinski v Dodds*-style of constructive trust in unjust enrichment appears linked to the idea that it is purely remedial. As will be seen in the next two chapters, the constructive trust in joint endeavours is not purely remedial and, as will be seen in the theory chapter, unconscionability can adequately explain the remedial and institutional nature of this type of constructive trust.

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IV: Shear – Sword

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I  The Shear

The two previous chapters examined the development of the principles in *Muschinski v Dodds* through three influential cases. Through these cases, it was shown that principles in *Muschinski v Dodds* may have a larger scope than the de facto relationship context, and that their operation as a cause of action or principle has never been made clear. In this chapter and the next chapter, the development of the principles in *Muschinski v Dodds* as the windfall equity and joint endeavour principle will be explored through case law respectively.

This investigation and distinction is necessary because the case law is divided on the importance of constructive trusts. Do constructive trusts arise only arise as a remedy for a cause of action, or do they have some institutional significance beyond a cause of action? This thesis posits that the question can be answered by considering the windfall equity as a cause of action separately from the joint endeavour principle as a set of general principles.

As will be seen from this chapter and the next chapter, both of these interpretations are correct. Unfortunately, as will be seen, this distinction has never consciously manifested in the case law. This distinction will be examined in this chapter and the next chapter and discussed further in

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1 *Muschinski v Dodds* (1985) 160 CLR 583.

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the theory chapter. From an analysis of case law since Muschinski v Dodds, there appears to be a dual use of the principles in Muschinski v Dodds.

On one side, there are parties to a joint endeavour suing one another after the joint endeavour has broken down in order to protect their own interests. This is the windfall equity as a cause of action, wherein a number of equitable remedies appear to be used, ranging from equitable compensation to constructive trusts. The windfall equity as a cause of action can be thought of as a ‘sword’, whereby one party takes action to recover property.

On the other side, there is a third party making a claim to property of a joint endeavour, and a party to the joint endeavour may sue or intervene to protect their own interests. This is the joint endeavour principle, wherein a constructive trust arises by operation of law on which the party to the joint endeavour seeks to rely. The joint endeavour principle is used in this scenario as a ‘shield’, whereby one party to the joint endeavour attempts to protect property from the claim of a third party due to the principles of trusteeship.

This distinction, although not consciously made, is broadly found within the case law. Since the High Court case of Giumelli v Giumelli\(^2\) in 1999, courts have been reluctant to construe a trust when another ‘lesser’ remedy, the minimum equity to do justice, would suffice. This case involved an action for equitable estoppel, where a son contributed to a family business on the basis that he would receive a portion of property later. He did so, but the parents did not transfer the property as promised. Rather than finding a constructive trust in favour of the son over the property, the court awarded equitable compensation commensurate with his contribution due to other complicating factors, such as the son’s brother having made contributions to the property as well. It seems that the ‘sword’ cases using the windfall equity as a cause of action take this approach, whereas the ‘shield’ cases use the joint endeavour principle to take advantage of the principles of trusteeship that arise when a constructive trust is found to exist.

Despite this dichotomous usage, the windfall equity and joint endeavour principle are conflated in the case law, and the cases do not attempt to distinguish them. This means that the courts are apparently using identical principles to construe a trust on one hand, yet they are using those same principles without discussion on constructive trusts being necessary on the other hand. This leads to an erroneous application of the law. For example, if a constructive trust is found to exist in the shield cases, then the same principles must apply in the sword cases. Yet the coining

windfall equity case, *Henderson v Miles (No 2)*, had no mention of constructive trusts at all. This is surprising for another reason: the judge in that case, Young CJ in Eq, co-authored a book which categorised the windfall equity as a principle that gives rise to a constructive trust.

It is clear that there is some form of interplay between these two types of cases, yet they appear to lead to different conclusions despite being based on the same principles. If constructive trusts are in fact relevant in the sword context, then the failure to properly engage with issues relating to constructive trusts appears to be an oversight.

Another parallel can be drawn from *Muschinski v Dodds*. In discussing the constructive trust, Deane J noted that constructive trusts have been called ‘remedial’ or ‘institutional’. However, he notes that this perceived dichotomy is ‘ephemeral’: there is no real distinction. The windfall equity as a cause of action in sword cases can be seen as an instance of using a remedial constructive trust. The joint endeavour principle in shield cases can be seen as an instance of using institutional constructive trusts. However, if the dichotomy of remedial and institutional constructive trusts is of no real significance, then so should the distinction between these sword and shield cases be ephemeral. This will be explained in the theory chapter where it will be shown that the distinction is indeed not able to be sustained: any remedial constructive trust found will have flowed from the consequence that an institutional constructive trust had arisen by operation of law.

It is important to analyse how the courts have treated the principles in *Muschinski v Dodds* in a way that is simultaneously dichotomous yet unitary. To make a poetic analogy to geology, the law in this regard has ‘sheared’: its usage has separated, yet it still runs closely parallel. This shear will be analysed to understand why it has occurred. Through this understanding, the problems and difficulties that have resulted from this shear can be identified. These problems and difficulties can then be reconciled in the theory chapter, paving the way for a full restatement of the windfall equity and the joint endeavour principle.

II  The Factual Contexts: ‘Sword’ vs ‘Shield’

As discussed above, the principles in *Muschinski v Dodds* can be split between two uses. This is as a sword, being the windfall equity as a cause of action, and as a shield, being the joint

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3 *Henderson v Miles (No 2)* [2005] NSWSC 867.
5 *Muschinski v Dodds* (1985) 160 CLR 583, 614–615 (Deane J).
endeavour principle. The terminology of swords and shields is borrowed from equitable estoppel post-*Waltons Stores*. Prior to that case, equitable estoppel was used as a defence—a shield. After that case, equitable estoppel could be used proactively as a cause of action—a sword.

In much the same way, the windfall equity as a sword can be used to recover property from a joint endeavour once it has broken down. The joint endeavour principle as a shield can be used to protect the property of a joint endeavour against a third party through the bulwark of trusteeship. This also mirrors the usage of constructive trusts as remedial and institutional as discussed above, despite Deane J’s insistence that any such distinction is ephemeral. Regardless, the cases that cite *Muschinski v Dodds* can still be separated into these ‘sword’ and ‘shield’ categories that mirror ‘remedial’ and ‘institutional’ constructive trusts.

The windfall equity when used as a sword finds its expression in a mix of family and commercial contexts. These cases involve claims between family members, between those in commercial relationships, and a mixture of both familial and commercial relationships. These parties are involved in a joint endeavour, whether it is familial, commercial or a mixture of both, and the parties often seek to wind up their joint endeavour and recover property they are entitled to.

The joint endeavour principle when used as a shield is expressed in a wider variety of contexts. These cases usually involve taxation assessments, confiscation of property related to crime, social security assets tests, and insolvencies and bankruptcies. Although these cases run the gamut of family and commercial cases and all and sundry between, the identifying hallmark of these shield cases is the existence of some third party making a claim to the property of a joint endeavour. It is that third party that parties to a joint endeavour seek to thwart by raising a constructive trust.

These cases show a distinct scope creep since *Muschinski v Dodds*. The cases that apply *Muschinski v Dodds* are not confined to de facto relationships. In fact, even *Henderson v Miles (No 2)* which was discussed in the last chapter involved a dispute across a generation of family members, being a mother and daughter. The High Court, when determining special leave

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to appeal for *Lloyd v Tedesco*, noted that, despite family law legislation beginning to include de facto relationships, there still remained other areas to which *Muschinski v Dodds* could apply.

This is evident from an analysis of cases that apply *Muschinski v Dodds*. Of the relevant cases that cite *Muschinski v Dodds*, approximately 679 published Australian cases were identified, both reported and unreported. These cases can be split into the seven broad contexts discussed earlier. The full case list used for this case analysis is contained within Appendix A to this thesis.

In the sword context, 542 cases were identified. This included 276 family-only cases, 168 commercial-only cases, and 98 family and commercial cases. The 276 family-only cases mostly involved disputes between family members as to ownership of property in some family arrangement, whether the parties were married, were siblings, were parent and child, uncle and nephew, or aunt and niece. The 168 commercial-only cases involved commercial arrangements, not family arrangements, where the parties were not related by family. The remaining 98 family and commercial cases involved cases where parties were both family in which a family arrangement included commercial arrangements, a popular example of which being a family farm.

In the shield context, 137 cases were identified. This included 13 taxation cases, 16 criminal property cases, 22 social security cases, and 86 insolvency cases. The 13 taxation cases mostly concerned disputes over the beneficial ownership of property and whether that property was properly assessable for tax. The 16 criminal property cases concerned property confiscated in relation to criminal offences and claims by third party family members who claimed an interest in the confiscated property. The 22 social security cases are much like the taxation cases and mostly involved appeals against pension asset tests which took into account property that may have been beneficially owned by another. The final 86 insolvency cases involved a number of cases regarding personal and corporate insolvency and attempts to remove property from the asset pool through constructive trusts.

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8 It is important to note that, just because one party appears as a ‘third party’ in proceedings, it does not mean that they were not a party to a joint endeavour. For example, assume a married couple and the brother of one of the spouses are in a joint endeavour. The couple breaks up and seeks to have their property issues sorted out, so they institute property proceedings in the Family Court. The brother intervenes as a third party, because he also has an interest in the property due to his involvement in the joint endeavour. He is a ‘third party’ as a matter of court procedure, but in relation to the joint endeavour, he is not a ‘third party’.

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Care was taken to categorise these cases so as to be mutually exclusive with no duplicate entries. For example, whilst all social security cases involved family members, these cases do not appear in the cases listed as family cases.

The categorisation of the cases in this way show that the courts do indeed treat the principles in *Muschinski v Dodds* differently depending on context. The sword cases involve the windfall equity as a cause of action against other parties to the joint endeavour, whereas the shield cases apply the joint endeavour principle to thwart the claims of third parties. It should be noted that the cases discussed rarely use either term, and instead often refer to “the principles” in *Muschinski v Dodds* or *Baumgartner v Baumgartner*. In this chapter and the next chapter, the phrase “principles in *Muschinski v Dodds*” will be used generally, whereas the terms ‘windfall equity’ and ‘joint endeavour principle’ will be used when it is intended to explicitly differentiate between the two as a cause of action and principle respectively. The definitions of and delineation between the windfall equity and the joint endeavour principle will be explained in the theory chapter.

An examination of these cases in both contexts will help show further principles related to the windfall equity and the joint endeavour principle. It will also help identify the problems required to be solved in the theory chapter. This chapter will deal with the ‘sword’ context. The next chapter will deal with the ‘shield’ context.

### III The ‘Sword’ Context: Family and Commercial

The cases in the sword context involve family-only, commercial-only, and family and commercial cases. There are some interesting trends in these cases that cite *Muschinski v Dodds*. Whilst not all of these cases cite *Muschinski v Dodds* specifically for the windfall equity, they do cite it for principles relating to constructive trusts which are still relevant.

This is particularly important in the family law context. When *Muschinski v Dodds* and *Baumgartner v Baumgartner* were decided by the High Court, the *Family Law Act 1975* (Cth) did not apply to de facto partners. The property of de facto relationships, if not specifically provided for by state legislation, was often left up to common law and Equity. The federal family law regime would only apply to de facto relationships when the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (‘the Amendment’) came into force. The

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9 *Baumgartner v Baumgartner* (1987) 164 CLR 137.
Amendment coming into force highlights a correlative trend in the family-only and family and commercial cases.

These family-only and family and commercial cases will be examined first. The commercial-only cases will be examined separately, as by definition, they do not involve family law.

IV Family and Family/Commercial Cases

It is worth considering how the 276 family-only and 98 family and commercial cases have been applied in family law cases over the years. This is because, historically, Muschinski v Dodds has been mostly applied in family-related contexts and its usage in this context has not deviated substantially. It is of interest to consider how the principles in Muschinski v Dodds have or have not been overtaken by statute, and what value they still have in this context.

The prevalence of these cases over the years since Muschinski v Dodds in 1985 include the following distribution of cases:

There has been a steady increase in cases that cite Muschinski v Dodds over the years. Whilst there is a steady increase in the first half of 2000, it is towards 2008 that the cases begin to appear more frequently.
This trend is also seen when examining the family-only and family and commercial cases separately.

![Graph of FAMILY CASES](image1)

![Graph of FAMILY/COMMERCIAL CASES](image2)

Although there are the outlying spikes in 1999 and 2004, and although there is easier electronic access to unreported judgments, there is a definite growing trend of cases that cite *Muschinski v Dodds* in these contexts. It can be seen that, where the family-only cases begin to level off, the family and commercial cases begin to make their presence known. As a matter of pure correlation, it is interesting to note that the explosion of family and commercial cases coincides with the introduction of the Amendment including de facto relationships within the purview of the *Family Law Act 1975* (Cth).
This correlation is of interest when the cases heard in the family law jurisdiction are identified.

Of the cases identified earlier, only 59 cases were heard in the family law jurisdiction. It is only in 2004 where the family and commercial context arises. There is also a sudden increase around and after 2008, which coincides with the introduction of the Amendment.

The content of these 59 cases is particularly intriguing. The important question is, what were these family law cases dealing with before and after the Amendment, and is there a difference? This can be answered by examining all cases reported up to and including 2008, and all cases reported from 2009 onwards.

Apart from two cases in 2008, the cases up to and including 2008 concern property settlement proceedings between husband and wife, and the property rights of a third party, whether or not formally part of the proceedings. These third parties who have interests in the property settlement occur across the full spectrum of familial relationships. The cases include a family

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10 See Jacobs v Vale [2008] FMCAfam 641 which involved a bare claim of unconscionability unsupported by legal principle, and Moore v Moore [2008] FamCA 32 which involved a second set of property proceedings between a former husband and wife, concerned with property that the husband and wife had jointly expended money on after the first property settlement order.

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trust, parents, a mother, children, a brother, parents and children, family friends, an uncle, and a deceased estate.

All of these cases involve spouses invoking the family law jurisdiction to determine their property issues, with ‘third party’ interests being considered, whether or not the ‘third party’ intervenes in the proceedings.

As stated in an earlier footnote, it is important to note that the ‘third parties’ are not actually unrelated third parties to the joint endeavour to which a spouse may be party. Given the nature of these types of proceedings being between the spouses, the interest of anyone else who is not the spouse is, by court procedure, necessarily termed a ‘third party’. In fact, these parties claim a direct interest in a joint endeavour in which one of the spouses is involved.

With that being said, has the content of cases from 2009 onwards changed, given the introduction of the Amendment? If de facto partners can avail themselves of the family law jurisdiction, there is no need to resort to a court of Equity to resolve their dispute.

What is found with the remaining 43 cases is that Muschinski v Dodds is still being used in the family law jurisdiction in relation to third parties. However, this time, there are eight outlying cases that do not relate to third parties. Five of these cases involved a direct claim for a trust between de facto couples or spouses, two cases involved questions about rights of contribution between spouses, and the remaining one case involved the question of characterising contributions to property as gifts.

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11 Balnaves v Balnaves (1988) 12 Fam LR 488.
15 Chiu v Wei [2006] FamCA 788.
16 Sikorski v Sikorski [2007] FamCA 487.
18 Miner v Gilchrist [2008] FamCA 917.
19 Solare v Hearst [2008] FamCA 1027.
20 See above n 8.
23 Venson v Venson (No 2) [2010] FamCA 963.
The remaining 35 cases, much like the pre-2009 cases, involve third parties such as sisters, grandparents, children, former spouses, parents and siblings, mothers, parents, brothers, fathers, and even the entire family. Family businesses also begin to take prominence as subject matter in the case law, such as family farms. Third parties in this regard also include legal entities such as corporations and trustees for family farms or other businesses with family interests, other businesses between the spouses or de facto partners, and other third-party claims against property.

It is clear that, despite the Amendment to the Family Law Act 1975 (Cth), the courts still have consistent recourse to the principles in Muschinski v Dodds. This is because the statutory family law regime does not account for any other family relationship, which requires others who are not a direct spouse to intervene in the disputes.

This means that, of the cases not in the family law jurisdiction, where statute cannot unwind a joint endeavour between family members, the principles in Muschinski v Dodds are still relied upon. It appears that the amendment to the Family Law Act 1975 (Cth) only helped de facto partners reach parity with married couples. Both de facto partners and married couples, and other family members, must still have recourse to the common law and Equity if they cannot intervene in a property settlement proceeding in family law. This is evidenced by the remaining 315 family-only and family and commercial cases not heard in the family law jurisdiction. One such example is Henderson v Miles (No 2) which concerned a mother and daughter. Some of the cases are:

25 Landon v Landon (No 3) [2009] FamCA 1300.
28 Sofous v Cethenes [2012] FamCA 188.
32 Akbar v Mali [2013] FamCA 1010.
33 Handley v Tenneson [2014] FamCA 441.
36 Slymms v Wisteria (No 2) [2011] FamCA 507; Baght v Baght [2012] FamCA 711.

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notable cases of these 315 cases were discussed in the last chapter in the context of *Henderson v Miles (No 2)*.

Whilst the view in *Lloyd v Tedesco* was correct in that *Muschinski v Dodds* would become less relevant as statute took over, such legislation is limited to claims between de facto partners and married couples. The majority of family disputes that cite *Muschinski v Dodds* and involve non-spouse claimants still utilise the common law and Equity, even in family law. These cases and the principles they espouse are substantially identical to the commercial-only cases, which will be discussed next. For each relevant heading, a table will be inserted which shows a summary of principles that have been gleaned from case law along with each principle’s supporting case law.

**V Commercial Cases**

The 168 commercial-only cases that cite *Muschinski v Dodds* do not involve family law or familial relationships. As envisaged in *Lloyd v Tedesco* before the High Court, the principles in *Muschinski v Dodds* find expression in more than just family relationships. These cases, while they cite *Muschinski v Dodds* in regard to the windfall equity, also cite it for the other principles it discusses, such as contribution, gifts with conditions, and constructive trusts.

**A The High Court Decisions**

<table>
<thead>
<tr>
<th>Principle</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Equity only intervenes when a party has been deprived of their ability to make a worthwhile judgment about their own interests.</td>
<td><em>Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd</em> (2003) 214 CLR 51</td>
</tr>
<tr>
<td>Unjust enrichment is the unifying theory behind restitution for what was once termed quasi-contract.</td>
<td><em>Pavey &amp; Matthews Pty Ltd v Paul</em> (1987) 162 CLR 221</td>
</tr>
<tr>
<td>It is not permissible to discard well-settled principles of unconscionability in favour of unjust enrichment.</td>
<td><em>Farah Constructions Pty Ltd v Say-Dee Pty Ltd</em> (2007) 230 CLR 89</td>
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</table>

37 Whether there needs to be a specific statutory regime for other types of family relationships may be worth exploring, but for the purposes of this thesis, that question will remain open-ended.

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There are nine cases in this context that were before the High Court. Of these nine cases, none of them address the windfall equity. This leaves *Baumgartner v Baumgartner* as the latest decision to have concerned itself with the windfall equity.

The High Court cases that cite *Muschinski v Dodds* in this context addressed estoppel and rescission; 38 restitution for quantum meruit and unjust enrichment; 39 unconscionable conduct in trade; 40 unconscionable conduct under an instalment contract; 41 whether termination of a contract was unconscientious; 42 a potential breach of a contractual joint venture; 43 knowing receipt of trust property obtained in breach of fiduciary duty; 44 fiduciary duty in relation to a number of land agreements; 45 and construing a charitable trust over public land. 46 These cases are not directly relevant to the mechanisms of the windfall equity but are important regarding the development of Equity in general.

The single biggest point related to Equity in general was in *ACCC v C G Berbatis Holdings Pty Ltd*. 47 This involved a claim of economic duress. It was said that Equity does not necessarily intervene just because one party was deprived of “independent judgment and voluntarily will”: instead, Equity will intervene because that party had been deprived of the ability to make a worthwhile judgment about their own interests. 48

The distinction can be demonstrated by imagining someone stranded in the outback with a vehicle breakdown. When a repairer comes by and fixes the vehicle for money, the stranded person is not necessarily entering into that contract voluntarily – not if they want to get to safety, at any rate. Yet Equity will not necessarily intervene. Alternatively, if that repairer told the person that their vehicle needed to have a number of engine parts replaced on the spot, despite just needing a jump start, then that stranded person might not have the ability to make a

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39 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.
43 *Kocalidis v Andrews* [2013] HCASL 11, an application for special leave, which is not substantially relevant to this thesis but is mentioned for completeness’s sake.
44 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.
48 Ibid 74 [46] (Gummow and Hayne JJ), at least in relation to economic duress.
worthwhile judgment about their own interests, given the danger they perceive themselves to be in. That may be unconscionable.

As will be discussed later in this thesis, it will appear that Equity will intervene whenever a party seeks to take advantage of and rely upon another party’s inability to make a worthwhile judgment about their own interests. This point about how and when Equity will intervene will become integral in the theory chapter in a discussion as to how and when the windfall equity and joint endeavour principle will operate. This will involve the concept of ‘personality’, to be discussed in Chapter 6.

The applicability of unjust enrichment has been met with scepticism, casting doubt upon Toohey J’s postulation in Baumgartner v Baumgartner that there is no real difference in how unjust enrichment and unconscionability act in the windfall equity. In Pavey & Matthews Pty Ltd v Paul, it was said that unjust enrichment was the unifying theory behind restitution in the old actions once termed quasi-contract. This has been affirmed by the High Court in 1992 and 2001.

The High Court has since gone on to state that unjust enrichment should not be used as a general theory beyond these types of action. In Farah Constructions Pty Ltd v Say-Dee Pty Ltd, the High Court rebuked the New South Wales Court of Appeal’s decision to “bite the restitutionary bullet” by reframing knowing receipt of trust property in breach of trust in the context of unjust enrichment. This unanimous joint judgment found that the Court of Appeal committed a “grave error”, which would be “very unjust” and would cause “great confusion”. There was no justification for the Court of Appeal to depart from well-settled principles in unconscionability in favour of adopting unjust enrichment. The High Court reaffirmed unconscionability as the basis of knowing receipt, not unjust enrichment. The High Court has continued to reinforce unconscionability over unjust enrichment.

As many people in a joint endeavour may have written agreements (such as contractual joint ventures), it may seem tempting to frame the arrangement in contractual or quasi-contractual terms to invoke unjust enrichment when things do not go to plan. Unfortunately, this frame of

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49 Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221.
51 Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89.
52 Ibid 148–149 [130]–[131].
53 See, eg, Bofinger v Kingsway Group Ltd (2009) 239 CLR 269. Note also that ‘unconscionability’ here refers to unconscionability generally in Equity, and not to any specific form of ‘unconscionable conduct’. 

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reference requires the contortion of contract and the invention of legal fiction to be flexible enough to cover all aspects of the windfall equity and joint endeavour principle. One example of this is the existence of joint endeavours with no discernible offer or consideration. It was said in *Roxborough*,\(^5^4\) which concerned restitution for partial failure of consideration, that it is not appropriate to impute intentions to parties or to imagine what they “might have” agreed to if those intentions are factually absent. Case law continues to affirm this.\(^5^5\)

B Joint Endeavours Generally

<table>
<thead>
<tr>
<th>Principle</th>
<th>Cases</th>
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<tbody>
<tr>
<td>Equity may ‘fill in the gaps’ of a joint venture.</td>
<td><em>Gibson Motor Sport Merchandise Pty Ltd v Forbes</em> [2005] FCA 749</td>
</tr>
<tr>
<td>Assets used for a joint venture may be held on trust for other parties of the joint venture.</td>
<td><em>John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd</em> [2010] NSWSC 150</td>
</tr>
<tr>
<td>Contracts should be applied as far as possible.</td>
<td><em>Minter v Minter</em> [2000] NSWSC 100</td>
</tr>
<tr>
<td>Equity will not apply if arrangements already exist as to how to wind up a joint endeavour.</td>
<td><em>McCauley v McInnes</em> [2012] ACTMC 2</td>
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It appears that the windfall equity and joint endeavour principle frequently intervene when contract law fails. Although some cases talk about how the windfall equity may be used to ‘fill in the gaps’ of a contract, this should not be taken literally. If the parties have never turned their mind to something then, for the same reason above in *Roxborough*, it would not be correct to impute contractual terms where none were ever discussed.

It was said in *Gibson Motor Sport Merchandise Pty Ltd v Forbes*\(^5^6\) that a ‘joint venture’ is governed by contract and property law but may still call on Equity to fill in the gaps of an

\(^{54}\) *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

\(^{55}\) See, eg, *Executive Seminars Pty Ltd v Peck* [2001] WASC 229, [230].

\(^{56}\) *Gibson Motor Sport Merchandise Pty Ltd v Forbes* [2005] FCA 749, [79].
incomplete agreement. However, this statement is problematic. It presumes that a ‘joint venture’ is governed by contract and property law first and foremost, with Equity acting as an ‘overlay’ where necessary. In Daoud v Boutros,\(^5^7\) it was noted that the windfall equity may be used to fill in an incomplete agreement, but ‘joint ventures’ do not have a settled common law meaning. This appears to draw from the High Court case of UDC v Brian\(^5^8\) which also found that ‘joint ventures’ do not have any technical meaning. In that case, the ‘joint venture’ in question was found to be a form of partnership, and the parties’ actions were also governed by the law on fiduciary duties.

Clearly, ‘joint ventures’ are not a term of art. It would not make sense to presume the existence of the law on ‘joint ventures’ is based on contract and property first, and then overlay Equity upon it all. It would make more sense to say that Equity instead presumes many principles that relate to ‘joint endeavours’ in general, which may also include ‘joint ventures’, which are then modified by whatever the parties agree to via contract. This will be the purview of the ‘joint endeavour principle’ to be discussed in the theory chapter.

This interpretation is consistent with the case law that cites Muschinski v Dodds in this commercial context. This can be seen from sophisticated joint ventures all the way to informal agreements between friends.

At the sophisticated end of the spectrum, the News Ltd v Australian Rugby Football League Ltd\(^5^9\) cases are an example. These cases involved various clubs which formed the Australian Rugby League (the ARL) and a proposed “Superleague” to be formed by News Ltd. The ARL was under contract with Channel Nine to broadcast ARL games, but News Ltd wanted to broadcast their own Superleague. The ARL and Channel Nine did not want News Ltd to interfere in this deal. News Ltd instead conducted a self-styled “blitzkrieg” behind the scenes where they signed up key ARL officials and players for unprecedented amounts of money. The intent was to take over the ARL by force. A significant number of ARL clubs ‘defected’ to News Ltd. The court found that the ARL clubs were part of a joint venture. As members of this joint venture, they held their club assets on trust for the ARL. By using those assets for the Superleague, they were in breach of trust, and News Ltd was also in breach for knowingly receiving those trust assets. In this regard, the sophisticated contractual joint venture was ultimately still subject to Equity. The court also

\(^{57}\) Daoud v Boutros [2013] NSWSC 687, [78]–[79].

\(^{58}\) United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1.

\(^{59}\) News Ltd v Australian Rugby Football League Ltd (1996) 58 FCR 447; News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410, together ‘Rugby League’ cases.

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cited the High Court case of *Chan v Zacharia*\(^\text{60}\) for the authority that fiduciary relationships and constructive trusts can exist in partnerships.

The application of Equity as an undercurrent to joint ventures is a recurring theme. It was said in *Hawker v Barretts Bowyangs Pty Ltd*\(^\text{61}\) that if it was not possible to imply a contractual term, then Equity will step in where necessary – but this can always be modified by any contract between the parties, and the terms of the contract should be applied as far as they can be.\(^\text{62}\) This was similar to *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd*\(^\text{63}\) which involved another sophisticated contractual joint venture. The contract in this case provided for contingencies if the contract failed in many instances. Unfortunately, the contract failed due to one unforeseen reason at an earlier stage during the contract which was not accounted for. Equity stepped in to ‘fill’ this gap by applying equitable principles to wind up the joint endeavour relationship.\(^\text{64}\)

This equitable undercurrent is also evident in arrangements that fall far short of a contract. In *Minter v Minter*,\(^\text{65}\) there was an arrangement between a mother and her three sons in which they would own property, but the arrangement of legal ownership was disproportionate to the contributions that the parties made. This arrangement fell short of a partnership or a contract, yet the court still applied the same principles that *Muschinski v Dodds* derived from partnership law.\(^\text{66}\) Likewise, a person rented out a house to a friend in *McCauley v McInnes*.\(^\text{67}\) Nothing was in writing, but there was an oral understanding that the tenant would have the benefit of any capital improvements that they made to the property. This was upheld.\(^\text{68}\)

The above cases lend credence to the idea that it is equitable principle that will govern joint endeavours as a baseline. In other words, it appears that the equitable principles in *Muschinski v Dodds* were not necessarily derived from partnership law, but it appears that partnership law is just one sophisticated instance of these general equitable principles. These general equitable


\(^\text{61}\) *Hawker v Barretts Bowyangs Pty Ltd* [2001] NSWSC 913.

\(^\text{62}\) Ibid [10].

\(^\text{63}\) *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd* [2010] NSWSC 150.

\(^\text{64}\) Ibid [326]–[338].

\(^\text{65}\) *Minter v Minter* [2000] NSWSC 100.

\(^\text{66}\) Ibid [106].

\(^\text{67}\) *McCauley v McInnes* [2012] ACTMC 2.

\(^\text{68}\) Ibid [80]–[91].

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principles then appear to apply to any other joint endeavour, but these joint endeavours may modify these general equitable principles through partnership law and general contract.

This is definitely the case as discussed earlier in *Hawker v Barretts Bowyangs Pty Ltd*\(^\text{69}\) wherein it was said that the parties' intentions should be given as full an effect as possible. This extends to the winding up of a joint endeavour if a method of winding up was already contemplated. In *Arrow Custodians Pty Ltd v Pine Forests of Australia Pty Ltd*,\(^\text{70}\) there was a pine plantation which involved several thousand joint tenants of lots in the plantations. The plantation entered liquidation, and disputes over payments and reimbursements were raised. An attempt was made to rely on *Muschinski v Dodds*, but this failed. This was because statute explicitly provided a mechanism for the parties to rely on.\(^\text{71}\) The joint endeavour did not fail in unforeseen circumstances. Such circumstances were foreseen and accounted for, so that should be relied upon rather than contradicting the parties' intentions (regardless of whether those intentions are shown to exist by contract or be imposed by statute).

From the above analysis, it is incorrect to say that the windfall equity or joint endeavour principle “fills in the gaps” of a contract. This analogy takes a perspective that assumes a contract is a ‘container’, and Equity is the ‘glue’ which is only poured into the container to prevent ‘leaks’ flowing through the ‘gaps’ in the contract.

But Equity will still act without a contract. How do you pour ‘glue’ into a non-existent ‘container’ and expect to have a theory that holds water?

Clearly, Equity is not the ‘glue’. Equity does not patch together a contract. Equity is the substrate, the ‘plate’ – it is the basis upon which a contract can safely rest. If that contract ‘breaks’ due to unforeseen circumstances, any ‘leaks’ flowing through the ‘gaps’ in the contract are caught by Equity.

There is therefore, at the very base level, some form of principle that binds various joint endeavours together, whether they be sophisticated contractual joint ventures, partnerships, or loose family arrangements. Equity would become less necessary when more sophisticated arrangements such as contracts and partnerships prepare for more contingencies. This will be explored in Chapter 7 as the joint endeavour principle.

\(^\text{69}\) *Hawker v Barretts Bowyangs Pty Ltd* [2001] NSWSC 913, [10].

\(^\text{70}\) *Arrow Custodians Pty Ltd v Pine Forests of Australia Pty Ltd* [2008] NSWSC 839.

\(^\text{71}\) Ibid [47]–[67].
C The True Nature

<table>
<thead>
<tr>
<th>Principle</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>A proprietary interest must be a legitimate expectation when making a contribution.</td>
<td>Americana Leadership College v Coll [2003] NSWSC 295</td>
</tr>
<tr>
<td>It is not unconscionable to receive exactly what a party bargained for.</td>
<td>WMJ Attractions Pty Ltd v Ireland [2008] QSC 140</td>
</tr>
<tr>
<td>If another cause of action applies, the windfall equity may be an alternative only.</td>
<td>Ferryboat Pty Ltd v Gray [1999] TASSC 126</td>
</tr>
<tr>
<td>There must be ‘something more’ to make the parties’ interests congruent, and not merely selfish, for the windfall equity to arise.</td>
<td>Clancy v Salienta Pty Ltd [2000] NSWCA 248</td>
</tr>
<tr>
<td>The term ‘joint venture’ does not have any meaning above a simple contract unless there is mutual trust and confidence.</td>
<td>John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1</td>
</tr>
<tr>
<td>A fiduciary relationship can only be imposed in certain circumstances.</td>
<td>King v Adams [2016] NSWSC 1798</td>
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</table>

Following on from the above conclusion, if the windfall equity or joint endeavour principle provides a substrate for the parties to a joint endeavour, a joint endeavour needs to be identified first. It is clear that the parties must be in a joint endeavour before they can avail themselves of the windfall equity and joint endeavour principle.

It was discussed earlier that McCauley v McInnes\(^72\) showed that contributions to a property based on an understanding that an entitlement to property would arise amounted to a proprietary interest. Such contributions were not sufficient in Americana Leadership College v Coll.\(^73\) It was alleged that a company had a proprietary interest for making payments towards property levies for property that was owned by someone else. However, this was not for the purpose of a joint endeavour. The payments were made to forestall the consequences of non-payment. The arrangement was not a joint endeavour.\(^74\)

\(^72\) McCauley v McInnes [2012] ACTMC 2.
\(^74\) See also Sheather v Staples Waste Removals Pty Ltd (No 2) [2014] FCA 84, [145] where a claim by an agent seeking repayment of a “windfall benefit” received by the principal was in fact a result of the agent’s abuse of his position, and not a joint endeavour at all.
Further, there is no relief if the parties have received all that they had bargained for under their arrangement.\textsuperscript{75} The plaintiffs in \textit{WMJ Attractions Pty Ltd v Ireland}\textsuperscript{76} attempted to invoke \textit{Henderson v Miles (No 2)} to prevent the defendants from receiving a “windfall benefit”. The plaintiff developed mini golf courses and was contracted by a party to construct a mini golf course on the defendant’s land. However, the party that contracted with the plaintiff was not the defendant, and the defendant had no involvement in this contract whatsoever. It was the other party that the plaintiff had contracted with which directed the plaintiff to construct the mini golf course on the defendant’s land. The plaintiff then sued the defendant to recover the “windfall benefit” that the defendant had received from having a mini golf course constructed on their land without paying for it. However, the plaintiff had received all that they had bargained for from the party that they had actually contracted with.\textsuperscript{77} Although the defendant received a benefit without paying for it, that benefit was paid for by the other party fully on terms entirely contemplated by the plaintiff and the other party and there was no allegation of a breach of contract in that regard. One wonders why this curious case was brought, but it at least provides valuable principles for those who discover it.

In determining the true nature of the parties’ arrangement, even if it is a joint endeavour, the full facts and circumstances must be considered. This is because there might be some cause of action other than the windfall equity that might apply. Like the analogy earlier of Equity catching the ‘leaks’ of contract, they may be something else that catches a ‘spill’ before the windfall equity does. Contract itself is the obvious example, as was discussed earlier, but there might be other avenues, such as failure of consideration and breaches of fiduciary duty which should be considered before the windfall equity.

This was the case in \textit{Ferryboat Pty Ltd v Gray}\textsuperscript{78} which involved an action for money had and received. The plaintiff upheld their end of the contract, but the defendant failed to perform and kept the benefit of the plaintiff’s performance. The plaintiff claimed on the basis of total failure of consideration, but pleaded a constructive trust in the alternative, based on the windfall equity. The claim for a failure of consideration was sufficient, but the court did say that there was “considerable substance” in the claim for a constructive trust.\textsuperscript{79} This is also the case where parties to a partnership or a proposed joint venture breach their fiduciary duties. In these cases,

\textsuperscript{75} See generally \textit{Paul v Speirway Ltd (in liq)} (1976) Ch 220.
\textsuperscript{76} \textit{WMJ Attractions Pty Ltd v Ireland} (2008) QSC 140.
\textsuperscript{77} Ibid [35].
\textsuperscript{78} \textit{Ferryboat Pty Ltd v Gray} (1999) TASSC 126.
\textsuperscript{79} Ibid [44].
if an action for a breach of fiduciary duty can be sustained, then this will be used to resolve the issue, even though the windfall equity may have also applied.\textsuperscript{80} The reasons for this, including the use of the windfall equity as an alternative, will be examined in the theory chapter.

It seems that Equity requires some compelling reason to alter legal interests. Contributions to property, by themselves, do not grant a proprietary interest. In the absence of some other cause of action such as a breach of fiduciary duty, ‘something more’ is required to claim under the windfall equity. As will be seen, this relates to the existence of a joint endeavour.

The only real comment made in the case law on what this ‘something more’ pertains to is in \textit{Clancy v Salienta Pty Ltd}.\textsuperscript{81} Without going into the facts of the case, the court said that the parties’ interests were “selfish interests” and were insufficient, distinct from the parties’ interests in \textit{Muschinski v Dodds} and \textit{Baumgartner v Baumgartner}. The parties’ interests in these two cases were called “congruent”, in contrast to the selfish interests of the parties before the court.\textsuperscript{82} If the parties’ interests should be congruent before a joint endeavour can be found, this points to a requirement for some sort of joint effort between the parties in which they must work together before a joint endeavour may be found.

It seems the answer for this might lie in the same principles that give contractual ‘joint ventures’ a fiduciary character. For example, in \textit{UDC v Brian}, a contractual joint venture was characterised as a partnership. The court said that the parties’ fiduciary duties were borne not from their relationship’s classification as a ‘joint venture’, but due to the parties’ reliance on their mutual trust and confidence to undertake the venture.\textsuperscript{83}

This is important and is perhaps why the law on ‘joint endeavours’ has been so murky. It seems that it has been confused with ‘joint ventures’. As said earlier, a ‘joint venture’ has no technical common law meaning.\textsuperscript{84} Yet, if such a ‘joint venture’ has the hallmarks of mutual trust and confidence, it becomes something more akin to a partnership, and becomes subject to those

\begin{thebibliography}{9}
\bibitem{80} \textit{GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers Pty Ltd} [2002] VSC 487; cf \textit{Old v Hodgkinson} [2009] NSWSC 1160, [48].
\bibitem{81} \textit{Clancy v Salienta Pty Ltd} [2000] NSWCA 248.
\bibitem{82} Ibid [195]–[201].
\bibitem{83} \textit{United Dominions Corporation Ltd v Brian Pty Ltd} (1985) 157 CLR 1, 7–8 (Gibbs CJ), 12–13 (Mason, Brennan and Deane JJ), 16 (Dawson J). This case will be discussed in Chapter 7. See also \textit{Breen v Williams} (1996) 186 CLR 71, 82 (Brennan CJ) and \textit{Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd} (2006) 229 CLR 577, 612–613 [123]–[124] (Callinan J).
\bibitem{84} \textit{United Dominions Corporation Ltd v Brian Pty Ltd} (1985) 157 CLR 1; \textit{Daoud v Boutros} [2013] NSWSC 687.
\end{thebibliography}

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principles. The windfall equity and joint endeavour principle are also based on the exact same principles on which partnership law is based.

What gives a joint venture its fiduciary character? ‘Something more’ is required: is this the ‘congruent interests’, the ‘mutual trust and confidence’, that gives a relationship its fiduciary character? The cases never state it explicitly, as the principles are treated in a disparate manner. Fiduciary duties never made their appearance in Muschinski v Dodds either, as no breach of fiduciary duty was found to be necessary. But when the cases are viewed in this light, the parallels become clear.

Two other cases in the commercial context highlight this. The High Court case of John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd85 involved a ‘joint venture’, but the court declined to find any fiduciary relationship or constructive trust. This was because, despite being called a ‘joint venture’, the parties did not rely on any other party beyond the standard expectation that the parties to the contract would perform. There was no mutual trust or confidence. There was no reason to superimpose fiduciary relationships onto a simple contractual relationship, and as such there was no breach of fiduciary duty nor any constructive trust to be found. The true nature of this transaction was, in fact, a simple contract – not a joint endeavour. Whilst it was argued that Muschinski v Dodds and Baumgartner v Baumgartner might apply, this was not given much consideration. At most, Gummow J remarked that the cases should be revisited at some point.86 This thesis intends to do that revisiting.

There is one more case to consider on the true nature of a joint endeavour. This is King v Adams87 which concerned a lottery syndicate. The syndicate won over $40 million, but the plaintiff was not part of the syndicate, and wanted to share in the winnings. The plaintiff claimed that he was owed a duty to be asked to be involved, framing the syndicate as a joint venture including a breach of fiduciary duty with lottery winnings to be held on trust. The court had reference to a similar High Court matter on the topic.88 In short, the court could not find any reason to impose a fiduciary duty upon the defendant, the person who ran the syndicate, which would require him to involve the plaintiff. The plaintiff did not make any attempts to be part of the syndicate draw, nor did he say he would want to be included. In the absence of this, there was no reason to hold the defendant in a fiduciary position to the plaintiff, nor did the plaintiff have any

86 Ibid 8.
87 King v Adams [2016] NSWSC 1798.
88 Van Rassel v Kroon (1953) 87 CLR 298.
vulnerability which the defendant was obliged to protect. Whilst the defendant clearly ran a joint endeavour of a lottery syndicate, the plaintiff was not part of it whatsoever. He therefore had no reason to expect to be included without choosing to become involved.

These cases on ‘joint ventures’ which also cite Muschinski v Dodds show that the ‘something more’, the ‘congruent interests’ that turn a simple relationship into a joint endeavour, are identical to the principles that give a joint venture its fiduciary character beyond being a simple contractual relationship. It is therefore safe to assume that, as all of these cases rely on the same principles as partnership law, joint ventures, partnerships, and joint endeavours may all be derived from the same general principles. If partnerships and some ‘joint ventures’ give rise to fiduciary duties, then so too must a joint endeavour potentially involve fiduciary duties. The ramifications of this will be discussed in the theory chapter.

D Constructive Trusts

<table>
<thead>
<tr>
<th>Principle</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constructive trusts are a proprietary interest that can found interests in property, such as a caveat, without curial order. They arise upon their entitling circumstances occurring.</td>
<td>Surfers Paradise Investments Pty Ltd v United Investments Pty Ltd [1997] QSC 179 Youssef v Victoria University of Technology [2005] VSC 223 Parsons v McBain (2001) 109 FCR 120</td>
</tr>
<tr>
<td>There must be a joint endeavour, and a bare claim for unjust enrichment is not sufficient.</td>
<td>Excel Quarries Pty Ltd v Payne [1999] QSC 59 Excel Quarries Pty Ltd v Payne [2000] QCA 213.</td>
</tr>
<tr>
<td>The impossibility or unenforceability of a proprietary remedy that arises out of a constructive trust does not affect a personal remedy.</td>
<td>Flint v Sorna Pty Ltd [1999] WASCA 1040 Sorna Pty Ltd v Flint (2000) 21 WAR 563 GM &amp; AM Pearce &amp; Co Pty Ltd v Australian Tallow Producers Pty Ltd [2002] VSC 487</td>
</tr>
<tr>
<td>A constructive trustee can commit a breach of trust.</td>
<td>Macks v Emanuele [1998] SASC 6523</td>
</tr>
</tbody>
</table>

Since it is the case that joint endeavours may involve fiduciary duties, then the Rugby League cases have greater significance. As discussed earlier, the ARL clubs held their assets on trust for

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89 King v Adams [2016] NSWSC 1798, [348]–[356].

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the ARL joint venture. If assets are to be held on trust in a joint venture, then assets must also be held on trust in a joint endeavour.

The largest number of cases on this matter relate to caveats over land. Under Australia’s system of Torrens land title, all land is registered and dealt with by each State and Territory’s land registry. A caveat may be lodged with the relevant land registry, which is then registered on the title. This caveat is noted on the title to the land, and it prevents any dealing with the property until the caveat is removed. Caveats are often lodged by those who have a claim against real property and wish to prevent the owner from dealing with the land before the claim can be resolved.

To lodge a caveat usually requires a caveatable interest. This means that the person lodging the caveat must have some proprietary interest in the property. It is not enough to make a claim against property for some unsecured debt – the claim must relate to some interest in the property.

A constructive trust is one such proprietary interest that can constitute a caveatable interest. In Surfers Paradise Investments Pty Ltd, it was said that a constructive trust can constitute a caveatable interest. It was held that it is not correct to say that a constructive trust is ‘remedial’ and therefore incapable of giving rise to a proprietary interest until its declaration. In this regard, the distinction between ‘remedial’ and ‘institutional’ was rightly not made. A constructive trust arises when circumstances construe its existence, so regardless of curial order, it can form a proprietary interest.

This is especially the case after curial order. In Macks v Emanuele, the respondent lodged a caveat claiming an interest in property due to a ‘joint venture’. However, the respondent, in previous proceedings, was already held to be holding the property in question on constructive trust for 27 companies. Whether or not the respondent could sustain his claim, the property in question was already held on constructive trust, and to act otherwise would be in breach of trust.

90 See, eg, Land Title Act 1995 (Qld).
91 Surfers Paradise Investments Pty Ltd v United Investments Pty Ltd [1997] QSC 179.
92 See Youssef v Victoria University of Technology [2005] VSC 223, [97]. See also Parsons v McBain (2001) 109 FCR 120.

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Of course, there must be a justifiable claim to a constructive trust. *Excel Quarries Pty Ltd v Payne*[^94] involved a claim for ‘unjust enrichment’, but the true nature of the arrangement was not a joint endeavour. The parties had a simple contract where they would attempt to rezone some land but they could only rezone part of it. The contract related to an opportunity to rezone land, with no guarantee of full rezoning being achievable. There was no joint endeavour or any other reason to find a proprietary interest. It was simply a commercial dealing that did not work out. Further, being a bare claim for unjust enrichment, it was easily dismissed.[^95]

This proprietary interest does not vanish into the aether if for some reason it cannot be enforced. This was the case in *Flint v Sorna Pty Ltd*[^96] in which the parties had intended to buy mining tenements to be held on trust for the other. However, the relevant legislation did not allow any legal or equitable interests in these mining permits to be transferred in any way other than writing, which was not done. Despite this disentitling the proposed beneficiary from owning the mining tenements, this still allowed a personal remedy, namely following *Muschinski v Dodds*, that the court decided to apportion the parties’ interests according to their contributions. Similarly, if a party has a proprietary interest but that property has ceased to exist, that party may still have a personal remedy for equitable compensation.[^97]

If the distinction between ‘remedial’ and ‘institutional’ constructive trusts is ephemeral then, given that a constructive trust arises upon the occurrence of its entitling circumstances,[^98] it seems that there are principles at play that will construe the existence of a trust in a joint endeavour. This is an important point to consider, as is the case with fiduciary duties. This point will be analysed in Chapter 6 and will also become more apparent when the shield cases are discussed in the next chapter. The shield cases relating to the joint endeavour will be discussed in the next chapter and the principles discussed above will be compared and contrasted with the principles to be derived from the shield cases.

[^94]: *Excel Quarries Pty Ltd v Payne* [1999] QSC 59; *Excel Quarries Pty Ltd v Payne* [2000] QCA 213.
[^95]: *Excel Quarries Pty Ltd v Payne* [2000] QCA 213, [20]–[21].
[^97]: See *GM & AM Pearce & Co Pty Ltd v Australian Tallow Producers Pty Ltd* [2002] VSC 487.
[^98]: See *Youssef v Victoria University of Technology* [2005] VSC 223, [97]. Also see *Parsons v McBain* (2001) 109 FCR 120.
V: Shear – Shield

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I The ‘Shield’ Context: Tax, Crime, Social Security, Insolvency

The use of the principles in Muschinski v Dodds as a shield, proposed by this thesis to be called the joint endeavour principle, yields more interesting cases to examine. Whereas the sword cases are focused on a remedy, the shield cases often focus on the institutional aspects of constructive trusts. The same principles that grant a remedy in the sword cases are also used to find the existence of a constructive trust in the shield cases, yet when the sword cases apply these principles, the institutional aspects of constructive trusts have often been ignored by the courts, either favouring a purely remedial view of the constructive trust or not considering a constructive trust as a remedy at all. An analysis of these shield cases will be crucial for the theoretical analysis in the next chapter.

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The shield cases are present in four contexts. Although these contexts contain various mixtures of familial and commercial elements, these cases have been analysed separately from the cases in the sword context. These cases include 13 taxation cases, 16 criminal property cases, 22 social security cases, and 86 insolvency cases. Like the last chapter, this chapter will insert tables under headings which summarises principles and the cases those principles are derived from.

II Taxation

The taxation context includes 13 decisions which involve a question of tax liability. Particularly, these cases mostly examine whether a legal owner of property is the beneficial owner of that property. If they have no beneficial title to the property that they hold, they are holding it on trust, and therefore that property is not assessable for tax.

<table>
<thead>
<tr>
<th>Principle</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>A constructive trust arises by operation of law, not curial order. Equitable maxims such as ‘clean hands’ do not negate a trust arising by operation of law.</td>
<td>Zobory v Commissioner of Taxation (Cth) (1995) 64 FCR 86</td>
</tr>
<tr>
<td>There must be inequitable circumstances to justify a constructive trust.</td>
<td>Case No ST 93/27 (1994) 29 ATR 1238, Case No QT 93/128 (1994) 29 ATR 1151</td>
</tr>
<tr>
<td>The true nature of the facts and circumstances of the case must be discerned to see whether the parties were in fact in a joint endeavour.</td>
<td>Lord v Australian Elizabethan Theatre Trust (1991) 30 FCR 491, Gerbic v Commissioner of Taxation [2013] AATA 664, Deputy Commissioner of Taxation v Vasilides (2014) 323 ALR 59</td>
</tr>
</tbody>
</table>

1 Constructive trust arises upon circumstances, not curial order

A number of these tax cases do not involve a claim for a constructive trust as a remedy. Rather, a constructive trust is claimed to exist by operation of law, and then that trust relationship is relied upon to challenge tax assessments.

An example of this is Zobory1 where an employee misappropriated money from his employer and claimed it as income on his tax return for one year, but not for the second. He was convicted and repaid the stolen money plus interest. The Commissioner for Taxation sought to recover tax

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1 Zobory v Commissioner of Taxation (Cth) (1995) 64 FCR 86.

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on the amount he stole but did not claim in the second year. Zobory claimed that as he stole the money, he held it on constructive trust for his employer, and thus was not the beneficial owner and could not be taxed on it. This argument was upheld and as a constructive trustee he satisfied the relevant statutory definition of a trustee.²

The Commissioner tried to argue against this through the equitable maxim of ‘clean hands’, arguing that it would not be equitable to allow Zobory to avail himself of Equity to avoid a tax obligation despite committing a wrong. However, as was discussed above, Zobory did not claim a constructive trust as a ‘remedy’. Rather, he correctly stated that, as the thief, he held the money on constructive trust for his employer, regardless of his intentions. It was by operation of law that the constructive trust arose, not by any other means. Zobory was entitled to rely on this consequence of the law. It would be inconsistent to say that he held the money he stole on trust by operation of law, while simultaneously denying his status as a constructive trustee.

A similar case was Case No ST 93/27³ where the claimant ran a photocopying business but tried to avoid sales tax. The claimant alleged that, as it was photocopying confidential material, it could never truly ‘sell’ that confidential material as it was not the owner, thus there could not be sales tax on the photocopies. Whilst the argument may be sound in other circumstances, the fact is that the claimant’s clients, by using its photocopying services, were giving the claimant permission to photocopy the confidential documents. The claimant could only claim a constructive trust if it would be inequitable for it to charge for its services, but being done by consent, it clearly would not be inequitable.⁴

The requirement for inequitable circumstances was shown in Case No QT 93/128⁵ which involved a family farm. The owners of the farm, parents, had an arrangement whereby when they were ready, they would transfer the title to the farm to their son and his wife. When that transfer finally occurred, they were assessed for capital gains tax. They objected, saying that it was held on trust for their son and his wife. This argument was rejected. The parents intended to retain full legal title until the transfer, which they in fact did, and the transfer occurred in accordance with their arrangement. The son and his wife had no interest until the transfer, and

² Ibid 93.
³ Case No ST 93/27 (1994) 29 ATR 1238.
⁴ Ibid 1244 [52].
⁵ Case No QT 93/128 (1994) 29 ATR 1151.
as there was no other reason to construe a trust, it was not possible to hold it on trust before the transfer.\textsuperscript{6}

These cases highlight the important point that a constructive trust arises by operation of law, and it is not necessary to claim it as a remedy to take advantage of its implications. This makes the consequences of classifying a constructive trust as ‘remedial’ or ‘institutional’ largely irrelevant. It also throws doubt upon the sword cases, such as Henderson v Miles (No 2) which decided a claim based on the principles in Muschinski v Dodds without any regard to conduct that would have given rise to a constructive trust.

2 True nature of the parties’ arrangement is important

Much like the sword cases, the true nature of the parties’ arrangement is also important in the shield cases. The parties must be in a joint endeavour before the windfall equity or joint endeavour principle can apply.

If an arrangement is not a joint undertaking, then the true nature of the relationship will determine its outcome. In the tax context, this often relates to gifts. This was the case in Australian Elizabethan Theatre Trust\textsuperscript{7} where parties had made donations to the Theatre Trust, but upon the liquidation of the Trust, wanted these donations repaid. The main argument alleged that a Quistclose trust existed to protect their donations.\textsuperscript{8} This was because, upon making donations to the Trust, the donors had expressed a preference as to which arts organisations those donations would be applied to. As the Trust went into liquidation, these donations could no longer be applied to those arts organisations, and it was argued that the donations should be returned to the donors. However, this argument failed. The donations were made on the basis that they would be tax-deductible, and to be tax-deductible, they must have been donated unconditionally. The mere indication of a ‘preference’ could have had no legal or equitable significance, thus the donations could not be returned by a Quistclose trust. It was then alleged that a joint endeavour existed and that a constructive trust should be found on the basis that the joint endeavour failed due to the donations not being able to be applied as preferred. For the same reason, this argument also failed. As the donations were clearly meant

\textsuperscript{6} Ibid 1158.
\textsuperscript{7} Lord v Australian Elizabethan Theatre Trust (1991) 30 FCR 491.
\textsuperscript{8} See Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567.
to take the form of an unconditional gift, it would be inconsistent to find that a joint endeavour existed.\textsuperscript{9}

These types of gifts are also found between parties. \textit{Gerbic}\textsuperscript{10} involved a capital gains tax assessment. Mr Gerbic bought a townhouse with his son as joint tenants for his son to live in. He took an interest in the property to ‘guard’ his son against acting unwisely, but after his son eventually moved out, he sold the property and was assessed for capital gains tax on his 50 per cent interest. He said the arrangement was to protect his son, in that his legal 50 per cent interest was held on trust for his son in order to protect him. However, this was not the true nature of the arrangement. Mr Gerbic intended, at all times, to retain 50 per cent ownership to the exclusion of his son, explicitly to \textit{prevent} his son having full control. There was thus no joint endeavour, nor any trust.

It is not only parties to a joint endeavour that may seek to rely on a trust. In a role-reversal, the Commissioner for Taxation tried to raise a resulting or constructive trust in order to tax a husband in \textit{Vasiliades}.\textsuperscript{11} The Vasiliades owned a number of properties, but for one of these properties, Ms Vasiliades owned it solely, but it was paid for by Mr Vasiliades solely. The Commissioner sought to show that Mr Vasiliades had an interest in the property due to his contribution. However, the case was not one where either a resulting trust under \textit{Calverley v Green}\textsuperscript{12} or a constructive trust under \textit{Muschinski v Dodds} could apply. The true nature was that Mr Vasiliades purchased the house for his wife as a gift, without intending to take any beneficial interest.

It is clear from the tax context that constructive trusts are not solely ‘remedial’. They can be claimed to be in existence by anyone due to operation of law, and thereby take advantage of its existence in numerous ways. Principles of Equity underly the existence of constructive trusts without needing to be claimed as a mere remedy. The entitling circumstances that give rise to a constructive trust in a joint endeavour, and the existence of a joint endeavour, will be examined in the next chapters.

\textsuperscript{9} \textit{Lord v Australian Elizabethan Theatre Trust} (1991) 30 FCR 491, 509.
\textsuperscript{10} \textit{Gerbic v Commissioner of Taxation} [2013] AATA 664.
\textsuperscript{11} \textit{Deputy Commissioner of Taxation v Vasiliades} (2014) 323 ALR 59.
\textsuperscript{12} \textit{Calverley v Green} (1984) 155 CLR 242.
### III Criminal Context

The criminal context includes 16 decisions which involve third-party claims to property confiscated under various legislation, often for being the proceeds of crime and the like. These cases most often involve family members of accused criminals who try to reclaim property confiscated by the State or Territory, claiming a constructive trust exists in their favour. Of interesting note is that the majority of these cases are from Western Australia where the ‘joint endeavour principle’ was coined.

<table>
<thead>
<tr>
<th>Principle</th>
<th>Cases</th>
</tr>
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</table>
| Merely being a de facto partner or a married spouse is insufficient to find the existence of a joint endeavour. | *Queensland v Hirst* [2003] QSC 266  
*Lamers v Western Australia* (2009) 192 A Crim R 471  
*Smith v Western Australia* [2009] WASCA 189  
*Willis v Western Australia* (No 3) [2010] WASCA 56  
*Bamess v Western Australia* [2015] WASCA 259 |
| There may not be a remedy if a joint endeavour has not broken down. | *Director of Public Prosecutions (Vic) v Ali* (No 2) [2010] VSC 503  
*Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189  
*Lambert v Western Australia* [2014] WASCA 145  
*Ly v Director of Public Prosecutions* [2015] VCC 184  
*Stribrny v Western Australia* [2015] WASCA 396  
*Trajkoski v Western Australia* [2017] WASCA 273  
*Director of Public Prosecutions (NSW) v Diez* [2003] NSWSC 238  
*Campana v Western Australia* [2008] WASCA 230  
*Dawson v Western Australia* [2014] WASCA 113  
*Stavrianakos v Western Australia* [2016] WASCA 64 |
| Contributions must be shown to exist as a matter of fact and must have been made to an identifiable joint endeavour. |
Mere familial relationship not enough to form a joint endeavour

A large number of these cases failed for failing to show a joint endeavour. Much like the circumstances in *Lloyd v Tedesco*, being in a marriage or a de facto relationship and making contributions as an ordinary incident of those relationships is not enough to show the existence of a joint endeavour.\(^{13}\)

It was also said that if a joint endeavour does not break down, then there can be no constructive trust. This was said in two cases in this context where property was confiscated, but the de facto relationship or marriage did not break down. As such, no relief was found.\(^{14}\) Significant doubt should be cast on these two cases. As seen earlier in this chapter and the previous chapter,\(^{15}\) a constructive trust arises by operation of law to prevent an unconscionable retention of benefit. The entitling circumstances that construe a trust often predate the claim. It is not the breakdown of a joint endeavour that gives rise to a constructive trust – what is important is whether it would be unconscionable to *assert beneficial ownership*. In these two cases, the State or Territory asserted beneficial ownership. If the claimants in these two cases had been in a joint endeavour, and if they had a proprietary interest in the confiscated property, they would have had a claim.

These two cases appear to conflate the windfall equity as a cause of action and the joint undertaking principle. The breakdown of a joint undertaking is only a catalyst for claiming the windfall equity as a cause of action. The breakdown of a joint undertaking is not necessary to invoke the joint undertaking principle which may construe a trust before any breakdown of a joint undertaking. These two cases are incorrect, either for saying that a marriage or de facto relationship must first break down, or by incorrectly concluding that a joint undertaking existed in the first place. The latter is the more charitable interpretation, but the first interpretation is very important and this distinction will be discussed in the next chapter, and particularly in the insolvency context later in this chapter.

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\(^{13}\) *Queensland v Hirst* [2003] QSC 266, [22]–[25]; *Lamers v Western Australia* (2009) 192 A Crim R 471, 474–478 [18]–[55]; *Smith v Western Australia* [2009] WASC 189, [87]–[90]; *Willis v Western Australia (No 3)* [2010] WASCA 56, [67]–[73]; *Bamess v Western Australia* [2015] WASC 259, [74]–[79].

\(^{14}\) *Director of Public Prosecutions (Vic) v Ali (No 2)* [2010] VSC 503, [81]–[87]; *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189, 202–203 [50]–[51].

\(^{15}\) See also *Taleb v Director of Public Prosecutions (Vic)* [2014] VSC 285, [80]–[88] where the claimant lent money to her brother-in-law to develop property, but was used for drug trafficking. The money was confiscated by the State, but the claimant reclaimed the money due to a trust existing the moment the money was used for something other than its intended purpose.
2 **Contributions must be ascertained**

Even if there is a joint endeavour, there must be ascertainable contributions made towards that joint endeavour. The ordinary incidents of contribution in a marriage or de facto relationship are not enough, such as contributions made for one’s own benefit in cohabiting property. No contribution will grant no interest, and if a party is trying to claim more than their legal interest, they need to establish that contributions in excess of that legal interest were made for the purposes of a joint endeavour, and not for any other reason.

A lot of these cases have failed, but there have been cases which have succeeded. Many of these cases concerned the identification of contributions made to a joint endeavour. The contributions and their proportion must be ascertained before the court can continue and they must be shown to exist as a matter of fact. Likewise, if claiming a proprietary remedy, the contributions need to have identifiably been made to the property in question. If this is not the case, then no proprietary remedy can be found, but there may be some form of personal remedy. Proving contributions, much less a joint endeavour, can be difficult. Regardless, it can happen, even if the joint endeavour spanned 20 years.

The cases in this criminal context show that two threshold questions must be satisfied before any other consideration may be discussed. A joint endeavour must exist as a matter of fact, and contributions must be shown to have been made towards the property of the joint endeavour. If these requirements cannot be met, the claimant will fail. What is also important is that the statutory mechanism of confiscation will still be subject to Equity and the intricacies of legal ownership as a trustee compared to full beneficial ownership are still relevant matters.

**IV Social Security**

The social security context includes 22 decisions which mainly relate to asset tests for social security payments. In this regard, the claims mostly involve appeals against determinations

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16 *Lambert v Western Australia* [2014] WASC 145, [22]–[30]; *Ly v Director of Public Prosecutions* [2015] VCC 184, [222]–[223].
17 *Stribrny v Western Australia* [2015] WASC 396, [81]–[93].
18 *Trajkoski v Western Australia* [2017] WASC 273, [31]–[38]. See also *Calverley v Green* (1984) 155 CLR 242, 262 (Mason and Brennan JJ).
19 *Director of Public Prosecutions (NSW) v Diez* [2003] NSWSC 238, [23].
20 *Campana v Western Australia* [2008] WASC 230, [124]–[125].
21 *Dawson v Western Australia* [2014] WASC 113, [132]–[134].
22 *Stavrianakos v Western Australia* [2016] WASC 64, [331].
which included assets that the claimants argued were held on constructive trust. Many of these cases involve claims for constructive trusts generally: for example, some of the cases involve estoppel supporting a constructive trust.

The important point here is that these cases often cite the principles in *Muschinski v Dodds* in order to find an ‘institutional’ constructive trust. Rather than claiming the benefit of a constructive trust as a beneficiary, the claimants’ purpose is to say that, through some circumstance, they no longer own the property and instead hold it on trust as a trustee for someone else. They are attempting to take advantage of the institutional nature of a constructive trust by claiming to be the trustee rather than the beneficiary.

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23 Much like *Zobory v Commissioner of Taxation (Cth)* (1995) 64 FCR 86.

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If there is a joint endeavour and there is a genuine expectation of an interest in property, the entitlement may be legitimate.

Wrongdoing does not give rise to a constructive trust, but conduct that would otherwise be inequitable does.

1 Property must be held on trust, not retained for personal benefit

Many of the cases in this context involve people who try to reduce their assets in order to get a better result on social security assets tests. This is often done by claiming they hold property on trust and not for their own benefit. However, in order to take advantage of this, the claimants need to satisfy the court that they did indeed hold the property on trust in some manner. If the claimant intended to retain beneficial ownership, no trust can be found. This is because the court cannot depart from the legal interest unless that legal interest would be unconscionable to assert. Unless that unconscionable reason exists, then no constructive trust can be found.

As discussed earlier in this chapter and the previous chapter, the true nature of the circumstances must always be determined. There are four cases in this context which show that, even with the best of intentions, a trust will not be found in favour of the beneficiary if the donor had intended to retain beneficial ownership.

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24 Millner v Secretary, Department of Social Security [1986] AATA 287; Secretary, Department of Education, Employment and Workplace Relations v Mozumder [2008] AATA 671; Slamkova v Secretary, Department of Social Services [2017] AATA 137.

25 Dauti v Secretary, Department of Social Services [2017] AATA 1241.

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Three of these cases involved testamentary dispositions in wills made before Muschinski v Dodds was decided. This meant that the legal advice that the parties received could not have taken into account the possibility for constructive trusts to apply to their situations. In these cases, the parties sought to have properties that they owned in their own names to be excluded from the assets test. They claimed this on the basis that they had always intended that the properties would pass to their children. This fact was easily proven, given the content of the wills of the parties.

However, the very existence of those wills made their claims untenable. It was shown that, even though the parties had intended their children to take an interest in the properties, the interest was to only devolve upon their death – that is, they intended to retain ownership until death. One party did this based on the fear of “elderly people being forced off their land once they had relinquished legal control of it”. Based on the legal advice they received, the parties had considered this the best course of action. They did not hold the property on trust.

A similar thing happened in Slaven. The appellant was seeking an aged pension, but a second property she owned was included in the assets test. This second property was owned by the appellant for her disabled children to live in. The legislation only exempted personal property used to care for a disabled person, not real property, so the appellant claimed that the property was held on trust. This claim was not accepted. No common intention could exist due to the incapacity of her disabled children, and the appellant received similar legal advice when ultimately deciding to take the property entirely in her own name. There was no reason to suggest that the second property was held on trust, as the children had no interest of any kind in the property that required the property to be used for their benefit. In the absence of any interest of the children in the property, the appellant had full beneficial ownership. There was no reason in Equity to hold the appellant as a constructive trustee. It was suggested by the Tribunal that the appellant seek specialist legal advice to better structure their affairs.

2 There must be a genuine interest in property, not a mere expectation of an interest

Given the above cases, particularly the will cases, it seems that a mere expectation of an interest does not give rise to an interest under a trust. This extends to cases that do not provide such an

26 Lutwyche v Secretary, Department of Social Security [1987] AATA 144; Dineen v Secretary, Department of Social Security [1988] FCA 425; Marshall v Secretary, Department of Social Security [1989] AATA 314.
27 Marshall v Secretary, Department of Social Security [1989] AATA 314, [15].
28 Slaven v Secretary, Department of Social Services [2015] AATA 427.

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explicit expectation as a will otherwise would. A mere expectation of an inheritance is not enough to be required to hold the property on trust for that expectation. A mere promise of a gift is also not enforceable and does not give rise to a trust.

However, if there is a joint endeavour, or some other genuine interest in property, then a trust may be found. Kidner involved land which was sold to the claimant’s sons, but this contract never fully completed. The sons worked on the land on the understanding that it was theirs. The sons had a genuine entitlement in the land, thus the claimant held it on constructive trust for the sons. Similarly, in Evans, the claimant sold a family business to his sons in 1989. He applied for a pension in 1993 but was denied due to his assets. He still owned assets of the family business due to the length of time it was taking to transfer the business. The court found that, due to the transfer of the business to his sons that took effect on 1989, even though it had not been finalised, a constructive trust existed since 1989 in which he held those assets on trust for his sons. That meant that by the time he applied for a pension in 1993, he had no beneficial interest in the assets of the family business and was holding them on trust.

Other reasons for finding a trust have also been heard. Joint endeavours between family members have had their contributions to the joint endeavour recognised by constructive trust and resulting trust, and in one case a claimant had their assets reduced partially by only $20,000 in order to take into account their daughter’s $20,000 contribution. Another case involved a formal partnership between husband and wife. When the husband died and the wife took sole ownership of the property by survivorship, part of the partnership agreement obliged the wife to give half the sale proceeds of the property to her son. Centrelink alleged this was a gift by which she deprived herself of an asset but, given the terms of the partnership, the wife had no interest in the proceeds of the sale of the property. The sale proceeds were always intended to pass to the sons and were to never form part of the wife’s assets, despite survivorship.

30 Tokolyi v Secretary, Department of Social Security (1992) 26 ALD 97.
31 Kidner v Secretary, Department of Social Security (1993) 18 AAR 545.
32 Secretary, Department of Social Security v Evans [1997] AATA 739.
33 Secretary, Department of Family and Community Services v Amine (2005) 85 ALD 660.
34 Kyrgios v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs (2009) 115 ALD 26.
35 Kozolup v Secretary, Department of Family and Community Services [1999] AATA 891.
36 Cameron v Secretary, Department of Families, Community Services and Indigenous Affairs [2006] AATA 1049.

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Perhaps the apex of the case law in this context is Agnew v Secretary, Department of Social Security.\(^{37}\) This case, like so many others, involved a family farm. Agnew applied for a social security payment but was denied due to the family farm being in his name. Although he did not know how constructive trusts worked, there was always an intention that he would not assert a beneficial interest in the family farm. It was the common intention of himself and his sons, who ran the farm as a partnership together, that he would not draw any profit from the partnership and that the sons would assume all of the debts. He kept his promise.

The court found that he held the farm on constructive trust for his sons. This was because, had he reneged on his promise, his sons would have had a claim in equitable estoppel against him. It would have been unconscionable to assert title to the farm in contravention of his promise due to the detriment his sons would have experienced. Although Agnew had not committed any wrongdoing, the court held that it is not wrongdoing that gives rise to a constructive trust, but conduct.\(^{38}\) The moment that Agnew told his sons they could have the farm and he would disclaim any interest is the moment a constructive trust arose. For a third party to assert that Agnew had an interest would be contrary to the trust he was subject to. In this case, it was a potential claim for equitable estoppel which gave rise to a trust. This trust was able to be asserted against an unrelated third party without Agnew having done any wrongdoing by denying his sons’ interest.

3 Gifts are not to be assumed

Finally, as was the case in Calverley v Green, gifts are not to be assumed. Re Weeding\(^{39}\) involved parents and the Public Trustee who provided benefits for their disabled daughter. The parents and the Public Trustee pooled money together in order to purchase housing for the care of their daughter. This was a joint endeavour, taking the form of a loose arrangement without any explicit written agreement. The Public Trustee took full title of the property. When the property was sold, the Public Trustee asserted full ownership of the money, wanting to reinvest the money to care for their daughter. The parents objected and wanted their contributions repaid. It was found that there was no evidence that the parents intended the money to be a gift to their daughter, much less any evidence that the parents intended the money to be treated as a gift to the Public Trustee. The money was then returned to the parents.

\(^{37}\) Agnew v Secretary, Department of Social Security [1999] FCA 837. See also the appeal, Secretary, Department of Social Security v Agnew (2000) 96 FCR 357.

\(^{38}\) Secretary, Department of Social Security v Agnew (2000) 96 FCR 357, 365–366 [18]–[20].

This does not necessarily mean that a gift must be explicitly stated. For example, Sadto\textsuperscript{40} involved a claimant who received properties from his mother. He took full legal title to those properties. He alleged that he was holding the property on trust for his mother, but no evidence was led in this regard at all. There was no justification for his claim that he was holding the properties on trust, and the transfer could only be construed as a gift.

The institutional nature of a constructive trust finds clear expression in the social security context. It is the conduct of the parties which gave rise to a trust, and not any wrongdoing or any other action. This is an important concept which will be discussed in the next chapter. It will also be discussed next in the insolvency context.

V Insolvency

The insolvency context includes 86 decisions which relate to personal bankruptcy and corporate insolvency. The cases in this context are more numerous than in the other shield contexts and often involve the insolvency of a party to a joint endeavour. In this context, a third-party administrator is appointed to deal with the bankrupt person or insolvent company’s affairs according to the Bankruptcy Act 1966 (Cth) and the Corporations Act 2001 (Cth). Another party to the joint endeavour may then try to claim to be the beneficial owner of property due to the institutional nature of constructive trusts, thereby excluding the asset from insolvency.

**Principle**

A positive act of unconscionable conduct is not necessary to find that property has been unconscionably retained.

The principles in Muschinski v Dodds should not be used as a form of quasi-family law.

A constructive trust is not a ‘mere remedy’ but gives rise to a proprietary interest.

The effect of a constructive trust may be moulded by the court at the court’s discretion, including to account for legitimate third-party interests or to award a simpler remedy.

**Cases**

*Re Osborn* (1989) 25 FCR 547

*Re Popescu* (1995) 55 FCR 583

*Parsons v McBain* (2001) 109 FCR 120

*Draper v Official Trustee in Bankruptcy* (2006) 156 FCR 53

*Brooker v Friend* [2006] NSWCA 38

*Katingal Pty Ltd v Amor* (1999) 162 ALR 287

\textsuperscript{40} Sadto v Secretary, Department of Family and Community Services [1999] AATA 855.
Constructive trusts may arise without curial order, and this may affect rights to property, even when undertaking a statutory function.

Unless expressed to the contrary, contributions made to a joint endeavour are held on trust in proportion to those contributions.

A breach of fiduciary duty may be the preferred avenue if it can be shown to exist.

A joint endeavour must be shown to exist as a matter of fact, and the true nature of the facts and circumstances must be discerned.

Like unjust enrichment, a bare assertion of unconscionability does not substantiate a cause of action.

A unilateral act taken by one party without the knowledge or consent of the other is not sufficient to form a joint endeavour.

A party external to the joint endeavour may be able to insist on the existence of a constructive trust in the joint endeavour.

It may not be necessary for a joint endeavour to have broken down for a remedy to be found.

1 The ‘bad’ cases: misconstruing what it means to be ‘unconscionable’

The first case that should be examined is the first case chronologically in this context that cites Muschinski v Dodds. This case is Re Osborn,\(^{41}\) decided in 1989. Apart from being the first case in this context, it is important for another reason: it is not good law.

This case concerned a couple who had been living in a de facto relationship for 20 years. Prior to the man’s bankruptcy, he transferred property that he solely owned to himself and his partner as joint tenants. This was done in order to reflect his partner’s “financial, emotional and nursing

\(^{41}\) Re Osborn (1989) 25 FCR 547.

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support” that she had given him. The trustee in bankruptcy successfully had this transaction overturned, but the woman sought to have a constructive trust recognised due to her contributions.

The court held that she would have to show unconscionable conduct for a trust to exist. The court held that, whilst the trustee in bankruptcy is still subject to any equities against the bankrupt, no action by the bankrupt could be classed as unconscionable and that the trustee in bankruptcy is not acting unconscionably by acting under its statutory authority. The woman’s claim for a trust failed.

With due respect, this is a flawed analysis. As seen previously in this chapter and the previous chapter, a constructive trust arises by operation of law. As was said in Agnew, it was not necessary for any party to have committed any wrongdoing for a constructive trust to arise: something may be unconscionable without a “wrong”. Further, it is not correct to say that the trustee in bankruptcy could not be acting unconscionably in carrying out its statutory functions. Equity can and will intervene to prevent the unconscionable reliance on statutory provisions.

The point here is not that one party had committed a positive act of unconscionable conduct against any one person. The point is whether asserting full beneficial ownership would be unconscionable. This does not require wrongdoing. It is therefore fully open to find that the trustee in bankruptcy, by asserting full beneficial ownership of the property, would be doing so unconscionably without any action whatsoever by the bankrupt man being necessary.

Re Osborn was explicitly overruled by the Full Federal Court in Parsons v McBain. The court said that Re Osborn seemed to treat a constructive trust as a “mere remedy” that does not affect title to property, which is plainly incorrect and Re Osborn should no longer be followed.

For similar reasons, Re Popescu should also be regarded with suspicion. This case was similar in that a bankrupt husband made a payment to his non-bankrupt wife which was overturned in

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42 Ibid 552.
43 Ibid 553.
44 Ibid 554.
45 See, eg, Commonwealth v Verwayen (1990) 170 CLR 394 on unconscionable reliance on statutory limitation periods and Bofinger v Kingsway Group Ltd (2009) 239 CLR 269 on committing a breach of trust despite complying with statutory priority provisions in distributing the proceeds of sale of a property.
46 Secretary, Department of Social Security v Agnew (2000) 96 FCR 357.
48 Ibid 123–124 [8]–[9].
49 Ibid 125–126 [12]–[13].
favour of the husband’s creditors. The court raised the equitable maxim “one who seeks equity must do equity” in that the person who receives a benefit must also bear its burden. In this regard, the court considered that, if the wife succeeded in her claim, that money would be used for the benefit of the husband. This would protect the bankrupt and would be “the very antithesis of the intent of bankruptcy”. ⁵¹

Although *Re Popescu* makes a valid point regarding benefit and burden, the court should have considered the wife’s claim properly. Instead, the court treated it as a form of quasi-family law. The court thought that, as the parties were together, the husband would have benefited from the property. This position is untenable, least of all because the principles in *Muschinski v Dodds* are not a form of quasi-family law, ⁵² but also because the reasoning falls apart if the wife decides to separate from the husband. It seems inappropriate to presume a wife’s independent interests as a creditor would be naturally subservient to those of her husband’s interests, unless the arrangement specifically was designed to defeat the other creditors of the husband.

Independently decided one day apart from *Parsons v McBain* was the decision of *Clout v Markwell* ⁵³ which, when taken together, should dispel any assumption that either *Re Osborn* or *Re Popescu* are good law. This decision involved a husband and wife, Mr and Mrs Markwell. The husband bought property in his sole name, and the couple came to an arrangement whereby the wife would contribute to the upkeep and maintenance of the property, as well as living in the property, on the basis that, when eventually sold, she would receive an amount of money commensurate with her contributions to the property. The property was eventually sold, and Mrs Markwell was paid.

The trustee in bankruptcy sought to have this payment to Mrs Markwell overturned, but failed. The court found that a common intention constructive trust existed, and if for some reason that analysis was wrong, a constructive trust pursuant to the principles in *Muschinski v Dodds* would also exist to prevent an unconscionable retention of benefit. ⁵⁴ It was noted that the husband was not denying any interest of the wife, but the trustee in bankruptcy was, even though he was undertaking his statutory duties, which is in stark contrast to *Re Osborn*. ⁵⁵ The trustee in bankruptcy takes the property “subject to all the liabilities and equities which affect it in the

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⁵¹ Ibid 589–590.
⁵³ *Clout v Markwell* [2001] QSC 91.
⁵⁴ Ibid [20]–[21].
⁵⁵ Ibid [19]–[21].
bankrupt’s hands”.56 Thus if it would be unconscionable for Mr Markwell to deny Mrs Markwell’s interest, so too would it be unconscionable for the trustee in bankruptcy to do likewise. The court also noted that creditors must always be aware of potential equitable interests and constructive trusts.57

2 Constructive trusts not a ‘mere remedy’, but are flexible

As was said in Parsons v McBain, a constructive trust is not a ‘mere’ remedy: it does affect title to property.58 Its institutional nature must be acknowledged. Although a constructive trust arises at the same time its entitling circumstances arise, it was noted in Muschinski v Dodds that its date of operation can be changed by the court, if necessary. The trustee in bankruptcy in Parsons v McBain sought to have the date of its operation changed for this reason, but the court rejected this argument. The court noted that, whilst it has the discretion to modify the operation of a constructive trust, this discretion only relates to whether or not the constructive trust may be defeated by or deferred to another claim.59 In this case, the trustee in bankruptcy’s claim did not defeat or defer the constructive trust.

The malleability of the constructive trust is a recurring theme in this context and consistently reinforces Deane J’s view that the distinction between ‘remedy’ and ‘institution’ is truly ephemeral. Constructive trusts in this context routinely arise well before any instance of bankruptcy, which allows the parties to rely on that trust to take the property out of the assets of the bankruptcy, whether by equitable estoppel, resulting trusts, or a joint endeavour.60

Whilst constructive trusts arise by operation of law without curial order, the ultimate remedy a court decides on is discretionary, and a constructive trust may still be moulded by the court to better suit the needs of the case. Many cases in this regard follow the High Court case of Giumelli v Giumelli which urged the minimum equity to do justice, rather than first resorting to a trust, as discussed earlier. This was restated in Draper61 where, although the appropriate remedy was a constructive trust, the court said it should always first consider if there are other means “to

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56 Ibid [21].
57 Ibid.
59 Ibid 126 [14]–[16].
quell the controversy”.62 This is particularly the case where the property in question no longer exists and a personal remedy is required.63

The most important case on the flexibility of constructive trusts and court discretion is Katingal Pty Ltd v Amor.64 Although the facts of the case are complicated by the number of parties, the case concerns the liquidation of a business. However, this business was started due to a breach of trust. One party stole money which was then used to run a business, which then entered liquidation. The party who had their funds stolen to start the business claimed in the liquidation. It is without doubt that the party who stole the funds held those funds on constructive trust, and that those funds would be traced into the business.

But that was not the case here. The problem was that the business had many creditors, and the debts outweighed the value of the business. If the applicant succeeded in their claim to have the business held on trust for them, it would leave nothing for the creditors, and the applicant would walk away with a business with no debts.

This was not tenable, especially as the creditors were innocent of any wrongdoing. Further, the value and assets of the business only existed due to the business done with the creditors. Therefore, if the applicant sought equity, he would need to do equity and account to the bona fide creditors for their debts.65 But, as the debts outweighed the value of the business, the applicant would be left with a worthless company that would have been wound up in any event. If a constructive trust was found, there would be two options. The first would be the applicant walking away with a business without accounting to its bona fide creditors. The second would be the applicant having a constructive trust over a worthless entity that would shortly after cease to exist. The court decided to exercise its discretion to not award a constructive trust, given its futility.66

This does not mean that the applicant was left without a remedy. It merely means the applicant was left without a proprietary remedy, and as has been seen throughout this chapter and the previous chapter, the applicant would still have a personal remedy against the person who stole the funds.

62 Ibid 77 [99] (Rares J), 84–85 [135] (Besanko J).
64 Katingal Pty Ltd v Amor (1999) 162 ALR 287.
65 See Chapter 2, particularly Messenger v Andrews (1828) 4 Russ 478 and Gregg v Coates (1856) 23 Beav 33.
66 Katingal Pty Ltd v Amor (1999) 162 ALR 287, 292 [10].

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3 Contributions to a joint endeavour are held proportionately on trust

Another recurring theme is that parties to a joint endeavour hold their contributions on trust in proportion to their contributions. It also follows that contributions must be shown to exist as a matter of fact.

This was the case in *Lopatinsky*\(^67\) where a husband and wife had separated, and the husband later became bankrupt. The parties agreed to sell the property they owned as joint tenants whereby the wife would receive 81 per cent and the husband would receive 19 per cent, rather than an equal interest in the property, due to the wife’s contributions. This agreement was not binding beyond the parties simply agreeing to this, as binding financial agreements were not available then and the parties did not apply for an order of the Family Court under s 79 of the *Family Law Act 1975* (Cth). It was also not binding as a contract, as the wife’s past contributions did not amount to consideration.\(^68\)

With these agreements unable to be enforced, the wife relied on the fact that there was a joint endeavour and the question was whether a constructive trust existed.\(^69\) The trustee in bankruptcy argued that she should receive only her legal half interest in the property.\(^70\) After considering the true contributions made to the joint endeavour between the parties, including financial and non-financial contributions, it was found that the wife was in fact owed 85 per cent, rather than 81 per cent.\(^71\) This principle that parties hold contributions to a joint endeavour on trust proportionate to their contributions has been affirmed since.\(^72\)

4 A joint endeavour must actually exist

As is the case with every other context discussed in this chapter and the previous chapter, a joint endeavour must exist, and it must in fact be a joint endeavour, and not some other form of arrangement. For example, a breach of fiduciary duty may be the preferred interpretation,\(^73\) although the courts seem confused about the interpretation of joint endeavours, joint ventures and fiduciary duties.\(^74\) A transfer of money also does not necessarily result in a proprietary

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68 Ibid 248 [85] (Whitlam and Jacobson JJ).
70 Ibid 255 [145]–[147] (Whitlam and Jacobson JJ).
73 *Australian Receivables Ltd v Tekitu Pty Ltd* [2011] NSWSC 1306, [117]–[124].
74 *Ambridge Investments Pty Ltd (in liq) [rec apptd] v Baker* [2010] VSC 59, [547]–[548].

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equitable interest, either. Lending someone money does not grant an interest in property if it is an unsecured loan. A bare assertion of unconscionability is also not enough, just like a bare assertion of unjust enrichment is likewise insufficient to form a cause of action.

It takes more than one party to form a joint endeavour. In Rankin, bankrupt applicants were renting a house and entered into a contract to purchase the house. When they became bankrupt, this contract vested in the trustee in bankruptcy. The bankrupts did not hear from the trustee in bankruptcy in nine years and, during that time, they made improvements to the property and arranged to sell the property and discharge their debt to a secured creditor. When they sold the property and paid out a secured creditor, they tried to claim the $60,000 surplus, but the trustee in bankruptcy claimed this money as the property never revested in the bankrupts. The only reason they were allowed to continue to occupy the property was that its sale would not discharge their debts and it would leave them homeless. There was no joint endeavour between the trustee in bankruptcy and the bankrupts, nor did the trustee encourage the bankrupts to act in this way. The bankrupt applicants’ unilateral act did not form a joint endeavour with the trustee in bankruptcy.

The true nature of the facts might show a simple gift with a condition. Craig v Craig involved a father who contributed $70,000 for his son and daughter-in-law to purchase property on the condition that he could live in the property rent-free. They agreed, the son and daughter-in-law provided the balance funds, and the father moved in. After living in the house for 28 years rent-free, he moved out and claimed a trust to reclaim his $70,000 contribution. The court did not find a joint endeavour, and instead characterised it as a gift with a condition. The son and daughter-in-law did not breach the conditions of the gift, so the father had no claim. The court simply declared that the father may continue to occupy the property rent-free and that the son and daughter-in-law were still bound by the condition.

5 No breakdown necessary?

It has been seen through many of these cases that a constructive trust arises by conduct, and frequently arises well before the breakdown of a joint endeavour. However, it is often claimed

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75 Re Lofthouse [2013] VSC 341. See also Paul v Speirway Ltd (in liq) [1976] Ch 220.
77 Rankin v Official Trustee in Bankruptcy (2005) 220 ALR 723.
78 Ibid 731 [45].
79 Ibid 731 [46]–[47].

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as a result of the breakdown of a joint endeavour. This breakdown may not actually be necessary. A breakdown of a joint endeavour is only necessary in order to enliven a claim under the windfall equity. The joint endeavour principle may construe a trust in a joint endeavour, and the institutional nature of the constructive trust can be relied upon in various ways.

One such way was the role-reversal similar to Vasiliades in the case of Rail Plus Pty Ltd v Ng. Here it was a creditor who relied on the principles in Muschinski v Dodds to claim extra property in a bankruptcy. Mr Ng attempted to shield assets before he became bankrupt by making significant contributions to a property held solely in the name of his wife, Mrs Ng, in order to reduce his asset pool. The creditor knew this was happening and it was a third party who proved the existence of a joint endeavour between Mr and Mrs Ng. The creditor was then able to rely on the constructive trust that arose by Mr Ng’s conduct. No breakdown of a joint endeavour was necessary – the creditor merely knew a joint endeavour existed, knew contributions were being made, and relied on the fact that a trust was construed by operation of law without the joint endeavour needing to break down. This is the joint endeavour principle being used without resorting to the windfall equity as a cause of action.

Another example of a joint endeavour not failing, yet a court still providing relief, is Sui Mei Huen. Here a husband and wife jointly owned their matrimonial home. The husband signed an unenforceable agreement declaring that the wife was to have sole beneficial ownership of the home. They later separated, the husband became bankrupt, and the trustee in bankruptcy sought to realise the husband’s interest in the matrimonial home.

The wife’s claim was denied for being a transaction for no value and thus invalid against the trustee in bankruptcy, but the wife appealed. The husband and wife were in a joint endeavour: the husband did not waive his interest in the matrimonial home unconditionally. Rather, he waived his interest in the home provided that he was indemnified against all outgoings, mortgage repayments and the like regarding the home, that the wife would live there with the kids, and that she would take no further action under the Family Law Act 1975 (Cth).

At all times, the wife upheld her end of the arrangement and had no intention of ceasing this joint endeavour. The husband did not intend to end the arrangement, either. It was only the act of the trustee in bankruptcy who tried to bring it to an end. The court noted that a remedy

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81 Rail Plus Pty Ltd v Ng [2013] VSC 429.
83 Ibid 20–23 [70]–[81].

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short of a constructive trust should be preferred, especially given the possibility of giving the wife an unfair priority over other equally deserving creditors.\textsuperscript{84} However, this was a case where a constructive trust did appear to be necessary due to its flexibility.\textsuperscript{85} The court noted that a constructive trust arose in the joint endeavour and simply declared that the parties’ obligations under the joint endeavour should continue.

Given the institutional use of constructive trusts, especially given the above case, a joint endeavour does not need to break down for a constructive trust to be found. As the constructive trust arises by operation of law in a joint endeavour, a party may simply rely on the fact that a trust was construed, without needing to specifically claim a remedy due to any specific cause of action or remedy for a failed joint endeavour.

VI Summary of Principles

A number of principles are clearly shown to exist in the windfall equity and the joint endeavour principle, as are a number of problems. These principles and problems will be discussed below so that a solution may be proffered in the following chapters to be compiled into a coherent restatement. The principles will be discussed first.

A The True Nature

What is of importance is the true nature of the relationship between the parties.\textsuperscript{86} The facts and circumstances of the case will determine which principles apply to the case, which determines how it will be resolved.\textsuperscript{87} For example, if the dispute can be resolved by contract, or if the issue in dispute was already contemplated by a contract, then the windfall equity does not apply.\textsuperscript{88} Likewise, if the relationship can be characterised as an unsecured loan or a gift with a condition, then the court will treat it as such and the principles in \textit{Muschinski v Dodds} will not apply.\textsuperscript{89} This is also the case if statute already provides a resolution for the breakdown of a joint endeavour.\textsuperscript{90}

\textsuperscript{84} Ibid 22 [78].
\textsuperscript{85} Ibid 22–23 [79]–[80].
\textsuperscript{86} Parianos v Melluish (2003) 30 Fam LR 524.
\textsuperscript{87} Excel Quarries Pty Ltd v Payne [1999] QSC 59; Excel Quarries Pty Ltd v Payne [2000] QCA 213; Sheather v Staples Waste Removals Pty Ltd (No 2) [2014] FCA 84, [145].
\textsuperscript{88} Ferryboat Pty Ltd v Gray [1999] TASSC 126, [44]; WMJ Attractions Pty Ltd v Ireland [2008] QSC 140, [35], [39].
\textsuperscript{89} Re Lofthouse [2013] VSC 341; Craig v Craig [2015] SADC 109. See also Paul v Speirway Ltd (in liq) [1976] Ch 220.
\textsuperscript{90} Arrow Custodians Pty Ltd v Pine Forests of Australia Pty Ltd [2008] NSWSC 839, [47]–[67].
Another example is a breach of fiduciary duty, where its associated principles and remedies may be all that is required to remedy a situation without turning to the windfall equity. In these circumstances, there is a principle that is already applicable, but the principles in *Muschinski v Dodds* may still be relied upon as an alternative pleading.

However, although the parties’ intentions should be given as much effect as possible, there are circumstances where implications cannot be drawn to resolve the issue. In these circumstances, without any other recourse, the principles in *Muschinski v Dodds* may step in to ‘fill in the gaps’ to resolve the issue. This is also the case where an arrangement may fall short of a formal relationship, such as a partnership. This is especially important as, although implications may be drawn before using the principles in *Muschinski v Dodds* to ‘fill in the gaps’, imputation of intention is not permitted. This is particularly so as it may not be possible to predict what a party may have agreed to if they had given an issue some thought.

If it can be shown that a party had intended to retain or obtain full beneficial ownership of property, or if otherwise all the relevant parties did not intend to participate in a joint endeavour, then there is no room to find that the property in question was held for the benefit of another. For example, the transaction may be an unconditional gift, or a party may have intended to retain beneficial ownership of property. This means that the principles in *Muschinski v Dodds* cannot apply, as it is not unconscionable to deal with property that one has absolute unburdened title to. If the true nature of the relationship calls for another principle

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93 Minter v Minter [2000] NSWSC 100, [106].
94 Roxborough v Rothmans of Pall Mall Australia Ltd [2001] 208 CLR 516. See also Executive Seminars Pty Ltd v Peck [2001] WASC 229, [230].
95 See also Roxborough v Rothmans of Pall Mall Australia Ltd [2001] 208 CLR 516, 576–577 [162]–[164] (Kirby J).
98 Millner v Secretary, Department of Social Security [1986] AATA 287; Lutwyche v Secretary, Department of Social Security [1987] AATA 144; Dineen v Secretary, Department of Social Security [1988] FCA 425; Marshall v Secretary, Department of Social Security [1989] AATA 314; Tokolyi v Secretary, Department of Social Security (1992) 26 ALD 97; Sadto v Secretary, Department of Family and Community Services [1999] AATA 855; Carpenter v Secretary, Department of Families, Community Services and Indigenous Affairs (2006) 90 ALD 366; Secretary, Department of Education, Employment and Workplace Relations v

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where another remedy suffices, such as an express trust or a common intention constructive trust; then as discussed above, the principles in *Muschinski v Dodds* may not be necessary to consider, but may be an alternative pleading.

This may also work the other way by showing that a prima facie gift or other entitlement was actually made in the context of a joint endeavour. This shows the regard of the principles in *Muschinski v Dodds* for content over form. The parties’ intentions might be apparent prima facie, but a more thorough consideration of all the facts and circumstances might alter the effect of those intentions.

The principles in *Muschinski v Dodds* may also assist even if there is no contractual or statutory enforceability of an agreement. A party’s conscience may still be personally affected along the lines of the parties’ arrangement, even if it falls short of enforceability.

B The Joint Endeavour

The intentions of the parties are crucial to finding the existence of a joint endeavour. For a joint endeavour to exist, the parties’ interests must be congruent. Apart from the parties’ intentions being the same, their interests must be intertwined in some way that is more than a usual contracting party’s ‘selfish interests’. The intertwining of interests may be related to the existence of fiduciary duties in some joint venture contracts, or the existence of fiduciary duties in general. As there is no settled common law meaning of what a joint venture is, it is possible that the similar principles that give rise to fiduciary duties in joint ventures are the same that underpin the operation of the principles in *Muschinski v Dodds* in relation to joint

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99 *Cameron v Secretary, Department of Families, Community Services and Indigenous Affairs* [2006] AATA 1049.
100 *Kyrigos v Secretary, Department of Families, Community Services and Indigenous Affairs* [2006] AATA 115 ALD 26.
101 See *Clout v Markwell* [2001] QSC 91.
102 *Secretary, Department of Family and Community Services v Amine* (2005) 85 ALD 660.
103 *Draper v Official Trustee in Bankruptcy* [2006] 56 FCR 53.
105 *Clancy v Saliento Pty Ltd* [2000] NSWCA 248, [195]–[201].
106 Cf *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; *King v Adams* [2016] NSWSC 1798, [348]–[356].
107 *Daoud v Boutros* [2013] NSWSC 687, [78]–[79].

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endeavours. The parties’ intentions may change throughout the course of their relationship, so the nature of the joint endeavour may change in relation to those changing intentions.

Intentions also affect the making of contributions to a joint endeavour. If payments are made in relation to property then, unless it is supported by the parties’ intentions, that payment by itself does not alter the parties’ proprietary interests. If there is no legitimate expectation or intention that a party should take an interest in property due to their contributions, then no joint endeavour can be found and therefore no entitlement to a proprietary interest will be found.

Contributions cannot, by themselves, alter proprietary interests. Similarly, without any contribution, there can be no interest. However, if an expectation is legitimate and supported by contributions made towards the property, then such an entitlement may arise. If a payment or contribution towards property was made based on an understanding (even a loose unwritten understanding) that a proprietary interest would be acquired, then that may be sufficient to found an interest in the property due to the intentions of the parties. Such contributions made towards a joint endeavour may give an entitlement to have those contributions returned upon its collapse.

The parties’ status as a married couple or as de facto partners is not, by itself, sufficient. There must be something more. Similarly, a unilateral act taken by one party without the knowledge of another does not form a joint endeavour, and any contributions made by that person to any

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108 This concept will be explored in greater detail in the next chapter.
112 Trajkoski v Western Australia [2017] WASC 273, [31]–[38]. See also Calverley v Green (1984) 155 CLR 242.
113 Stribrny v Western Australia [2015] WASC 396, [81]–[93].
114 Kidner v Secretary, Department of Social Security (1993) 18 AAR 545.
116 Yeo v Arifovic [2017] FCCA 604.
property that they are not otherwise beneficially entitled to will not be recognised, as the contribution is effectively voluntary.\footnote{118}{Rankin v Official Trustee in Bankruptcy (2005) 220 ALR 723, 731 [45]–[47].}

In considering a claim, a party’s contributions should be properly ascertained as to their proportion in relation to property.\footnote{119}{Director of Public Prosecutions (NSW) v Diez [2003] NSWSC 238, [23].} Legitimate contributions made to property in relation to a joint endeavour may be returned once their value is ascertained.\footnote{120}{Campana v Western Australia [2008] WASC 230, [124]–[125].} The same principle applies if the parties had a legitimate expectation of receiving a gift or other entitlement to property pursuant to a joint endeavour wherein they did not receive legal title.\footnote{121}{Stavrianakos v Western Australia [2016] WASC 64, [331].}

There appears to be a principle that, when contributing disproportionately to a marriage, there is a presumption that those contributions are held beneficially in proportion to those respective contributions.\footnote{122}{Prentice v Cummins (2003) 134 FCR 449, 466 [60].} This appears to follow \textit{Calverley v Green} wherein unless a contribution could be shown to have been a gift, then Equity will not treat it as one. It seems then that if contributions were made to a joint endeavour, they will be returned upon the end of the joint endeavour if the contributions were not intended as a gift.\footnote{123}{Re Weeding [1992] TASSC 40.}

C Constructive Trusts and Remedies

The payment towards property under a joint endeavour may support an interest in that property. In these circumstances, a constructive trust may arise. A constructive trust will arise to grant a proprietary interest at the time that the circumstances construe the existence of the trust (in this case, being the payment or contribution).\footnote{124}{Surfers Paradise Investments Pty Ltd v United Investments Pty Ltd [1997] QSC 179.} Although the constructive trust does not arise upon curial order, a court may still make an order that modifies the effect of the constructive trust to suit the circumstances of the case.\footnote{125}{News Ltd v Australian Rugby Football League Ltd (1996) 58 FCR 447, 545–546; News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410.}

Fiduciary duties may be implied in some joint venture contracts where the trust of other parties to the joint venture is integral to the venture and assets held by one party to the joint venture may be held on constructive trust for the benefit of the other parties in the joint venture.\footnote{126}{As mentioned earlier, this may be related to the existence of constructive trusts in joint endeavour cases.} A
constructive trustee owes the duties associated with trusteeship, including fiduciary duties, and a constructive trustee may act in such a way as to amount to a breach of fiduciary duty.\textsuperscript{127}

The windfall equity may also grant a proprietary remedy. Even if statute prevents a legal or equitable transfer of property, this does not affect any personal remedy a party may have against the other.\textsuperscript{128}

A constructive trust arises at the time when it would be unconscionable to deny another’s interest in property or otherwise to improperly assert full beneficial ownership, not upon curial order.\textsuperscript{129} Conduct gives rise to a constructive trust, rather than any wrongdoing being necessary,\textsuperscript{130} although wrongdoing may give rise to a constructive trust.\textsuperscript{131} If such a trust exists, it would be unconscionable for a third party to compel another to act contrary to their constructive trust obligations.\textsuperscript{132}

The institutional nature of the constructive trust, by arising at the time the circumstances construe its existence, may avoid claims against the property held by the constructive trustee as the constructive trustee is not personally entitled to the property they are holding on constructive trust.\textsuperscript{133} If a constructive trust exists, then the constructive trustee owes the duties of a trustee, including fiduciary duties.\textsuperscript{134} This makes it possible to be held in breach of fiduciary duty after being held as a constructive trustee.

As the existence of a constructive trust is construed by circumstances, it arises by operation of law. It does not need to be claimed as a remedy: it is possible for a third party who is not the beneficiary of a constructive trust to claim its existence and the consequences that flow from that operation of law.\textsuperscript{135} The constructive trustee may also claim the benefit of the constructive trust arising by operation of law in circumstances where claiming it as a remedy may otherwise

\textsuperscript{127} Macks v Emanuele [1998] SASC 6523.
\textsuperscript{128} Flint v Sorna Pty Ltd [1999] WASCA 1040; Sorna Pty Ltd v Flint (2000) 21 WAR 563.
\textsuperscript{129} Case No ST 93/27 (1994) 29 ATR 1238, 1244 [52]; Secretary, Department of Social Security v Evans [1997] AATA 739; Agnew v Secretary, Department of Social Security [1999] FCA 837; Secretary, Department of Social Security v Agnew (2000) 96 FCR 357.
\textsuperscript{130} See Secretary, Department of Social Security v Agnew (2000) 96 FCR 357.
\textsuperscript{131} See Zobory v Commissioner of Taxation (Cth) (1995) 64 FCR 86.
\textsuperscript{132} See Secretary, Department of Social Security v Agnew (2000) 96 FCR 357, 365–366 [18]–[20].
\textsuperscript{133} Francey v Commissioner for ACT Revenue [2013] ACAT 84; Commissioner for ACT Revenue v Francey [2014] ACAT 67; Taleb v Director of Public Prosecutions (Vic) [2014] VSC 285, [80]–[88].
\textsuperscript{135} Rail Plus Pty Ltd v Ng [2013] VSC 429; cf Deputy Commissioner of Taxation v Vasiliades (2014) 323 ALR 59.

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deny relief, such as by enlivening the equitable maxim of clean hands. This means that third parties must be aware of potential equitable interests and may be subject to them.

However, a constructive trust may not be the ultimate remedy if a simpler remedy (or declaration) may suffice. Further, if a constructive trust would have no practical effect, regardless of its applicability, the court will exercise its discretion and decline to find the existence of a constructive trust. The court’s discretion may also be exercised to defeat or defer a claim for a constructive trust in preference to another claim where appropriate.

If there is no property to declare a constructive trust over, then contributions to a joint endeavour may still be unwound, but that remedy will be of a personal nature rather than proprietary. If contributions cannot be linked to property, then a personal remedy such as equitable compensation may suffice, which may also be secured by an equitable charge where appropriate.

D Equity in General

Equity does not necessarily intervene due to one party being deprived of ‘independent judgment and voluntary will’. Equity intervenes because that party’s ability to make worthwhile judgments about their own interests had been removed or otherwise overridden by the other party.

Unjust enrichment is the unifying theory behind restitution for the old actions once termed quasi-contract. However, unjust enrichment is not to be used to replace well-established equitable principles based on unconscionability. This is particularly important in Australia as theory is developed from case law, rather than case law being developed from theory.

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138 Kozolup v Secretary, Department of Family and Community Services [1999] AATA 891.
139 Katingal Pty Ltd v Amor (1999) 162 ALR 287, 292 [10].
140 Parsons v McBain (2001) 109 FCR 120, 126 [14]–[16].
141 Brooker v Friend [2006] NSWCA 385, [193].
142 Dawson v Western Australia [2014] WASC 113, [132]–[134].
146 See generally Gummow J in Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516.

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development of case law must be legitimate, “by precedent out of principle”. Presently, unjust enrichment by itself is not a cause of action in Australia.

Although the principles in *Muschinski v Dodds* operate when it would be unconscionable to assert a benefit to the exclusion of another, unconscionability is not a cause of action in itself in Australia. Further, a claimant cannot take a benefit without its burden. In other words, to seek Equity, one must do Equity. It was said that if a party to the joint endeavour could potentially use their entitlement to the benefit of another, this will defeat creditors and will not sustain a claim. This is also incorrect, as this conception of the principles in *Muschinski v Dodds* treats it as a form of quasi-family law: had the case involved a separated couple, then the reasoning would have broken down.

It was also said incorrectly that if there is no positive act of unconscionable conduct by a joint endeavourer, then the windfall equity does not apply. This is patently incorrect. Whilst a trustee in bankruptcy may not be committing any unconscionable act in undertaking their statutory duties, it is the denial of another’s equitable interest which is the form of unconscionability that construes the existence of a trust. This is called an unconscionable retention or assertion of benefit.

It has been said that the windfall equity operates upon the breakdown of a joint endeavour, and if there was no breakdown, there is no remedy. This principle appears dubious and is related to treating a constructive trust as purely remedial, without recognising that it may arise by operation of law and has institutional characteristics. It is in fact not necessary for a joint endeavour to break down for a constructive trust to be found. It appears that the constructive trust arises upon the circumstances that construe its existence and does not need to be recognised as a remedy first. It is not a ‘mere remedy’ as, by operation of law, it construes a

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147 *Tenth Vandy Pty Ltd v Natwest Markets Australia Pty Ltd* [2012] VSCA 103, [134] (Nettle and Neave JJA).
148 *Excel Quarries Pty Ltd v Payne* [1999] QSC 59; *Excel Quarries Pty Ltd v Payne* [2000] QCA 213.
150 *Katingal Pty Ltd v Amor* (1999) 162 ALR 287. See also *Messenger v Andrews* (1828) 4 Russ 478; *Gregg v Coates* (1856) 23 Beav 33.
153 *Clout v Markwell* [2001] QSC 91, [19].
155 *Director of Public Prosecutions (Vic) v Ali (No 2)* [2010] VSC 503, [81]–[87]; *Director of Public Prosecutions v Mattiuzzo* (2011) 29 NTLR 189, 202–203 [50]–[51].

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proprietary interest.\textsuperscript{157} Instead, it can be used to protect and ensure the ongoing existence of a joint endeavour, especially when it would ensure the survival of the joint endeavour where other remedies such as an equitable accounting would not be possible.\textsuperscript{158}

VII Summary of Issues

A number of issues need to be addressed by this thesis before a coherent restatement of the windfall equity and joint endeavour principle can be made. The issues are set out below.

A Distinction Between Cause of Action and Principle

The windfall equity and joint endeavour principle have been conflated and applied without regard to the distinction between cause of action and principle. This has caused considerable confusion about how they operate. This is evident from the analysis in this chapter, whereby the principles in \textit{Muschinski v Dodds} are used to construe trusts in one instance while simultaneously being unnecessary in another instance.

The joint endeavour principle may regulate fiduciary duties and may construe trusts in joint endeavours. The windfall equity appears to operate as a cause of action when a joint endeavour breaks down. The problem here is that the courts have applied various principles haphazardly without sufficiently identifying the principles used or their appropriate application. Although the case law seems to say that the windfall equity as a cause of action operates when a joint endeavour breaks down, the principles that apply (the joint endeavour principle) seem to exist independently of the cause of action, and also find expression in partnership and contractual ‘joint venture’ law. The distinction between these two concepts and how they operate will be discussed in the next chapter.

B Joint Endeavours

The formation of a joint endeavour requires explanation. It has been said that for a joint endeavour to exist, the parties’ interests must be congruent and intertwined in a way beyond the parties’ own ‘selfish interests’.\textsuperscript{159} As there is no settled common law meaning of what a joint

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\textsuperscript{157} Parsons \textit{v} McBain (2001) 109 FCR 120.
\textsuperscript{158} Sui Mei Huen \textit{v} Official Receiver for Official Trustee in Bankruptcy (2008) 248 ALR 1, 20–23 [70]–[81].
\textsuperscript{159} Clancy \textit{v} Solinta Pty Ltd [2000] NSWCA 248, [195]–[201].
venture is, it is possible that the same principles that give rise to fiduciary duties in some joint ventures are the same in joint endeavours.

It seems to be the case that contractual joint ventures, joint endeavours and partnerships do not have their gaps ‘filled in’ by the windfall equity or joint endeavour principle. Rather, it seems to be that Equity has general principles that apply to all joint endeavours, regardless of which form they take. It is then that more developed areas of law such as contract and partnership law may take precedence, but any gap is caught by Equity. There is some principle or set of principles at the base level that binds various joint endeavours together under one unified area of law. This seems to operate independent of any cause of action. This principle also seems to regulate fiduciary duties and construes trusts, which has ramifications for joint endeavours in general. This underpinning set of principles may collectively be referred to as the joint endeavour principle. Further, the windfall equity may also be an alternative cause of action if other actions such as breach of fiduciary duty cannot be easily proven.

C Constructive Trusts and Remedies

How and when a constructive trust arises in a joint endeavour is important, as it is possible that constructive trusts are integral to the operation of the windfall equity. As they arise by conduct, not curial order, the institutional nature of the constructive trust may have ramifications for the conduct of the parties, as the constructive trustee will owe the duties of a trustee, including fiduciary duties. It is also important that the constructive trust arises without any wrongdoing having been committed: the circumstances themselves, regardless of any “wrong” act, give rise to the constructive trust. This is relevant to the concept of attributable blame, which will be discussed in the following chapters.

The constructive trust is a proprietary remedy, but if there is no property to declare a constructive trust over, then contributions to a joint endeavour may still be unwound, but that remedy will be of a personal nature rather than proprietary. A personal remedy is not defeated just because a proprietary remedy is not available. How does a constructive trust arise and what are its institutional and remedial characteristics?

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160 *Daoud v Boutros* [2013] NSWSC 687, [78]–[79].
161 *Macks v Emanuele* [1998] SASC 6523; *Emanuel Management Pty Ltd (in liq) v Emanuele* [1998] SASC 6924. This is different from the ‘remedial’ constructive trust which is intended as an immediate remedy.
162 *Brooker v Friend* [2006] NSWCA 385, [193].

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D Equity in General

The question of when Equity operates requires explanation. Equity, at least in relation to economic duress, operates when a party has been deprived of the ability to make a worthwhile judgment about its own interests. The issue of how unconscionability arises, and how it construes trusts in a joint endeavour, will be addressed in the next chapter.

E Breakdown of the Joint Endeavour

The windfall equity as a cause of action applies when a joint endeavour has broken down. However, the joint endeavour principle may construe trusts and fiduciary duties in a joint endeavour without a breakdown being necessary. This means that constructive trusts and fiduciary duties may be inherent in joint endeavours given the nature of the parties’ relationship in a joint endeavour. It seems that a constructive trust in these circumstances cannot be purely remedial: there is a proprietary aspect that predates any breakdown of a joint endeavour.

VI: Theory

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I  The Theory

As discussed in the previous chapters, the principles in Muschinski v Dodds\(^1\) have been used both as a cause of action and as a set of general principles, but the courts have not made an effort to distinguish the two. This use as a cause of action and as a principle, or a ‘sword’ and ‘shield’ respectively, mirrors the remedial-institutional ‘divide’ in characterising constructive trusts.

Unfortunately, this distinction has never been explicitly acknowledged in the case law. There is also a lack of commentary in this area, as it seems many commentators focus on High Court authorities such as Muschinski v Dodds and Baumgartner v Baumgartner.\(^2\) The law has had a lot of development in the thirty-plus years since those two cases, and if this period of development is ignored, then the law cannot be properly understood. However, both case law and current commentary are not sufficient to explain what is happening.\(^3\) These deficiencies will be discussed before proposing a theoretical framework to analyse and understand the law.

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\(^1\) Muschinski v Dodds (1985) 160 CLR 583.
\(^2\) Baumgartner v Baumgartner (1987) 164 CLR 137.
A Problems with Cases

Although the cases in both the sword and shield contexts apply the principles in *Muschinski v Dodds*, the fact that the same principles arrive at different results without explanation is a problem, because these different results reinforce a distinction between ‘remedial’ and ‘institutional’ when that distinction should not exist.

There is clearly some underlying distinction between the two approaches. In some instances, the principles in *Muschinski v Dodds* apply in the breakdown of a joint endeavour to grant any number of equitable remedies, whereas in other instances, those same principles are used to find the existence of a trust prior to any breakdown and, in some instances, without a breakdown ever happening. There must be some concept here that delineates these two approaches that has not yet been properly articulated. This and the next chapter will put forth that the ‘windfall equity’ used by the courts since 1985 has combined two separate elements which need to be separated. These are the ‘joint endeavour principle’ and the ‘windfall equity’.

The joint endeavour principle will be shown to be that “general principle of Equity” identified by Deane J in *Muschinski v Dodds* which applies to all joint endeavours. This includes the general ‘joint endeavours’ as discussed previously in this thesis, but also includes contractual ‘joint ventures’ and partnerships. The joint endeavour principle is a set of principles which apply generally to all of these ‘joint endeavours’, which serves to provide a basis for parties to any joint endeavour to rely upon in case their endeavour fails, whether it is an informal arrangement, a contractual arrangement, or a sophisticated partnership. These principles include when a joint endeavour is formed, how fiduciary duties are regulated in a joint endeavour, and when property in a joint endeavour may be held on constructive trust. These principles have ramifications for other causes of action such as breach of fiduciary duty, and the construal of trusts likewise has a similar impact on the arrangements between the parties to the joint endeavour and other third parties.

The windfall equity will be shown to be a cause of action that only operates when a joint endeavour has collapsed. This cause of action allows the parties to seek a number of equitable remedies. This requires a joint endeavour to be or to have been in existence, which necessarily requires consideration of the joint endeavour principle to identify if a joint endeavour exists. As the joint endeavour principle also regulates the existence of fiduciary duties and constructive

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4 *Muschinski v Dodds* (1985) 160 CLR 583, 619 (Deane J).

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trusts in a joint endeavour, fiduciary duties and constructive trusts are also relevant to how the windfall equity may finalise the parties’ joint endeavour. In doing so, the windfall equity seeks to restore the parties to their position prior to the joint endeavour, subject to the parties’ intentions throughout the endeavour. It also operates without attributable blame, meaning that even if the parties have some other cause of action, such as breach of fiduciary duty, the parties may rely on the windfall equity as an alternative cause of action as they do not need to prove any attributable blame on behalf of any party.

B Problems with Commentary

As discussed earlier in this thesis, there is a gap in the literature concerning the principles in Muschinski v Dodds. Muschinski v Dodds and Henderson v Miles (No 2) have been characterised as constructive trust cases in the context of cohabitation or as arising from windfalls. This was so despite Henderson v Miles (No 2) not mentioning constructive trusts at all.

However, commentary on these cases seems to largely relate to remedial constructive trusts. There is a dearth of literature on joint endeavours that break down without attributable blame, which seems to be a rather large oversight given that this issue was the entire “principled basis” for awarding a constructive trust in Muschinski v Dodds in the first place. Rather, Muschinski v Dodds is treated as a kind of lodestar for remedial constructive trusts that do not require a breach of fiduciary duty.

This is concerning, as it is clear from the previous chapters that, although many cases treat the principles in Muschinski v Dodds as giving rise to a remedial constructive trust, there still remains a vast amount of cases that treat those principles as giving rise to an institutional constructive trust. The literature that characterises the principles in Muschinski v Dodds as only giving rise to remedial constructive trusts cannot be reconciled with the case analyses in previous chapters. Examples of this remedial-only approach in the literature include Bant and Bryan who suggest that, if Muschinski v Dodds were decided today, the appropriate remedy should have been an equitable charge as was originally proposed by Gibbs CJ. Wright also gives an example of a court

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5 Henderson v Miles (No 2) [2005] NSWSC 867.
8 Bant and Bryan, above n 7, 190–191.
ordering that a constructive trust will not exist when another party has a higher priority, instead preferring an equitable lien.\(^9\)

These approaches are consistent with the idea of a remedial constructive trust existing at the date of judgment, but this is not the full state of the law. In the intervening years, too much emphasis has been placed on the date of operation of the constructive trust in *Muschinski v Dodds*. Whilst it is true that the constructive trust in *Muschinski v Dodds* was held to take effect at the date of judgment, this was done to avoid potential prejudice to third parties.\(^10\) It was explained in *Parsons v McBain*\(^11\) that a constructive trust arises on the date the facts construe its existence: the discretion to otherwise alter its date of operation can only be exercised if it would be defeated by or deferred to another claim.\(^12\)

It has been established through the case analyses in previous chapters that a constructive trust may arise in a failed joint endeavour well before any claim actually arises. It would be contrary to established case law to characterise *Muschinski v Dodds* as authority for a “date of judgment” constructive trust\(^13\) when the case law explicitly says that the constructive trust arises upon circumstances that construe its existence, and that the discretion to change its date of operation is narrow, not wide.

There should not be a distinction between ‘remedial’ and ‘institutional’ when talking about constructive trusts in failed joint endeavours. This point can be further demonstrated with regard to Dal Pont’s commentary on *Muschinski v Dodds*.

Dal Pont draws this distinction between remedial and institutional constructive trusts by saying that the constructive trust in *Muschinski v Dodds* was not an “avenue (or trigger)”\(^14\) for relief, but was a remedy in itself.\(^14\) Although he notes that a constructive trust may be recognised by court order, he also says that a constructive trust may be *created* by court order.\(^15\) He says that this latter form of constructive trust is a remedial response which arises to prevent unconscionable conduct, in contrast to a constructive trust arising upon the breach of a fiduciary duty. He claims


\(\)\(^10\) *Muschinski v Dodds* (1985) 160 CLR 583, 623 (Deane J).

\(\)\(^11\) *Parsons v McBain* (2001) 109 FCR 120.

\(\)\(^12\) Ibid 126 [14]–[16].

\(\)\(^13\) Cf Bant and Bryan, above n 7, 190–191.

\(\)\(^14\) Dal Pont, above n 7, 465.

\(\)\(^15\) Ibid 466.
that this difference in operation is what maintains the distinction between institutional and remedial constructive trusts.\textsuperscript{16}

However, the case analyses undertaken in previous chapters cannot sustain Dal Pont’s distinction between remedial and institutional trusts in the context of failed joint endeavours. Whilst it is true that the type of constructive trust in \textit{Muschinski v Dodds} does indeed allow a constructive trust as a remedy for an unconscionable retention of property, this is not all. The exact same principles are also used to justify the existence of a constructive trust at a time \textit{well before} any unconscionable behaviour arises. This is evidenced by the cases where a constructive trust is found to predate the rights of third parties without any unconscionable conduct on behalf of the person actually controlling the property being necessary.\textsuperscript{17}

These constructive trusts arise to prevent unconscionable conduct, rather than remedy unconscionable conduct. This is because they arise at a time where it \textit{would} be unconscionable to assert an interest in property, as opposed to arising \textit{after} an unconscionable assertion to property has been made.\textsuperscript{18} In other words, the constructive trust arises by the conduct of the parties, and \textit{not necessarily} by wrongdoing. This view does not support Dal Pont’s distinction between remedial and institutional trusts. Whilst it is true that a breach of fiduciary duty may give rise to a constructive trust, it does not mean that a constructive trust in any other circumstance must be purely remedial. In a joint endeavour, a constructive trust arises without any wrongdoing being necessary.

A constructive trust in a failed joint endeavour must necessarily arise at a time before the breakdown of the joint endeavour. This is because it is not the breakdown of a joint endeavour which gives rise to a constructive trust, but it is when it would be unconscionable to assert full beneficial ownership of property. This is not dependent on the joint endeavour breaking down. To treat the constructive trust as purely remedial would be to start at the destination, put the cart before the horse, and ride backwards to the beginning. Instead, the correct process is to identify the circumstances that gave rise to a constructive trust first, and then decide on the appropriate remedy.

\textsuperscript{16} Ibid 467–468.
\textsuperscript{17} See, eg, \textit{Clout v Markwell} [2001] QSC 91; \textit{Parsons v McBain} (2001) 109 FCR 120.
\textsuperscript{18} See, eg, \textit{Secretary, Department of Social Security v Agnew} (2000) 96 FCR 357. Although this case concerned estoppel, no promise was ever broken. The constructive trust arose because it would be unconscionable to \textit{break} the promise. The constructive trust secured the rights of the promisees against the promisor without any unconscionable conduct actually occurring.
If this was the incorrect approach, then every case discussed in Chapter 5 that recognised an institutional constructive trust must have been decided incorrectly. Unless it can be successfully argued that these cases are incorrect, then it is clear that a constructive trust may arise during a joint endeavour, and not merely as a remedial response after the fact. The fact that parties have taken higher priority than third parties due to this constructive trust shows that it must exist well before any alleged unconscionable conduct. It would be a fiction to suggest that a later equitable interest somehow attains earlier priority over an earlier legal interest – thankfully, this fiction is unnecessary if the argument in this thesis is accepted.

A distinction between ‘remedial’ and ‘institutional’ constructive trusts in joint endeavours cannot be maintained. It appears that the principles in *Muschinski v Dodds*, at least in relation to joint endeavours, construe a trust that cannot be neatly categorised as ‘remedial’ or ‘institutional’. A constructive trust has institutional characteristics by arising during a joint endeavour, but it also has remedial characteristics when being used as a remedy upon the breakdown of a joint endeavour. As stated by Deane J, the distinction most emphatically is “ephemeral”.

**C Theoretical Assistance**

There appears to be a disposition by commentators towards theories of unjust enrichment in characterising the principles in *Muschinski v Dodds*. It was also said by Toohey J in *Baumgartner v Baumgartner* that unjust enrichment might be an equally valid explanation as unconscionability.19 It has also been suggested that Deane J in *Muschinski v Dodds* may have simply given unjust enrichment a different name.20 The influence of unjust enrichment may be seen in the works of the commentators discussed earlier in this chapter who take a purely remedial view of the constructive trust in *Muschinski v Dodds*.

The problem here is that many commentators focus on the High Court cases of *Muschinski v Dodds* and *Baumgartner v Baumgartner*. Whilst these High Court cases are important, to focus on these cases misses out on over thirty years of development in case law. In those thirty years, the cases adopt unconscionability as the correct approach. Further, the case law itself does not seem to be able to be reconciled with an approach based on unjust enrichment. How does unjust enrichment apply if there is no wrongdoing and if there is no compulsion to return the property?

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Unjust enrichment may explain a post-facto constructive trust in the remedial sense, but it cannot explain how a constructive trust may arise before any wrongdoing is committed and before the breakdown of a joint endeavour.

It is the institutional protection of property during a joint endeavour without any wrongdoing being necessary that renders unjust enrichment an unsuitable basis to explain the mechanics at play.\(^\text{21}\) Despite this unsuitability, a remedial view of constructive trusts that is consonant with unjust enrichment is still a pervasive perspective. Unfortunately, this approach does not accord with the practical reality of the parties’ relationship in a joint endeavour. Adopting unjust enrichment requires the law and the facts to be distorted in order to fit that perspective without any justification for doing so.\(^\text{22}\)

Rather than applying unjust enrichment to the case law, this thesis intends to build a theoretical model to analyse the windfall equity and joint endeavour principle in a way consistent with the case law. This will involve the concept of unconscionability, not unjust enrichment. In doing so, it will explain how the windfall equity and joint endeavour principle operate in a way that removes confusion and uncertainty expressed in the case law as identified earlier in this thesis. It also provides an explanation that is harmonious with the case law and does not require distortion of the law or the invention of any legal fiction to support it.

This approach is based on the view that theory should be developed from case law. This also happens to be the approach taken by the High Court of Australia. To quote the words of Gummow J:

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\text{To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.}^{\text{23}}
\]

\(^{\text{21}}\) Cf Bant and Bryan, above n 7, 190 fn 104.

\(^{\text{22}}\) Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, 545 [74] (Gummow J). See also Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 516.

\(^{\text{23}}\) Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, 544 [72] (Gummow J).
Much like idiosyncratic notions of justice and fairness not being a valid basis to discard legal and equitable rights,\(^\text{24}\) neither is a theory developed independently of case law an acceptable reason to impose liability and award relief. It is for these reasons that the significant case analyses in the previous chapters were undertaken: the principles exist in the case law, but they have never been appropriately discussed or harmonised to date.

In the common law, the development of general principle derived from case law is called the ‘bottom-up’ approach. Conversely, the ‘top-down’ approach develops general principle from theory to which case law must conform.\(^\text{25}\) There are noteworthy criticisms for not adopting the top-down approach. For example, theory developed from case law necessarily has future case law referring back to previous case law, which was itself developed from previous case law, and so on and so forth. It may be argued that the bottom-up approach involves circular reasoning and that there should be some explanation independent of case law.

Another particular criticism of bottom-up reasoning is the issue of taxonomy. When case law develops incrementally, especially by analogy, it is possible that the law may not develop in an ideal way. These considerations of ideal taxonomy were raised by Professor Peter Birks who argued that Equity should be accurate, and that proper classification promotes understanding of the law without changing the law.\(^\text{26}\) However, it has been said that new taxonomy necessarily changes how the law may be viewed, which in turn may spur development of the law in such a way that it no longer applies the principles that gave the law its character to begin with.\(^\text{27}\) The principles in *Muschinski v Dodds* exemplify this: should they be classified as a cause of action, a principle, or both? And more importantly, why? It has been shown in the previous chapters that incremental development of the law has led to this inconsistent treatment.

However, as valid as those criticisms of the bottom-up approach may be, this is the current approach of courts in Australia. Equity derives its operation from its own internally developed principles. This is not a problem when one adopts the view that the purpose of private law is to


be private law and should be “grasped from within”, rather than viewing it as “the juridical manifestation of a set of extrinsic purposes”.\textsuperscript{28} Without presupposing what such extrinsic purposes may be, this thesis proceeds by examining the windfall equity and joint endeavour principle in terms of their own “internal unity”\textsuperscript{29} by reference to those internally developed principles of Equity. Although a black-letter common law lawyer may say that the case law will eventually work itself out, this thesis attempts to expedite that process. This will be done by providing a comprehensive explanation consistent with the case law that judges, when writing curially, may not have the luxury of exploring in depth.

Part of the inconsistent treatment examined by this thesis is in fact directly tied to bottom-up legal reasoning. This is exemplified by the pleadings of the parties in three of the main cases discussed earlier in this thesis. In \textit{Muschinski v Dodds}, only a resulting trust or constructive trust was pleaded. This meant the discussion on contribution giving rise to an equitable charge and the discussion on gifts with conditions was ultimately not relevant because, as the plaintiff did not plead her case on those bases, they could not be considered. In \textit{Lloyd v Tedesco}, the pleadings were structured in such a formulaic way that, when seeking special leave to appeal to the High Court, it was considered that the entire case would need to be repleaded because it was not an appropriate vehicle to properly address the principles in \textit{Muschinski v Dodds}. Finally, in \textit{Henderson v Miles (No 2)}, the plaintiff raised almost entirely equitable estoppel cases when trying to calculate the compensation payable, despite Young CJ in \textit{Eq} explicitly stating that the windfall equity, although similar to estoppel, is distinguishable from estoppel. Although these examples may be a criticism of bottom-up reasoning, this factor is mentioned to highlight how taxonomy really is important to the development of the law in Australia.

Despite the above examples, developing theory in a way that is consonant with case law is chosen as a method in this thesis for three reasons. The first reason is that there is no basis to suspect that courts in Australia will turn Equity on its head and seek to overhaul its current principles. There is also no justification to use unjust enrichment, as current explanations based on unjust enrichment have not accounted for the lack of distinction between the constructive trust’s use in a joint endeavour as being both remedial and institutional.

The second reason is that, whether under the influence of one philosophical zeitgeist or another, over the centuries, the law continually changes. It adopts and discards theories over time; it is

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\textsuperscript{29} Ernest Weinrib, \textit{Corrective Justice} (Oxford University Press, 2012) 32.
“a mosaic, and a mosaic which is kaleidoscopic in the sense that it is in a constant state of change in minute particulars”\textsuperscript{30} To replace old law with new law according to whichever theory is now in vogue lends little consistency to those who require the assistance of the law.

Further, as attractive as arguments for proper taxonomy may be, there must still be a basis for developing the appropriate taxonomy, and such a reclassification does change the law\textsuperscript{31} This thesis takes the view that, if the law requires appropriate classification, then it should be classified according to what the law is upon an appropriate examination and analysis of that law, rather than developing a theory independent from it to which the case law must conform. As said earlier, this thesis attempts to supplement the development of the law, rather than seeking to supplant it by twisting the law to fit the theory. Although the bottom-up approach may have led to inaccurate taxonomy, this is not a failure of the law, but rather is merely reflective of the practical realities of the law. Very few courts other than the High Court have the luxury of exploring over 600 cases to fully untangle the topic of this thesis, especially when they can still deliver an appropriate judgment without doing so in order to expedite the case load on the court.

The third reason for this thesis developing theory from case law is that the law may lose its flexibility if it is required to conform to an overarching theory developed independently from case law, and if a new overarching theory is developed, the law may lose predictability as its fundamental basis changes with the theory. If an “all-embracing” theory was developed to explain the windfall equity and joint endeavour principle in a way divorced from current case law, then “substance and dynamism may be restricted by dogma. In turn, the dogma will tend to generate new fictions in order to retain support for its thesis. It also may distort well settled principles in other fields, including those respecting equitable doctrines and remedies, so that they answer the newly mandated order of things.”\textsuperscript{32}

Further, the top-down approach “reflects a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development.”\textsuperscript{33} The “inevitable offshoot of an all-embracing theory” would “bring about an abrupt and violent collision with received principles without any assigned justification.”\textsuperscript{34} This is currently the case with theories of unjust

\textsuperscript{32} Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516, 545 [74] (Gummow J).
\textsuperscript{33} Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, 158 [154].
\textsuperscript{34} Ibid. It is important to note that this decision is a unanimous joint judgment of the High Court of Australia.
enrichment where, in an attempt to explain a remedial constructive trust, the factual realities of the parties’ relationship and how constructive trusts arise during a joint endeavour are distorted to suit the predominantly remedial view. As such, unjust enrichment will not be considered as the theoretical solution to resolving the confusion relating to the windfall equity and joint endeavour principle.

The theory and restatement developed by this thesis will restate the windfall equity and joint endeavour principle by reference to their own internally developed principles. Although the development of the case law has diverged along the ‘sword’ and ‘shield’ lines as explored in the previous chapters, this divergence can be reconciled when the mechanics of a joint endeavour are analysed in the context of corrective justice.

II Corrective Justice: Aristotelian Origins

The theoretical framework of corrective justice is chosen for two reasons. The first reason is that Equity, most often acting in personam in private law, is perfectly suited for a framework that focuses on the relations solely between the persons involved. The second reason is that there is a model of corrective justice that, when adapted for unconscionability, can adequately explain when it would be unconscionable to assert full beneficial ownership of property in a joint endeavour, without needing to make the “remedial” or “institutional” distinction within constructive trusts.

Corrective justice has its origins in Aristotelian virtue ethics as expounded in Aristotle’s work, *Nicomachean Ethics,* and this may be the earliest written account of corrective justice in the history of Australia’s jurisprudence. Corrective justice in private law may be summarised by this quote from Aristotle:

> For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it.

Therefore, this kind of injustice being an inequality, the judge tries to equalize it.  

Aristotle’s virtue ethics focuses on the concept of balance. He believes that by exercising perfect virtue, one reaches happiness. “Perfect virtue” in this sense is the mean between excess and deficiency. This is a form of normative ethics which considers how someone ought to act. Of all the virtues identified by Aristotle, he considers justice to be the greatest virtue. He considers that justice can only be achieved by exercising perfect virtue towards others. Therefore, whereas someone may be virtuous by conducting themselves in a balanced way, they can only be just if they also exercise that balance towards others. To enact justice is to restore balance. It is from this concept of restoring balance that corrective justice operates.

Aristotle talks about lines of various lengths as an analogy for how corrective justice operates. An example of this is where lines A and B are of equal length but, due to theft by A from B, line A is increased by the same amount that line B is shortened. A lot of his examples are framed in mathematical terms, and for those of us less mathematically inclined, a diagrammatic example involving discrete boxes perhaps better illustrates the operation of his version of corrective justice.

Assume a simple theft of property occurs. On the left, Anaximander and Beowulf both own $100,000. The boxes demonstrate their material wealth. However, Anaximander pilfers $50,000 from Beowulf’s bank account. On the right, the boxes have changed to reflect the new state of

\[
\begin{array}{c|c|c|c|c|c}
\hline
& $100,000 & $50,000 \\
\hline
\text{Anaximander} & \text{Beowulf} & \text{Anaximander} & \text{Beowulf} \\
\hline
\end{array}
\]

\[
\begin{array}{c|c|c|c|c|c}
\hline
& $100,000 & $150,000 \\
\hline
\text{Anaximander} & \text{Beowulf} & \text{Anaximander} & \text{Beowulf} \\
\hline
\end{array}
\]

\[> \text{Theft!} >\]

\[\text{Assume a simple theft of property occurs. On the left, Anaximander and Beowulf both own $100,000. The boxes demonstrate their material wealth. However, Anaximander pilfers $50,000 from Beowulf’s bank account. On the right, the boxes have changed to reflect the new state of}\]

38 Aristotle, above n 36, 4.
39 For example, ‘courage’ is the mean between the excess of ‘rashness’ and the deficiency of ‘cowardice’.
40 Aristotle, above n 36, 1.
41 See, eg, Weinrib, The Idea of Private Law, above n 28, 58.
affairs. Anaximander now has $150,000, comprising his original $100,000 plus Beowulf’s $50,000, and Beowulf now only has his remaining $50,000.

Corrective justice demands that balance be restored. Therefore, to do justice, Anaximander must restore the balance by paying back the $50,000 he stole from Beowulf. When balance is restored, justice is done.

The choice to show the parties as both having $100,000 was to show how corrective justice operates in a simple manner. An important part of corrective justice is that the parties’ initial wealth relative to one another is immaterial. What is important is the concept of proportionality. The “just is intermediate, and the unjust is what violates the proportion; for the proportional is intermediate, and the just is proportional.”\(^4\) In this sense, all that matters is the proportion of wealth between Anaximander and Beowulf before and after the theft. When the proportion of wealth is restored, the proportion is balanced, and thus justice is done.

This concept of proportionality is important, as it is a distinction between corrective justice and distributive justice. In corrective justice, the initial proportion of the parties’ wealth is restored, regardless of ‘merit’. In distributive justice, a person’s merit does affect how justice is done. Aristotle gives examples of how merit can be defined in a number of ways, such as a person’s level of freedom, wealth, nobility or excellence.\(^4\) A modern example is the RMIT Bookshop case\(^4\) raised in Chapter 2 of this thesis. In that case, statute provided distributive criteria as to how the distribution of surplus funds in the winding up of the RMIT Bookshop co-operative would operate. Unfortunately, in the absence of parliamentary intention, the question of who is more deserving depends on the scope of the circumstances, which in turn may be influenced by many moral considerations, which may involve parties who may not be directly part of the wrong that was committed.\(^4\)

Corrective justice avoids these concerns of distributive justice by not basing justice on any party’s merit. All that matters in corrective justice is the proportion of the parties’ relative wealth before and after the events that gave rise to the cause of action. Corrective justice is bilateral,

\(^4\) Aristotle, above n 36, 3. The “intermediate” here can be thought of as the ‘middle ground’, in the sense of balance.

\(^4\) Ibid. Aristotle considers merit in three contexts: democracy regarding merit as freedom; oligarchy regarding merit with wealth or noble birth; and the aristocracy regarding merit with excellence.


concerning only a ‘wrong-doer’ and a ‘wrong-sufferer’, where one party has done something to affect another party.

However, this distinction between corrective justice and distributive justice has been criticised, and it is unclear how Aristotle distinguished the two, if at all. For example, if property is destroyed, there is nothing to restore. If the person who destroyed the property must make amends by giving their own property in recompense, this may raise concerns about whether it is just, from a distributive perspective, to hand that property over.\(^{46}\) Merit may then be relevant after all. Further, Robin Hood may fall afoul of corrective justice by stealing from the rich, but he may be justified by distributive justice in giving it to the poor.\(^{47}\) Corrective justice may also be considered to be a way in which distributive justice may operate. If all corrective justice does is correct circumstances according to a distributive criterion, then corrective justice is merely subsidiary to distributive justice, meaning that there is no meaningful distinction between corrective justice and distributive justice at all.\(^{48}\)

In noting these observations, this thesis does not propose that corrective justice is the apotheosis of Equity in Australia, nor does this thesis attempt to make any value judgments about the appropriate philosophical basis of court decisions.\(^{49}\) In the two-plus millennia since Aristotle, there has been plenty of discussion of corrective justice in relation to various areas of law, such as tort and contract law. This thesis merely intends to use corrective justice as a helpful framework to develop a model to show how unconscionability may operate in Australian Equity, and then apply that to the windfall equity and joint endeavour principle.

The intersection of corrective justice and distributive justice is not intended to be discussed. The reason for this is that, in joint endeavours, it is possible for an arrangement to be unconscionable despite the parties not being any worse off as a matter of wealth. For example, a joint endeavour may fail unexpectedly yet there may be a large profit to distribute. The introduction of a distributive criterion necessarily makes a value judgment about who is more deserving of that profit, whereas corrective justice is only concerned with restoring proportionality between the


\(^{49}\) Virtue ethics has been mentioned by this thesis merely as background to Aristotelian corrective justice and is not being relied on. Cf Mark C Modak-Truran, ‘Corrective Justice and the Revival of Judicial Virtue’ (2000) 12(2) Yale Journal of Law & the Humanities 249.
parties. Although this thesis is not opposed to the development of such distributive criteria, such as the statutory criteria that applied in the *RMIT Bookshop case*, it does not make much sense to postulate what that distributive criteria should be if the mechanics of the windfall equity and joint endeavour principle as they currently stand are not yet fully known.

At the very least, corrective justice will be used by this thesis to uncover the mechanics of the windfall equity and joint endeavour principle. In particular, this thesis intends to use a model of corrective justice developed by Professor Ernest Weinrib. The benefit of Weinrib’s model of corrective justice is that he addresses a form of normative imbalance that, when adapted for Australian Equity, explains how unconscionability may operate. This will explain how constructive trusts arise during joint endeavours and when a cause of action may arise. This will be discussed in the next section.

Another reason that corrective justice has been chosen as the theoretical lens for this thesis is that it is an approach that is consonant with the current approach that Australian courts take in relation to Equity as an area of private law. In favouring a bottom-up approach, it will be shown later in this chapter that the courts’ approach can be categorised within the corrective justice paradigm. Thus, taking an approach that is harmonious with that of the courts should yield a consistent and coherent explanation of the windfall equity and joint endeavour principle underpinned by theory.

### III Weinrib’s Corrective Justice

Ernest Weinrib is a Canadian jurist who has spent significant effort on developing corrective justice in a modern context, particularly in three areas: contract, tort and restitution. Of these three areas, his writings on restitution will be relevant to this thesis. However, his work will not be *adopted*, as his jurisdiction, Canada, accepts unjust enrichment as a general doctrine, which is contrary to the Australian position of Equity being underpinned by unconscionability. Instead, his work will be *adapted* to suit the Australian conception of Equity operating through unconscionability.

The reason why Weinrib’s corrective justice will be used is that his version of corrective justice can be applied to many areas of law, such as contract and tort, and not solely unjust enrichment. This means that his version of corrective justice may be adjusted to apply to unconscionability in Australia – however, there is no need to reinvent the wheel. Whilst unjust enrichment is an unsuitable vehicle when discussing the windfall equity and joint endeavour principle, Weinrib’s
application of corrective justice to unjust enrichment may be modified to suit unconscionability in Australia. In particular, what is important is Weinrib’s exposition on what makes an enrichment “unjust”, and it is this factor that can be modified for unconscionability. This factor involves a normative imbalance between the parties, rather than just a material imbalance. The norms in question relate to free agency and autonomy, which will be discussed later in this chapter.50

A Corrective Justice as Private Law

This thesis takes the view that corrective justice is an appropriate framework to analyse private law, particularly in relation to how Equity operates in private transactions. In that regard, Weinrib adopts the view that corrective justice is applicable to private law, and distinguishes it from distributive justice which he says relates to public law.51 In this sense, he is of the view that corrective and distributive justice are separate and should remain separate. Weinrib describes corrective justice as “the idea that liability rectifies the injustice inflicted by one person on another” and that it is “central to contemporary theories of private law”.52 He rejects the argument that corrective justice is merely a form of distributive justice. He says that corrective justice is about an equality of quantities, whereas distributive justice is about an equality of ratios;53 in other words, corrective justice is about restoring an initial proportion, whereas distributive justice is about adjusting an initial proportion. Corrective justice then focuses on form, rather than substance,54 because of its refusal to inquire as to whether the initial proportion requires adjusting. However, it is this formalism which restricts corrective justice to a bilateral gain and giving of loss which allows the initial proportion between the parties to be restored without needing to discuss any distributive merits.55

The focus on the bilaterality of the relationship between the parties to the joint endeavour is important because it is possible that third-party interests may also be involved. It would be unnecessarily complicated to attempt to ascertain the rights of third parties before determining which party to a joint endeavour may or may not be liable to third parties, if at all liable. Even if

50 This thesis does not intend to discuss whether this norm is a distributive criterion or not. The thesis will simply show that this norm is expressed in the case law in a way consonant with Weinrib’s corrective justice.
52 Weinrib, ‘Corrective Justice in a Nutshell’, above n 45, 349;
54 Ibid 57.

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a distributive criterion applied, such as through insolvency legislation, it is logical to first ascertain the rights of the parties to a joint endeavour before seeking to adjust those rights.

The formal focus on the parties’ bilateral relations in corrective justice makes it apolitical: in other words, without a distributive criterion, its formalism ensures that transactions in private law remain coherent and predictable. This factor can be seen to be expressed in Australian law, particularly in *Muschinski v Dodds* where the court was of the view that law should not be developed according to idiosyncratic notions of fairness and justice. Although some interpretations do not make a distinction between corrective and distributive justice, Weinrib is of the view that, if corrective justice works towards some distributive criterion, then the distinction between corrective justice and distributive justice would be invalidated. If there was no distinction between corrective justice and distributive justice, then the absence of apolitical formalism may cause the law to develop according to those idiosyncratic notions of fairness and justice that Deane J warned of in *Muschinski v Dodds*.

This thesis adopts Weinrib’s distinction between corrective justice and distributive justice as a matter of logical coherence. If there was some distributive criterion which allowed a third party claim in the windfall equity, then which party to the joint endeavour bears the cost of that? Who, between the parties to the joint endeavour, is liable? These questions must still be answered, even if a distributive criterion applied. Further, these questions should be answered in a coherent and predictable way that is not determined by any person’s individual notions of fairness.

Although corrective justice is, as Weinrib put it, about an equality of quantities (that is, restoration to an initial proportion), there must be something that underpins the desire to see this restoration to an initial proportion. This means that corrective justice must have some normative character – there must be some norm that corrective justice seeks to effect. In this regard, Weinrib considers that corrective justice is the “juridical manifestation of self-determining agency”, so the norms of autonomy and free will will underpin corrective justice. By presupposing free will, the formalism of corrective justice may make decisions without passing

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57 Ibid 32–36.
58 *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J).
59 See, eg, Jason W Neyers, above n 46; Allan Beever, above n 47.
60 Ibid 78–79.
62 Ibid 80–82.

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judgment on the “virtuousness” of any action: private law is then normative without being ethical,⁶³ as it respects the parties’ autonomy and free will and pays little heed to how that autonomy and free will is expressed.

Of course, one might say that there should be some purpose external to this version of corrective justice in order to validate its focus on formalism. Although Weinrib claims that an extrinsic purpose is incompatible with corrective justice,⁶⁴ one must ask whether the norms of autonomy and free will are actually distributive criteria, and if such distributive criteria are such an “extrinsic purpose”. However, this point only matters if one wishes to maintain the private/public distinction between corrective justice and distributive justice, which Weinrib seeks to maintain. Although this is certainly a large question, for the purposes of this thesis, the private/public distinction is only maintained insofar as it relates to the bilateral relations between the parties. So long as the focus is on the relationship of the parties to the joint endeavour first and foremost, there is no need to consider whether corrective justice should be extended beyond this immediate link,⁶⁵ as other parties can be considered after the relationship between the parties to the joint endeavour is determined. The private/public distinction, for the purposes of this thesis, is of little practical effect.

With this background, the mechanisms behind Weinrib’s corrective justice can be explored in an Australian context. In particular, two important principles will be discussed. The first principle is that liability is correlative, which relates to bilaterality as discussed above. The second principle is personality, or the “juridical manifestation of self-determining agency”.

B Correlativity

To do justice (to ‘restore balance’) requires some correlation between the parties’ rights and interests. In corrective justice, as a defendant gains at the plaintiff’s loss, so too must the plaintiff ‘win’ and the defendant ‘lose’ to restore that balance.⁶⁶

On this view, the liability between the parties must be correlative, otherwise it is no longer corrective justice. Any factor that is not correlative is not relevant. The concept of correlativity is easily grasped by reference to this axiomatic statement: “if two people enter into a contract, they both have rights and obligations in relation to each other”. This must be the case, as if only

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⁶³ Ibid 109–110; cf Mark C Modak-Truran, above n 49.
⁶⁴ Weinrib, The Idea of Private Law, above n 28, 212.
⁶⁵ Ibid 212–213.
⁶⁶ Weinrib, ‘Corrective Justice in a Nutshell’, above n 45, 351.

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one person had rights or obligations, it would not be a contract. If one party only had rights, it may simply be an in rem property right. If one party only had obligations, then it may be trusteeship or some other statutory obligation. An example of a factor that is not correlative is a defendant who has ‘deep pockets’ and who may be able to sustain a loss. This factor only applies to one party and as such is inconsistent with the correlative nature of the liability.\(^67\) It is therefore not relevant to corrective justice that a party stolen from was able to financially sustain the loss.

The correlative nature of liability is also apparent in court judgments. In relation to one claim, a court does not make two separate judgments, whereby one judgment takes from the defendant and the second judgment gives to the plaintiff: the court grants one judgment with one effect by which both parties are inextricably bound. Because the liability is correlative between the parties, the injustice perpetrated and the injustice suffered is one in the same,\(^68\) and is remedied by one judgment. In other words, if a person causes injury to another, the injury caused by the perpetrator is the same injury suffered by the victim, and one judgment rectifies that one injury, affecting both parties. This liability arises by the defendant doing something that is incompatible with the plaintiff’s rights.\(^69\)

Because liability is correlative, it is also bilateral. It exists between the ‘wrong-doer’ and ‘wrong-sufferer’ only, and no other party. The only factor in corrective justice that establishes liability is the correlative loss and gain between the parties.

An example of correlative liability being restricted bilaterally is in the High Court case of *Roxborough v Rothmans of Pall Mall Australia Ltd*.\(^70\) This case concerned restitution for failure of consideration between tobacco wholesalers and retailers. The New South Wales government charged a licence fee which was held to be an excise on tobacco to the wholesalers, who passed the cost onto retailers, who passed the cost on to consumers. The excise was found unconstitutional, and the government refunded the excise to the wholesalers. The case was focused on whether the wholesalers or the retailers could keep this refund, as neither the wholesalers nor the retailers were left out of pocket. Ultimately, it should be the consumers who should receive the refund, as they bore the cost of the excise. However, the retailers succeeded in recovering the refund from the wholesalers, despite passing the cost on to the consumers.

\(^{67}\) Ibid.

\(^{68}\) Ibid; Weinrib, *Corrective Justice*, above n 29, 10.

\(^{69}\) Weinrib, ‘Corrective Justice in a Nutshell’, above n 45, 352.

\(^{70}\) *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

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This is because, had it been feasible for the consumers to sue the retailers, the consumers would have been successful against the retailers for the exact same reason that the retailers were successful against the wholesalers.

This case effectively followed a chain of correlative liability:

Government <-> Wholesalers <-> Retailers <-> Consumers

As the wholesalers paid the government the tobacco excise, so did the government refund the excise to the wholesalers. This liability was bilaterally restricted between the two parties – no other party could claim directly from the government. Similarly, as the retailers paid to the wholesalers an amount on account of the excise being passed on by the wholesalers, liability was bilaterally restricted between the retailers and the wholesalers – no other party could claim against the wholesalers. Finally, had it been possible to organise, the consumers could have sued the retailers for a refund of the cost of the excise that they ultimately bore by having the retailers pass the cost on. Liability was again bilaterally restricted between the consumers and retailers.

At no stage in this chain of relations could anyone ‘jump the queue’ or skip a link in the chain. For example, the government could not give the refund to the retailers, as it was the wholesalers who paid the excise – likewise, the consumers could not sue the wholesalers, as they bought tobacco from the retailers. There are discrete chains of correlative liability between specific parties, and these chains need to be followed.\(^{71}\) It is for this reason that the retailers ‘passing on’ the cost to the consumers was not a relevant factor between the wholesalers and retailers, as this bilateral relationship did not involve the consumers.

Another example of this are the subrogation cases raised at the beginning of this thesis.\(^ {72}\) In these cases, the insurer only had a relationship with the insured, and the insured only had a relationship with the tortfeasor. The insurer cannot sue the tortfeasor directly as there is no correlative relationship between the two. However, under either contractual or equitable subrogation, the insurer may follow this chain of correlativity to sue the tortfeasor in the name of the insured in order to recover the loss from the tortfeasor.

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\(^{71}\) This only relates to who could sue whom. For example, the consumers could sue the retailers even if the retailers had not been refunded by the wholesalers. Each chain’s correlative liability is independent of the others.

\(^{72}\) *Randal v Cockran* (1748) 1 Ves Sen 98; *Mason v Sainsbury* (1782) 99 ER 538; *Yates v Whyte* (1838) 4 Bingham New Cases 272.
It should be noted that the term “bilateral” as used in this thesis is not meant to restrict relationships in corrective justice to only two parties whose interests are diametrically opposed. It is possible for more than two parties to be linked, such as in a tripartite partnership. In such a situation, what is important is not the number of “doers” and “sufferers” of a “wrong”: what is important is that the “wrong” that is “done” and “suffered” is one in the same, even if it affects the partners differently. What matters is how the parties are linked to one another due to that wrong: it is this nexus that must be established, and the parties’ liabilities to one another are restricted by this nexus.

C Personality

The second principle involved in Weinrib’s formulation of corrective justice is the idea of personality. This conception of personality is more than simply one’s legal standing. Personality is used by Weinrib to describe “the capacity for purposive agency”.\(^73\) He considers that this “encapsulates the normative standpoint” from which private law considers people’s rights and duties.\(^74\) However, personality (or the capacity for purposive agency) does not have much effect on its own. He refers to personality as being “the capacity for purposiveness” but “without regard to particular purposes”.\(^75\) In other words, personality can be thought of as the mere ability for someone to freely choose how to act, without referring to any chosen act itself. Weinrib considers that this addition of free agency and autonomy, as discussed above, serves to provide corrective justice’s normative character.\(^76\)

The personality of the parties may also be a factor in corrective justice. Rather than just a simple shift in the balance of the material wealth of the parties, there can also be an upset of the normative balance between the parties. For example, although a plaintiff may have suffered no loss if a defendant uses the plaintiff’s property for profit and then returns it undamaged, there was still an infringement of the plaintiff’s personality. Whilst the plaintiff has not lost out materially, the defendant “achieves a normative gain because he has acted in violation of his Kantian obligation to respect the plaintiff’s self-determining agency”.\(^77\) In Weinrib’s version of corrective just, this infringement of personality is what makes an enrichment ‘unjust’. However, this thesis is of the view that this infringement of personality is what may invoke Equity in many

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74 Ibid.
75 Ibid 25.
categories of case, even if the legal relations between the parties are sound. This difference in approach will be discussed in the next section.

Whilst Weinrib derives this normative character from the natural rights philosophies of Kant and Hegel,78 one does not need to subscribe to those philosophies to utilise his theory of corrective justice. Weinrib does not postulate a “conception of agency” from which to derive his theory; rather, he notes that such ideas of personality are inherent in the common law as it stands, and it is that from which he builds his theory.79

In a system derived from incremental development of the law, this thesis takes the view that it is enough to recognise that such consideration of self-determining agency is valued in Equity in Australia.80 Whatever the philosophical background influencing a decision, in practice, “law must make up its mind”, as it “supposes judges deciding cases day by day, deeply affecting the lives of ordinary citizens”.81 A judge must make a decision, and the protection of self-determining agency82 seems explicable from the way Equity acts in practice. This is exemplified by the High Court case ACCC v C G Berbatis Holdings Pty Ltd,83 discussed in the previous chapter. Equity does not merely intervene because a party has been deprived of ‘independent judgment and voluntary will’, but because they have been deprived of the ability to make a worthwhile judgment about their own interests.84 Equity acts when a party has been deprived of the ability to act with purposive agency – when the party has been deprived of personality.

An example of this conception of personality in Equity is the doctrine of unconscionable conduct, best illustrated through the High Court case of Commercial Bank of Australia Ltd v Amadio (1983).85 In this case, Mr and Mrs Amadio appeared to have guaranteed their son’s indebtedness to the Commercial Bank of Australia and granted the bank a mortgage over their property as part of that guarantee. When the bank sought to enforce the guarantee, the Amadios sought to be freed from the guarantee due to unconscionable conduct on behalf of the bank. They had a limited understanding of English, had received no independent financial advice, and did not

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78 Weinrib, Corrective Justice, above n 29, 26.
79 Ibid 26–27.
80 Ibid 27.
81 Birks, above n 26, 4–5.
82 See Smith, above n 77, 2141.
84 Ibid 74 [46] (Gummow and Hayne JJ).

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know the extent of their son’s debt, nor did they know that their liability was for the entirety of their son’s debt. The bank did not appraise the Amadios of such factors, either.

There was no failure in contract law that would render the guarantee void. In all the circumstances, it was a valid guarantee capable of being enforced by a valid mortgage. Ultimately, the Amadios successfully argued that the guarantee was voidable for being obtained through unconscionable conduct. This is because the Amadios did not have the capacity to exercise their purposive agency when entering into the guarantee: they lacked personality. Had they known what they were doing, they would never have entered into the guarantee. By having no personality when entering into the guarantee, the norm of free agency was violated. This case is a practical example of someone lacking personality (the capacity for purposive agency) and successfully seeking Equity’s intervention to undo a legally valid contract.

Another important point here is that a court will not, of its own volition, declare a contract entirely void for unconscionable conduct. Unconscionable conduct only renders such a contract voidable. It is incumbent upon claimants to ask that the contract be set aside, as the court will not make that order without being asked, even if a contract has found to be unconscionable. Part of this is a matter of procedure as claimants must ask for an order but, more importantly, it is possible that only some parts of a contract may be void. If this is the case, claimants may elect to keep the contract on foot and only ask that the contract be set aside to the extent that the contract is unconscionable. This is an important point, because it drives home the value attributed to personality in Equity. The court gives claimants the ability to choose to affirm or deny the contract; it does not make the choice for claimants.\textsuperscript{86} Therefore, the court restores the personality of claimants.

Recalling previous concerns on taxonomy potentially changing the law, it should not be controversial to make the observation that Australian courts value self-determining agency in Equity. Because judges may be influenced by many different schools of philosophical thought, all that matters for the purposes of this thesis is that such a general valuing of self-determining agency by Australian courts should be recognised and an approach should be taken that is consistent with this observation.

It is the combination of correlativity and personality which founds liability in Weinrib’s conception of corrective justice. If an act occurs between two people, correlativity is established.

\textsuperscript{86} Unless, of course, the contract is so infected with unconscionability that what is left is no longer a valid contract.

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If that act was done by someone exercising their purposive agency, personality is established.\(^{87}\) With correlativity and personality established, so too is liability established. This of course depends upon the various recognised categories of case that found liability. In Weinrib’s case, he treats this as the basis for liability in unjust enrichment. However, this thesis takes the view that unjust enrichment is an unsuitable basis for the windfall equity and the joint endeavour principle. Weinrib’s application of corrective justice to unjust enrichment will now be discussed and compared with this thesis’s proposed approach based on unconscionability, and will demonstrate why unjust enrichment is unsuitable.

D Deficiencies in an Unjust Enrichment Explanation

In Canada and the United Kingdom, restitution for unjust enrichment is a ‘third’ area of liability, being ‘restitutionary liability’, in addition to contractual and tortious liability. Unjust enrichment is not accepted as a general doctrine or cause of action in Australia.\(^{88}\) It is also not applicable to the windfall equity or joint endeavour principle, as it is possible for the parties to have exchanged property of objectively equal value, yet the windfall equity and joint endeavour principle may still apply.

Take for example Timo and Jens who want to record an album. In order to record the album, Timo gives Jens some music gear which is worth $5,000, and Jens gives Timo $5,000 to acquire some more gear that they need. After a few days, creative differences arise, and they no longer want to continue with the album. Jens still holds Timo’s music gear, and Timo still holds the $5,000 that Jens gave him. Jens asserts ownership of Timo’s music gear and says to Timo that he can keep the $5,000: “I’ll just keep the gear, as you can buy it again new for cheaper these days; keep the leftover cash, saves you transporting it all, too.” Given the facts, Timo may in fact be enriched, yet he would still be entitled to reclaim his music gear from Jens under the windfall equity and joint endeavour principle.\(^{89}\) This is because Timo’s ability to act with personality has been denied, and Jens has effectively forced a sale of Timo’s property without his consent. To

\(^{87}\) Future references to the capacity for purposive agency will now simply be called ‘personality’ from here on.


\(^{89}\) See also orders for specific performance in relation to the purchase of property which may not compensable by money, such as unique land.

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not return Timo’s music gear would be unconscionable. This is not possible in Weinrib’s conception of value in unjust enrichment, which will be discussed shortly.

That being said, Weinrib’s application of corrective justice to unjust enrichment is still valuable to an Australian conception of unconscionability. It may be adapted for unconscionability in Australia, at least insofar as unconscionability underpins specific causes of action, as unconscionability is not a cause of action in and of itself.90

Earlier in this chapter, the Aristotelian conception of corrective justice was discussed:

\[
\begin{array}{cc}
$100,000$ & $100,000$ \\
Anaximander & Beowulf \\
\end{array}
\]

> Theft! >

\[
\begin{array}{cc}
$150,000$ & $50,000$ \\
Anaximander & Beowulf \\
\end{array}
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At its simplest, Anaximander steals from Beowulf. The parties’ initial proportions of wealth were upset thus, to do justice, Anaximander must repay Beowulf the amount that was stolen to undo the imbalance between them. In this example, the boxes above are representative of the material balance between the parties. On the left, the parties’ have yet to interact and their material wealth is proportionately balanced. On the right, Anaximander has committed theft, wherein Anaximander’s material wealth has increased at the expense of Beowulf’s material wealth. The simplest conception of corrective justice merely involves the direct gains and losses of material wealth that parties have caused one another.

However, the above example only addresses a situation where one person has caused a wrongful act which resulted in a correlative transfer of wealth: it does not address a situation where that correlative transfer of wealth happens without any party intending it to happen. Corrective justice must also address restitution.91 Weinrib’s application of corrective justice to unjust enrichment addresses restitution in his later writings. A transfer of material wealth is no longer the only concern – instead, the question asked is “what is the unjust factor?” Because

91 Smith, above n 77, 2116.
unjust enrichment involves strict liability, and the person who is liable may not have done anything at all to cause another person loss\(^{92}\) such as in the case of mistaken payment, it is difficult to see how this scenario can be called ‘unjust’ when the party in receipt of the mistaken payment may not be aware of the mistaken payment at all.

Weinrib answers this by saying that there exists another form of balance – a normative balance. When a norm is violated, the normative balance is upset which makes something unjust. Recalling what was discussed earlier, this can be thought of as an infringement or denial of a party’s personality – their ability to act with purposive agency. Weinrib begins this discussion with what the idea of ‘value’ means\(^{93}\) before discussing personality. He says that ‘value’ can be thought of as the inherent worth of any one object in regard to the value of any other object in existence. In this sense, value is not a discrete property of one object, but is the relative value of one object compared to another. This view of value being relative means that Weinrib is not concerned with the transfer of things that have value. Instead, he is concerned with the transfer of value itself.\(^{94}\)

Weinrib gives an example of this distinction with a person seeking to trade a pair of shoes for a number of loaves of bread. If a pair of shoes is worth ten loaves of bread, and someone exchanges a pair of shoes for ten loaves of bread, then objects of value have been transferred: however, no value itself was transferred. This is because value is a property of an object that is necessarily relative to other objects. Whilst objects of value have been transferred, the value of the objects relative to one another is identical.

However, if someone exchanged the same pair of shoes for one loaf of bread, despite the pair of shoes being worth ten loaves of bread, then not only were objects of value transferred, but value itself was transferred from the person giving the shoes to the person giving the loaf of bread. By exchanging a thing of value that is only worth 1/10th of another thing of value, the person who gave the loaf of bread has received value in itself. Weinrib compares this to Homer’s Iliad, exchanging “gold armor for bronze armor, a hundred oxen’s worth for nine”.\(^{95}\)

It is the transfer of value itself, rather than the transfer of things of value, that may make a transaction normatively defective and thus requiring restitution. However, an exchange of value

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92 Weinrib, Corrective Justice, above n 29, 188.
93 Ibid 190. Although Weinrib draws upon a Hegelian concept of value, this thesis does not intend to discuss or critique this particular concept of value.
94 Ibid 194.
95 Ibid.
is not normatively defective in and of itself. Weinrib gives the example of a gift. A gift is a voluntary transfer both of a thing of value and of value itself. He says that this will take effect as a valid gift if it is given with donative intent and if it is accepted as donatively given. However, if it is given as a loan but accepted as a gift, or if otherwise the gift is refused, then the transfer is normatively defective, and the proprietary right remains with the transferor. This also occurs in the case of mistaken payment. A mistaken payment will be normatively defective as money was not given donatively, but was accepted as a gift, contrary to the paying party’s personality.

The transfer of value ties the notions of correlativeity and personality together. In the case of mistaken payment, the claimant and the defendant are inextricably linked by the mistaken payment, so correlativeity has been established. However, for there to be any liability, it must be determined whether the transaction is supported by the personality of the parties. In this case, there is no wrongful act that would establish liability. Instead, what establishes liability is the failure of the claimant to act with personality. In other words, the claimant intended something to happen with their money, but that intention could not be carried out: their attempt to act with purposive agency failed. Without that payment being supported by the claimant’s personality, the defendant who received the money is not entitled to deal with the money in any way except to return it to the claimant. However, the defendant must be put on notice that the money belongs to the claimant, otherwise the defence of change of position may be available. This is because personality on behalf of the defendant must also be established. Whilst the defendant may be enriched by the mistaken payment, unless they have acted purposefully to deny the claimant’s interest, no remedy may be found.

Whilst Weinrib continues to discuss this in relation to unjust enrichment, the idea that a transfer of value may be actionable as a result of the denial of someone’s personality is able to be applied to unconscionability. This is important in the case of the windfall equity where a remedy is available without attributable blame. If there is no attributable blame, there must be some other duty that compels one party to restore property to the other party as, even if there was attributable blame, there must still be an already-existing obligation.

However, Weinrib’s focus on the transfer of value itself must be modified to suit this thesis. Whilst a transfer of value may be relevant to many equitable causes of action, in the case of the

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96 Ibid 201.
97 Ibid.
98 Ibid 215.
99 Smith, above n 77, 2127, 2133.
windfall equity and the joint endeavour principle, what is of importance is the transfer of things of value, contrary to Weinrib’s focus on the transfer of value itself. As explained earlier in the example involving Jens and Timo, no value was transferred; in fact, Timo may have received value. Yet he may still have a claim against Jens. This is because Jens has asserted title to Timo’s property without Timo having a say in the matter, despite this action potentially enriching Timo by gaining value. This is because Jens has denied Timo’s personality. It does not matter if Jens gave Timo one million dollars if Timo has been denied the ability to act with purposive agency and has had no say in what happens to his music gear.\textsuperscript{100} Of course, to seek Equity, Timo must do Equity and return the money to Jens. These concepts relate to constructive trusts in the joint endeavour principle which will be discussed later in the next chapter. For now, it is sufficient to say that the transfer of things of value is important, not just value itself, as the windfall equity and joint endeavour principle may apply even where no value itself has been transferred.

IV Corrective Justice and Unconscionability

As has been established with regards to Anaximander and Beowulf, if someone commits theft and gains material wealth at the expense of another, corrective justice will seek to restore the parties’ material wealth to its initial proportions. This is a simple example to demonstrate the concept of corrective justice, but it is lacking when attempting to explain more complex transactions. For example, what of a legally valid contract entered into due to unconscionable conduct?

Setting aside a contract for unconscionable conduct can be explained through corrective justice by adding a second factor while retaining the boxes representing a transfer of material wealth. This second factor is a checkbox and it asks “did the parties have personality?” This is where, despite there being a material balance, there may also be an upset to the normative balance between the parties. If a party cannot act with personality, then the material transfer, despite being balanced with no transfer of value, is not valid in Equity.\textsuperscript{101} This is similar to what makes an enrichment ‘unjust’ in Weinrib’s view.

\textsuperscript{100} Another example is someone taking the author’s dog without their consent and leaving them a million dollars. Whilst the dog may be priceless to the author (or objectively worthless and a liability from time to time), the ability to effect such a compulsory acquisition is usually reserved for governments, and not private parties.

\textsuperscript{101} Smith, above n 77, 2139.
The *Amadio* case can be used to build a new example. Assume that the only parties are Mr Oidama and the Bank. Mr Oidama has been a customer of the Bank for some time, and the Bank, through its promotional efforts, has sent a letter of offer to Mr Oidama. For being such a loyal customer for some time, the bank offers Mr Oidama a personal loan of $100,000 with very favourable terms. In fact, Mr Oidama need only continue making the repayments he is already making on account of the home loan until the personal loan is also paid off. The Bank stands to make only a small amount of profit from this personal loan; however, the Bank knows that Mr Oidama makes his home loan mortgage repayments in a timely manner, and the bank would like to continue that relationship. The Bank knows that, whilst it will be making less of a profit due to such favourable terms, the investment is very sound due to the interest it will eventually collect.

Unfortunately, whilst Mr Oidama is good at paying his debts, he does not have a strong command of English, nor does he have much business sense. He is in his current position because he works incredibly hard and had solicited professional advice before taking out his home loan secured by a mortgage with the Bank. When he sees the offer of a personal loan, he is at a loss. He knows that he has $100,000 left to pay off his loan, so he does not know what the letter is about. So he goes into his Bank’s local branch, letter in hand, to discuss the matter. The overworked banker explains to him that the loan will be paid with the current instalments he is already paying, so all Mr Oidama needs to do is to continue making his payments and all will be fine.102

Mr Oidama is confused and asks if he has to pay $100,000 to the bank because of his “loan”. Mr Oidama is referring to the home loan. The banker concurs and says he will need to pay $100,000 with his current instalments until the “loan” is repaid. The banker is referring to the personal loan. Mr Oidama, thinking this is just a formality for his home loan, signs the offer for the personal loan and leaves the bank.

Not being a technologically sophisticated nor terribly financially literate man, Mr Oidama does not use internet banking and does not know that an account has been opened for him for the personal loan, nor does he receive physical correspondence on account of the personal loan because one of the terms of the personal loan was that he would only receive electronic communications.

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102 Given the revelations of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, a situation such as in this example is not far-fetched. The ‘overworked banker’ rather than ‘malicious banker’ was chosen as an example as a matter of charity, and to demonstrate the operation of the principles at play without the complication of fraudulent or malicious behaviour.

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correspondence through internet banking. However, he does not use email, and is only aware of the correspondence he receives by mail for his home loan. All that Mr Oidama knows is that he is due to pay off his home loan two years from now, because he has properly followed the excellent professional advice he received fifteen years ago.

Two years later, Mr Oidama makes what he thinks is his final repayment. Elated, he goes into his Bank’s local branch to verify that everything is done, and to ask what he needs to do to have the deed to his property in his possession. A different banker to the person he saw two years ago looks up his file. The banker, with trepidation in their voice, informs Mr Oidama that he has a personal loan account open for $100,000, plus a significant amount of interest that accrued over the past two years. Mr Oidama is at a loss – he was making repayments as he always has, so why is there over $100,000 left to pay? All the banker can do is print off the information for him, which includes the personal loan documentation. Mr Oidama leaves and immediately calls his solicitor.

The outcome of these circumstances should be clear from the law of unconscionable conduct set out in Amadio. However, the facts were altered to drive home certain points about corrective justice. The first point is that, in this scenario, Mr Oidama has received a very fair deal. Receiving a $100,000 personal loan on favourable terms is not harsh or oppressive in itself – many other people would have jumped at the opportunity instantly. Nor is the personal loan defective as a matter of contract law. In a loan situation, one party is seeking money so that they can have immediate capital to apply to some purpose, and the other party is seeking to supply that capital on the condition they be repaid interest while the loan remains outstanding. In many cases, such a loan is taken out to fund a profitable activity. In that case, the recipient of the funds has access to funds they otherwise would never have had access to, and the lender, in exchange for losing access to those funds for a period time, is entitled to be paid interest.

Where is the material imbalance here? There is no imbalance. The parties have entered into a legally valid contract where one lends money to the other immediately, with the expectation of the money being repaid with interest later on down the track. In fact, if the recipient’s venture goes to plan, it is possible for both parties to end up with more material wealth than what they started with. So how does Mr Oidama get out of this legally valid contract? Mr Oidama cannot simply pay back the $100,000: he still owes a significant amount of interest.

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A criticism of corrective justice in this regard is that it may not be possible to resolve a situation if a loss has been caused by the plaintiff without a gain by the defendant. Such a situation would mean that the loss is not correlated to any gain. This is especially apposite in this modified Amadio example where Mr Oidama is a party to a valid legal contract designed for mutual gain.

The answer here is not by recourse to a material imbalance that needs to be restored, but by recourse to a normative imbalance. This means the checkbox raised earlier must be considered: have the parties acted with personality? The Bank clearly has acted with personality, as it intended to offer a personal loan to Mr Oidama. However, has Mr Oidama acted with personality in accepting that personal loan? The answer is no. Whilst Mr Oidama intended to be bound, he thought the contract was a mere formality for his home loan. Although in this example the Bank did not attempt to ‘trick’ Mr Oidama, the fact remains that the Bank still had the benefit of a personal loan contract with Mr Oidama that, had he known what he was binding himself to, he never would have agreed to. Because Mr Oidama was deprived of his ability to act with personality in signing the contract, then although the personal loan is valid in contract law, he cannot in Equity be held to be bound to the contract, and thus has the option of having it rescinded.

It is in this way that the normative balance has been upset despite there being no material imbalance. The Bank, through denying Mr Oidama the ability to act with personality, has obtained a commercially sound contract in circumstances that the bank would not have been able to obtain had Mr Oidama been fully aware of what he was signing. It is this normative upset which requires a remedy.

The way in which Equity will rescind the contract is simple. It acts in reverse to put the parties back in their original positions as far as is possible, to the extent that the parties’ positions are no longer normatively defective. In other words, the parties’ material wealth is restored to the position it was at before any reliance on defective personality. In this case, Mr Oidama will repay the $100,000, and the Bank will forego its claim for interest.

This example of an otherwise ‘fair value’ contract where no value is transferred was deliberately chosen to show that a normative upset by denying someone personality may trigger the

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intervention of Equity to reverse the transaction. This is so because, despite being a contract with favourable terms, such a point is meaningless if the party in question does not want to enter into that agreement.

However, if Mr Oidama, after having been appraised fully of the circumstances, decides that the loan is acceptable to him, then he may affirm the contract (although the interest may not be enforceable until that point in time). In this regard, a contract that was normatively defective may be rectified by the aggrieved party choosing to act with personality in affirming the contract. This is despite the fact that the contract was originally obtained through unconscionable conduct: once the contract is no longer normatively defective, there is nothing unconscionable about the contract. This hearkens back to earlier in this chapter where it was indicated that a court will restore the ability of the aggrieved party to act with personality – the court only makes the order that is asked of it (if capable of being carried out). The court does not make that choice for the aggrieved party.

Weinrib’s application of corrective justice to unjust enrichment can then be adapted to unconscionability in the way discussed above. In summary, in certain recognised categories of case, if a person has been denied the ability to act with personality, then that denial of personality may be unconscionable, giving rise to a remedy. It is this method of identifying unconscionability that, when applied to constructive trusts in the joint endeavour context, can show exactly when a constructive trust arises, why, and the scope of the constructive trustee’s duties.

This example was an adaption of Weinrib’s corrective justice to unconscionability in Australia in just one area: unconscionable conduct. In the next chapter, the adaption discussed above will be applied to unconscionability in joint endeavours, and the chapter will discuss the mechanics of when unconscionability may arise in a joint endeavour and how that affects the joint endeavour principle and the windfall equity cause of action.
VII: Application

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I Application of Theory

The previous chapter discussed theoretical problems with the case law and the commentary on the principles in *Muschinski v Dodds*.

To resolve the problems identified, the previous chapter justified taking an approach consistent with judicial decision-making in Australia. In doing so, corrective justice was identified as a useful theoretical framework, and the previous chapter adapted Weinrib’s theories of corrective justice to suit Australian Equity. This framework was then applied to a number of examples in Equity to show that Equity will operate when personality is denied to a party. One such example was through the cause of action in Australia called unconscionable conduct.

This adapted corrective justice framework provides a lens through which the law can be viewed with a different perspective. This different perspective can provide coherence and clarity to the

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1 *Muschinski v Dodds* (1985) 160 CLR 583.

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law without seeking to overhaul it entirely, and it shows how the principles in Muschinski v Dodds give rise to the joint endeavour principle and the windfall equity, and how they both operate. It also shows that the “remedial” and “institutional” distinction is unnecessary to make.

II Elements of the Joint Endeavour Principle

It is important to remember that, like unjust enrichment, in Australia unconscionability is not a general doctrine that gives rise to a cause of action. Although the previous chapter examined when something may be “unconscionable” in a corrective justice framework, this examination by itself cannot be sustained without linking it to a settled category case. Before any idea of “unconscionability” can have effect at law, there must either be a settled category of case or an expansion of one through legitimate legal reasoning that amounts to a cause of action.

The previous chapter identified “unconscionable conduct” as one such settled category of case in which unconscionability may find its expression. This chapter will now apply what was discussed in the previous chapter to discuss another category of case that has been developed through processes of legitimate legal reasoning: when a joint endeavour breaks down without attributable blame. The joint endeavour principle applies to joint endeavours generally, and it is these principles that provide a basis to find a cause of action. This section will examine in a theoretical context how this category of case provides a cause of action consistent with the theoretical analysis undertaken in the previous chapter.

A Formation of Joint Endeavour – the Substratum

The substratum of a joint endeavour is integral to the joint endeavour principle and windfall equity. Without identifying the existence and content of a joint endeavour’s substratum, the joint endeavour principle and windfall equity cannot determine anything. It is only by reference to the substratum that the joint endeavour principle and windfall equity can function.

Although the case law does not explicitly say how the substratum is identified, general concepts may be identified and built upon. At the very least, the parties must have had an intention to participate in a joint endeavour and the joint endeavour must be proven to exist as a matter of fact. What separates the intention to participate in a joint endeavour from the intention to participate in another simple relationship is that the intentions of the parties to the joint

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endeavour must be something more than their ‘selfish interests’. It has been said that the parties’ interests must be congruent.¹ This concept of congruent interests means that the parties’ interest are more than just ‘selfish’, and it is this concept that separates a joint endeavour from another simple form of relationship, such as a de facto or marriage relationship or a mere contractual relationship. The congruent interests of the parties therefore form the substratum of a joint endeavour.

In the corrective justice context discussed in the previous chapter, when a party acts with intention, they have personality: they are acting with purposive agency with knowledge of what they are doing. Personality is then established when a party to a joint endeavour acts according to their intention. However, this personality must also be congruent, which is linked to the need to find correlativity. Due to the fact that the parties’ intentions must be congruent to find the existence of a joint endeavour, then correlativity necessarily follows from the parties’ congruent personality. If this was not the case, then a joint endeavour cannot be found. It is for this reason that a joint endeavour cannot be found through the unilateral act of a party.⁴

However, this does not mean that the parties’ intentions must be and remain fixed. Being able to freely act with personality is inherent in the case law, acknowledged by the fact that the parties may change their intentions from time to time.⁵ What matters is whether those changes in intention remain congruent between the parties for, if they do, then the substratum of the joint endeavour also changes.

The importance of the substratum is that it allows the parties to undertake the joint endeavour without fear of committing some legal or equitable wrong. This is because the substratum provides a basis for the parties’ relationship where the parties may act and deal with each other’s interests without any dealings being unconscionable if they are supported by the substratum.

An example can be used to demonstrate how congruent personality may form the substratum of a joint endeavour. Assume Flora and Olivia want to embark on a business venture together. Being close friends, they come to a loose understanding between themselves that falls far short of being an enforceable contract. They have nothing in writing about the arrangement between

³ Clancy v Salienta Pty Ltd [2000] NSWCA 248, [195]–[201].
⁴ Rankin v Official Trustee in Bankruptcy (2005) 220 ALR 723, 731 [45]–[47].
themselves, but they both agree that they will purchase real property for commercial purposes. They decide to both contribute $300,000 each to the purchase of the property. They decide to take legal ownership of the property as tenants in common in shares of 5/6ths to Flora and 1/6th to Olivia, rather than in equal shares. This was not meant as a gift: they decided to do this for tax purposes.\textsuperscript{6} They do, however, agree to split any profits made from the property equally. This is the extent of their arrangement.

Using boxes is a good way to visualise the flow of proportion of wealth between the parties.

\begin{align*}
\$300,000 & \quad \$300,000 \\
\text{Flora} & \quad \text{Olivia} \quad \text{Flora} \quad \text{Olivia}
\end{align*}

\begin{align*}
\text{\textgreater Purchase \textless} \\
\text{\textgreater Purchase \textless}
\end{align*}

The above example shows the state of the parties before the joint endeavour on the left, where both parties are each in possession of $300,000. This represents the fact that each party legally possesses $300,000 each. On the right, the parties have purchased the property and have taken their legal interests as anticipated by their joint endeavour. This represents the fact that the parties’ legal interests are now 5/6ths and 1/6th respectively.

Recalling earlier examples of corrective justice, this arrangement is a clear transfer of wealth. However, despite the arrangement not being a gift as the proprietary interest was neither donatively given nor donatively received, the transfer is not actionable. This is because the material imbalance is normatively supported by the congruent personality of the parties: it is supported by the substratum of the joint endeavour. This substratum makes valid what would

\textsuperscript{6} Note that the actual reason is not relevant for this example. For example, the parties may not have any real idea about the tax implications of their arrangement, but whether or not the reason is sound, people routinely do things that might not make legal sense, yet their arrangements must still be dealt with.

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otherwise be a clear transfer of wealth. As will be seen, when this substratum falls away, the windfall equity may step in, but at this stage, it is enough to see how the substratum of a joint endeavour may support such a material imbalance without needing to be corrected.

This substratum forms the basis of any joint endeavour, whether it is a loose family arrangement or a sophisticated commercial or partnership arrangement. The difference here is that, as the parties’ legal relations become more sophisticated, the more likely it is that other legal or equitable principles might apply to the relationship, but this does not displace the fact that a substratum must be found for a joint endeavour to exist.

When the parties’ interests are so aligned as to be congruent such that it forms the substratum of a joint endeavour, then another principle may apply to joint endeavours. This is the law relating to fiduciary duties.

B Fiduciary Duties

Due to the substratum of a joint endeavour requiring the parties’ interests to be so congruent, the parties must have mutual trust and confidence in one another. Without this trust and confidence, since the parties’ interests are congruent, it would be open for one party to take advantage of the other, or to take some benefit to the detriment of the other, despite both parties being interested. As such, fiduciary duties may exist in all joint endeavours in order to protect the parties from taking advantage of one another, giving them confidence to pursue their endeavour.

From a theoretical perspective, fiduciary duties may exist for the same reason a substratum for a joint endeavour exists. The parties’ congruent interests form a joint endeavour, and because those interests are congruent, the parties may owe one another fiduciary duties due to the mutual trust and confidence the parties must have in pursuing those interests. These fiduciary duties are moulded by the form and content of the joint endeavour. As such, by virtue of a

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7 See Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516 where the parties, tobacco wholesalers and retailers, had not contemplated a refund of an unconstitutional tax excise. Partial failure of consideration was the applicable law in this situation, as the contract between the parties was sophisticated enough to render the unexpected circumstance capable of determination as a partial failure of consideration.

relationship being shown to be a joint endeavour, it is highly likely that fiduciary duties may be owed between parties to a joint endeavour.

A point needs to be made here about terminology. This thesis posits that joint endeavours, whatever form they take, may involve fiduciary duties if the circumstances warrant. This is because the requirement of congruent interests is necessary to form the substratum of a joint endeavour. If this is not present, then the relationship is not a joint endeavour and does not fall under the joint endeavour principle or windfall equity. This becomes a problem when talking about contractual ‘joint ventures’: the term ‘joint venture’ has no legal meaning.

This problem can be demonstrated by the High Court case of John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd9 which involved a contractual joint venture. It was alleged that one party acted in breach of fiduciary duty, but such a duty was not found. It was found that the parties did not have the requisite mutual trust and confidence in each other that would require them to hold each other in a fiduciary capacity. It was a basic, simple relationship, not a joint endeavour, despite being termed a joint venture. It was then mentioned by Gummow J that Muschinski v Dodds and Baumgartner v Baumgartner should be revisited.10

Another High Court case can be turned to for guidance on this matter. Since the joint endeavour principle was derived from principles that find their expression in partnership law, a similar analogy may be made by reference to fiduciary duties in contractual joint ventures. The relevant High Court decision that could be drawn upon for principle is United Dominions Corporation Ltd v Brian Pty Ltd (1985)11 (‘UDC v Brian’) which was decided in the same year as Muschinski v Dodds.

This case concerned a ‘joint venture’ arrangement between multiple parties. The case in fact involved two joint ventures: one for building a hotel, and another for building a shopping centre. UDC was to provide the bulk of the funds necessary to enable the venture; ‘SPL’ was a company that was to develop the land; and Brian, among others, was to contribute money and receive a proportionate return of the profits. During these negotiations, the proposed joint venture to develop the hotel fell through, and it was agreed that the parties who contributed money to the

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10 Ibid 8.
11 United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1.
hotel venture would instead have it applied to the shopping centre venture from which they would receive a proportionate return of profit.

It was during these negotiations that, unbeknownst to all parties but UDC and SPL, SPL had agreed to grant a mortgage to UDC over the land to be used for the shopping centre development to support the loan that UDC would be providing. The joint venture between all parties was later formalised, without either SPL or UDC disclosing the mortgage that was granted during negotiations. After the development was complete, SPL went into liquidation, and UDC relied on a ‘collateralisation clause’ in the mortgage to assert title to all joint venture profits. Brian was not happy with this and sued UDC seeking to be paid its appropriate share of the profits. Brian failed at trial but succeeded on appeal. UDC appealed to the High Court but was unsuccessful, and Brian (and presumably the other joint venturers) was entitled to its share of the profits.

At the heart of this case is not a breach of fiduciary duty entitling one to compensation, but a breach of fiduciary duty invalidating the legal rights obtained from that breach of fiduciary duty. The High Court concluded that the term ‘joint venture’ has no specific legal definition, and that the nature of the parties’ relation is more important than its name. In this case, the parties’ relationship was akin to a partnership. The High Court held that, both during negotiations and after formalising the joint venture agreement, the parties owed one another fiduciary duties, including duties of good faith and utmost confidence. By both UDC and SPL failing to disclose the existence of the mortgage to the other co-venturers, they were obtaining an advantage in breach of their fiduciary duty as co-venturers. It did not matter that it was open for the parties to conduct their own independent investigation to find the mortgage's existence: a fiduciary duty was still owed to the co-venturers.

Because of the breach of fiduciary duty, UDC was not able to insist on exercising the ‘collateralisation clause’ under its mortgage to retain all joint venture profit. Rather than a constructive trust being awarded over the assets obtained by the mortgage, there was a simpler solution: the mortgage was found to be invalid as it was obtained in breach of fiduciary duty, thus Brian and the other co-venturers needed only to assert their contractual right to their proportionate share in the profits, unburdened by UDC’s mortgage.

This case is further relevant due to the discussion on what a ‘joint venture’ means and what its implications are for parties who negotiate and enter into joint endeavours. Muschinski v Dodds was decided in the same year as UDC v Brian, but Muschinski v Dodds did not address any other

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aspect of analogous principle to joint venturers other than the general equity requiring restoration of contributions.

Although the joint venture in *UDC v Brian* was characterised as a partnership, the label of the relationship between the parties is not a relevant consideration when determining whether the relationship involves fiduciary duties. This is because the term ‘joint venture’ itself is not a technical term with a settled common law meaning.\(^{12}\) Although it usually connotes some form of association for trading, commercial, mining or other such purposes, and has been termed a ‘joint adventure’ in Scots law, without a concrete definition, more than a mere label is required before a ‘joint venture’ relationship may be characterised as fiduciary.\(^{13}\)

Although fiduciary duties cannot be read into a joint venture or joint endeavour as readily as a partnership\(^ {14}\) due to the level of development that partnership law has had, regardless of how a relationship between associated parties is termed, what determines its fiduciary character is the form and content of that relationship.\(^ {15}\) The form and content of the relationship then “moulds” the character of that fiduciary relationship.\(^ {16}\) It is possible for a joint venture to not meet the requirements of a partnership, yet still contain fiduciary duties.\(^ {17}\) It appears that, when undertaking a joint venture however loosely termed, a fiduciary relationship will exist if there is a relationship based on mutual trust and confidence, rather than a merely contractual relationship without mutual trust and confidence.\(^ {18}\) This is also the case for negotiations prior to a joint venture being formed.\(^ {19}\)

Of interesting note is the explicit referral to a substratum by the High Court: it was held that the “fundamental element of the substratum of the fiduciary relationship” between the parties was that their intentions they had agreed to would be carried out.\(^ {20}\) If the point of their joint venture

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\(^{12}\) Ibid 10 (Mason, Brennan and Deane JJ), 14 (Dawson J); *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603, 626 [74] (Gummow, Hayne, Heydon and Kiefel JJ).

\(^{13}\) *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 10 (Mason, Brennan and Deane JJ), 14 (Dawson J).

\(^{14}\) Ibid 10 (Mason, Brennan and Deane JJ).


\(^{16}\) *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 11 (Mason, Brennan and Deane JJ).

\(^{17}\) Ibid 15–16 (Dawson J).

\(^{18}\) Ibid 7–8 (Gibbs CJ), 12–13 (Mason, Brennan and Deane JJ), 16 (Dawson J). See also *Breen v Williams* (1996) 186 CLR 71, 82 (Brennan CJ); *Concrete Pty Ltd v Parramatta Design and Developments Pty Ltd* (2006) 229 CLR 577, 612–613 [123]–[124] (Callinan J).

\(^{19}\) *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 5–6 (Gibbs CJ), 11–12 (Mason, Brennan and Deane JJ), 16 (Dawson J). See generally *Ewen v Gerofsky*, 382 NYS 2d 651 (1976).

\(^{20}\) *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 12 (Mason, Brennan and Deane JJ).
was to carry out their intentions, which obviously is the case given that the parties explicitly agreed so in writing, then it follows that the substratum of the fiduciary relationship is also the substratum of the joint venture. As discussed earlier, the parties’ intentions (their congruent personality) in a joint endeavour form the substratum of that joint endeavour. In substance, the applicable principles to determine the existence of fiduciary duties in a joint venture and a joint endeavour are identical.

In much the same way that a joint venture which involves mutual trust and confidence imposes fiduciary duties, so does a joint endeavour. As discussed earlier, a joint endeavour is formed from the congruent personality of the parties: they pursue a common goal distinct from any other simple relationship, whether contractual or personal. This also involves mutual trust and confidence between the parties. By virtue of a joint endeavour existing, fiduciary duties may also exist. Consequently, the scope of fiduciary duties in a joint endeavour is also moulded by the form and content of the joint endeavour.21

This is demonstrably the case in *UDC v Brian*. The parties were undertaking a joint venture, and their intentions were known during negotiations and were also made explicit in the contract agreed to by everyone. By failing to appraise Brian and the other co-venturers of the benefit UDC was receiving from SPL, UDC and SPL were acting without Brian’s knowledge or consent.22 This was a breach of fiduciary duty, as so held unanimously by the High Court. On a theoretical level, UDC and SPL acted in a way inconsistent with Brian’s and the other co-venturers’ intentions, denying their personality when the parties’ personality should have been congruent. As such, this denial of personality where Brian and the other co-venturers had no legal remedy was unconscionable. Therefore, the reliance by UDC on its mortgage (its legal rights) was held to be unconscionable as it was obtained through a breach of fiduciary duty.

However, there are two critical differences between the facts in *UDC v Brian* and many cases that fall within the purview of the joint endeavour principle. The first difference is that, in *UDC v Brian*, there was an explicit contract between the parties that set out the terms of the joint venture. The joint endeavour principle also applies to joint endeavours where the parties may not be so fortunate as to be in a position where their rights and intentions are recorded in

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21 *Birchennell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384; *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 11 (Mason, Brennan and Deane JJ), 16 (Dawson J); *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 100–101 [34]–[36] (French CJ and Keane J).

22 *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1, 13 (Mason, Brennan and Deane J).
writing. Even less fortunately, the relationship between the parties may fall short of a contract, and remedies such as restitution for failure of consideration may fail as transactions during the joint endeavour may have been intended as a conditional gift in furtherance of the joint endeavour. In *UDC v Brian*, the aggrieved co-venturers found relief in being able to assert their contractual rights, unburdened by an unconscionable mortgage.

The second difference is that, in *UDC v Brian*, it was a breach of fiduciary duty which triggered a remedy. It was this breach of fiduciary duty which disallowed UDC the ability to rely on its mortgage, which is why the aggrieved co-venturers needed only to assert their contractual rights. Many joint endeavours do not have their intentions enshrined in contract. There also does not need to be a breach of fiduciary duty to claim a remedy under the windfall equity, but importantly, the joint endeavour principle does not provide a remedy. The joint endeavour principle simply regulates the fiduciary duties between the parties to a joint endeavour and, as will be discussed later, the joint endeavour principle may also construe trusts. What happens when the joint endeavour comes to an end is a separate matter: at the very least, the possibility for the parties to owe each other fiduciary duties provides the parties a basis to sue for a breach of fiduciary duty, if it arises.

Despite these differences, the principles applicable in *UDC v Brian* are applicable to the joint endeavour principle. This is because, as stated in *UDC v Brian*, there is no technical definition of a ‘joint venture’, and it is not the label that attracts fiduciary duty: it is the mutual trust and confidence reposed in the parties and the form and content of their relationship which regulates the existence and moulds the content of a fiduciary duty. However, that moulding of fiduciary duties can take many forms, as will be seen. One example is a tightly drafted joint venture contract, designed in such a way to restrict (if not eliminate) fiduciary duties between the parties: although fiduciary duties may be presumed given the congruent intentions of the parties to the joint venture contract, the parties’ carefully considered intentions may in fact eliminate fiduciary duties. It is for this reason that the term “regulate” is chosen rather than “impose”.

As the joint endeavour principle is derived analogously from the principles that underpin the collapse of partnerships and joint ventures, so too should other aspects of the joint endeavour principle be analogously derived. This involves the regulation of fiduciary duties.

It is unfortunate that the vital mechanisms of the windfall equity and joint endeavour principle were never fully explored in *Muschinski v Dodds*. Justice Deane simply said of fiduciary duties that a constructive trust is not only applicable for when a fiduciary duty is breached. This is

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unqualifiedly true as, in the context Deane J was discussing, the windfall equity may apply without attributable blame. This means that a cause of action in the windfall equity does not require any fiduciary duty to be breached for a remedy to be given. However, this does not mean that fiduciary duties may not exist in a joint endeavour. The question “did Mr Dodds and Ms Muschinski owe each other fiduciary duties due to their joint endeavour” was simply not relevant to the claim.

Muschinski v Dodds only derived as much principle as necessary to find a remedy in a novel category of case. The absence of any discussion of the mechanism underpinning the windfall equity or joint endeavour principle has led to the current schism that this chapter is unravelling.

As discussed earlier in this chapter for the arrangement between Flora and Olivia, it is found that, in the absence of any intention to the contrary, they owe each other fiduciary duties due to the mutual trust and confidence they have in one another, borne from their congruent personality which forms the substratum of their joint endeavour. These fiduciary duties are then moulded by that substratum. This means that, in the joint endeavour, the parties may owe each other fiduciary duties as any partner in a partnership would. This duty is not entirely selfless, however. The duty is moulded by the substratum of the joint endeavour, so in this situation, Flora and Olivia are clearly motivated to participate in this joint endeavour in order to make a profit. The fiduciary duties they owe each other are subject to this motivation, which forms part of the substratum of the joint endeavour. To say that Flora and Olivia may not profit from their joint endeavour would in fact be contrary to their intentions.

C Mixture of Property and Constructive Trusts

The joint endeavour principle addresses the mixture of property in a joint endeavour and provides principles in relation to it. The property it addresses may also include debts and liabilities. A mixture of property occurs when the full beneficial ownership of the property of a party to a joint endeavour may become intertwined with the interests of another party to the joint endeavour where that full beneficial ownership is no longer clear. An example of this is one party giving a lump sum of money to another party to purchase items for their joint endeavour. In such a case, the giving of money from one party to another means legal control of the money is transferred to another. Further, the purchase of items with that money may be in the name of the party who purchased the items, rather than the party who actually contributed to money to enable that purchase. In this way, when the beneficial ownership of property contributed to

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the joint endeavour is no longer immediately discernible, the property of parties may become mixed in a joint endeavour.

In order to prevent property of the joint endeavour being used improperly, once the property of the parties becomes mixed for the purposes of the joint endeavour, then a trust is construed to exist over that property. This trust is construed over the property that is contributed, or if that property no longer exists, then the trust is construed over property in proportion to the contributions made by the parties. The reason why this is done is due to the personality of the parties. For a joint endeavour to form, the parties’ personality must be congruent. This forms the substratum of the joint endeavour. Once property has become mixed for the purposes of the joint endeavour, then that mixture of property is supported by the substratum of the joint endeavour, and a trust is construed to ensure the property is dealt with according to that substratum.\textsuperscript{23} Dealing with the property in a way inconsistent with the substratum would then be a breach of constructive trust.\textsuperscript{24} However, the mixture of property must be done for the purpose of the joint endeavour.\textsuperscript{25} If the property is not contributed for the purposes of the joint endeavour, then the contributing party’s personality cannot form part of the substratum of the joint endeavour and it falls outside the scope of the joint endeavour principle.

In the earlier example, Flora has a legal 5/6ths interest and Olivia has a legal 1/6th interest in commercial property, despite both contributing 3/6ths each. This contribution was based on the substratum of their joint endeavour and, as their legal interests no longer reflect their beneficial ownership, a trust is construed to exist over the property in proportion to their contributions. As Flora’s legal interest is greater than her contribution, she must hold the discrepancy (2/6ths) on constructive trust for Olivia to be used for the purposes of the joint endeavour. If Flora deals with this 2/6ths interest in a way inconsistent with the substratum of the joint endeavour, such as using it as security for a personal loan without Olivia’s consent, then this would be a breach of trust.

This is similar to a breach of fiduciary duty. As the parties’ interests are congruent, if Flora uses her position in the joint endeavour to take an advantage at the expense of Olivia without her consent, then Olivia has been denied the ability to act with personality due to Flora’s act. For a breach of trust, the same principles apply. When Flora is holding 2/6ths of the property on trust

\textsuperscript{23} Re Weeding [1992] TASSC 40.

\textsuperscript{24} From here on, a reference to a “breach of trust” is a reference to breach of a constructive trust arising by virtue of the joint endeavour principle.

\textsuperscript{25} Prentice v Cummins (2003) 134 FCR 449, 466 [60].

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for Olivia, this is done for the purposes of the joint endeavour. Olivia, no longer having legal control of this 2/6ths interest, relies on Flora to deal with it on her behalf. Flora, as a constructive trustee, has the ability to deal with the property and, as soon as that property is dealt with in a way inconsistent with the reason it was given to her, Olivia is denied the ability to act with personality in relation to that property.

What matters is whether the property has been mixed according to the substratum of the joint endeavour. For example, if Flora and Olivia embarked on this joint endeavour, but Olivia said that Flora could keep the full 5/6ths interest regardless of how the endeavour turned out, then this would constitute a gift. The 2/6ths interest given by Olivia is then not done for the purpose of the joint endeavour but was given unconditionally as a gift. Personality is not denied to Olivia in this scenario – Olivia has acted with purposive agency to make that gift. It cannot be unconscionable for Flora to assert an interest in property that was given as an unconditional gift when the donor has acted with the intent of giving that property as an unconditional gift.26 It is for this reason that it is important to fully grasp the true nature of the relationship between the parties and their intentions.

A point should be made about what a mixture of property entails. In Weinrib’s conception of corrective justice in unjust enrichment, he focuses on a transfer of value as an indicator of an unjust enrichment. This is one obvious indication of when property is mixed. In the example above, there has been a transfer of value from Olivia to Flora which a constructive trust would protect.

However, this explanation does not appear adequate as it does not account for transfers of things of value. Whilst the point made by Weinrib is to identify an enrichment at the expense of another, this is not adequate for unconscionability. This is particularly so when considering the Timo and Jens example used earlier. If Timo gives music gear worth $5,000 to Jens, and Jens gives $5,000 in cash to Timo, then there has been no transfer of value in the sense that Weinrib uses the term ‘value’: it has been an equivalent exchange of things of value. Neither party is any worse off. Does this mean that there is nothing that Equity can say about this transaction?

As a matter of unjust enrichment, nothing can be done as it would be a fiction to say there has been an enrichment and a detriment given the equal value. So how does Timo get his music gear back? What if Jens instead gave Timo $10,000? The unjust enrichment conception would

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demand that Timo pay Jens $5,000 to equalise the transfer of value. What if Timo’s music gear was left to him by his deceased father, carrying enormous sentimental value and can no longer be bought? Effectively, this will have been a forced transfer of Timo’s music gear to Jens. This forced transfer does not accord with Equity respecting a party’s personality.

The reason why this scenario is contrary to the idea of personality as used by this thesis is that, in the example above, whilst it is an equivalent exchange of things of value, Jens has forced a sale of property without Timo’s consent. If Timo provided music gear for the joint endeavour, then if Jens has control of it, this must be held on trust for Timo to be used for the purposes of the joint endeavour. By giving an equivalent monetary value to Timo, Jens cannot simply call off the joint endeavour and assert title to the music gear. He has ‘paid’ for it, but it was done by denying Timo personality. This is unconscionable in the same way that the modified Amadio example in the previous chapter was unconscionable. Whether the transaction was fair or not, it was procured without a party having personality, which is unconscionable.

Rather than weighing the value of things against one another, it is then better to treat property rights individually until they have been converted into something with liquidity, like money. This is important because some things may not be compensable with money, such as the purchase of land, or in Timo’s case, his irreplaceable music gear. If damages do not suffice, Equity may order specific performance. Clearly, Equity may recognise the individual value of things independently from their monetary value. In this sense, the relative value of the property mixed is not relevant unless it is in some indistinguishable form, such as money. What matters is the legal and equitable interests of the parties in property and whether or not those interests coincide. This requires a proper analysis of contributions from whom and to where.

This approach gives confidence to those in a joint endeavour that their contributions, be they in the form of money or irreplaceable property, will be protected by a trust. Of course, it is possible for this trust to be breached, which may give rise to a claim for breach of trust, but the construal of a trust at the moment the property was mixed for the joint endeavour protects the property, particularly against claims of third parties. In that regard, in a joint endeavour, fiduciary duties may protect the parties, whereas constructive trusts protect the property.

27 There is the requirement that one who seeks Equity must do Equity, so it is possible that Timo could seek to have his music gear returned on the condition he refund the $10,000, but this cannot be easily explained with an approach based on unjust enrichment with regard only to the transfer of value, and not things of value.

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As mentioned earlier, this trust is construed if the property is mixed for the purposes of the joint endeavour. This means the trust is supported by the substratum of the joint endeavour, which in turn means that the trust is moulded by that substratum. This is an important point to make, as the joint endeavour principle, when construing a trust, does not compel the return of property contributed to a joint endeavour: it only compels the use of property for the purposes of the joint endeavour.

For example, when Flora receives 5/6ths of the property despite only contributing 3/6ths, she is not compelled to return this to Olivia immediately. Rather, she is compelled to hold it on trust for Olivia for the purposes of the joint endeavour. This allows Flora to use that property for the purposes of the joint endeavour without committing a breach of trust, as it is being used in a way contemplated by Olivia. However, if the substratum falls away, then the property can no longer be used for the purposes of the joint endeavour. This is where the windfall equity may step in, without Olivia’s consent, to deal with the property in the absence of a substratum supporting it may constitute a breach of trust. It would be denying personality to Olivia in relation to that property.

This aspect of the joint endeavour principle protects property of a joint endeavour. Given the institutional nature of the constructive trust, it arises by operation of law and does not need to be claimed as a remedy. The trust is construed the moment that property is mixed pursuant to the joint endeavour, and not as a remedial response. The parties may also rely on this constructive trust as against third parties. In this regard, the parties also owe each other the fiduciary duties of a trustee, with those fiduciary duties consequently moulded by the substratum of the joint endeavour.

D Consequences and Causes of Action

The consequences of the joint endeavour principle can be separated into two distinct limbs. The first limb concerns the existence of a joint endeavour by examining whether the intentions of the parties are such that they are acting in such a way that their interests are congruent and require mutual trust and confidence to carry out those intentions. This determines the existence of a joint endeavour and, as those same requirements also regulate the potential fiduciary duties in the relationship, the joint endeavour may have fiduciary characteristics. These duties are


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moulded by the substratum of the joint endeavour, and the parties’ intentions may restrict fiduciary duties, either in part or in whole.

The second limb also draws upon the congruent interests of the parties. As the parties have mutual trust and confidence in one another, if they transfer property between themselves for the purposes of the joint endeavour, then that property will be held on trust. This constructive trust works to protect the property contributed to a joint endeavour in the absence of any intention to the contrary, such as making a gift.

The consequences of these two limbs of the joint endeavour principle are that there are two principles in play which give potential causes of action. The first limb regulates the fiduciary duties of the parties, requiring them to act in a way consistent with the duties expected of a fiduciary, including not taking advantage of the other party. Although joint endeavours are often for profit, the fiduciary duties are subject to the substratum of the joint endeavour which may accommodate those purposes. Given this duty exists, it may be breached, giving rise to a cause of action for breach of fiduciary duty.

Similarly, as the second limb construes a trust subject to the substratum of the joint endeavour, the parties who hold the property of the other must use that property only for the purposes of the joint endeavour. This does not compel the return of property, but only its proper use according to the substratum of the joint endeavour. Any improper use of the property held on trust may give rise to a cause of action for breach of trust.

The joint endeavour principle as expressed above applies to all joint endeavours, but the more sophisticated an arrangement becomes, such as being subject to contract and partnership law, the more that those areas of law take primacy over the joint endeavour principle. Ultimately, however, the joint endeavour principle still provides the substrate for all joint endeavours to rest upon safely, regardless of their level of sophistication.

There is one other aspect of the joint endeavour principle. Whilst it may give rise to causes of action for breach of fiduciary duty and breach of trust, these causes of action are not unique to the joint endeavour principle. Any fiduciary or trust relationship implied by other principles, such as through an express trust or the relationship between agent and principal, may give rise to these causes of action as well. However, no other principle or circumstance can give rise to the cause of action of the windfall equity. This cause of action operates when the substratum to the joint endeavour falls away unexpectedly and can operate whether or not ‘blame’ exists.
III Elements of the Windfall Equity Cause of Action

The windfall equity is a cause of action that arises when a joint endeavour has broken down in uncontemplated circumstances without attributable blame and where property has been unconscionably retained by one party to the exclusion of the other. This cause of action only arises if both limbs of the joint endeavour principle have applied. This means that a joint endeavour must have existed, and that property must have been mixed during the joint endeavour and has not been returned. It may also apply even if there has been a breach of fiduciary duty or breach of trust, but these breaches are not necessary to the cause of action or remedy as attributable blame is not an element. This is often why it is pleaded as an alternative to causes of action such as a breach of fiduciary duty and breach of trust.  

The aspects to be discussed involve the breakdown of a joint endeavour, unconscionable retention of benefit, attributable blame, and remedies.

A Breakdown of Joint Endeavour

As discussed earlier, the existence of a joint endeavour is defined by the parties’ congruent personality. It is this congruent personality that forms the substratum of the joint endeavour. It logically follows that when the parties’ personality is no longer congruent, then the substratum of the joint endeavour falls away, and when the substratum falls away, the joint endeavour collapses. Therefore, when the parties can no longer act in a way consonant with an ongoing joint endeavour, it has broken down. It also follows that a joint endeavour must be shown to exist, as if there was no joint endeavour, the windfall equity cannot apply.

A point about fiduciary duties should be made here. Whilst it is true that the same principles that give rise to a joint endeavour also give rise to fiduciary duties, it does not mean that when a joint endeavour collapses that there must have been a breach of fiduciary duty. In Muschinski v Dodds, there was no blame attributed to not being able to continue a personal relationship. Although there may be a breach of fiduciary duty, the collapse of a joint endeavour does not mean a fiduciary duty has been breached. Likewise, a breach of trust is also not necessary. Blame will be discussed later in this section.


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A joint endeavour does not immediately end whenever the parties have a disagreement or if a party wishes to make changes to the joint endeavour. For example, a number of changes to the joint endeavour occurred in *Muschinski v Dodds* without ending the joint endeavour. This is because, in much the same way that a party’s unilateral act cannot form a joint endeavour, a party’s unilateral act cannot end a joint endeavour. This is because the other party must either agree or disagree with this change in substratum. It is open for the other party to accept the change, or if they do not accept the change, the first party may choose to not go ahead with their change after all. This prevents an otherwise unilateral act from overriding the personality of the other party either deliberately or by accident—after all, the party that wants a change may be content in continuing the joint endeavour if the other party does not agree.

If the other party agrees, then the parties’ personality remains congruent, and the substratum of the joint endeavour is correspondingly altered to reflect the new state of affairs. It is only once the other party disagrees that it becomes possible for the joint endeavour to collapse. From here, the party who wanted a change can either carry on with the original joint endeavour, in which case nothing changes, or they can continue to disagree. It is when both parties can no longer agree on a course of action does the substratum of a joint endeavour fall away.

A party wishing to change their mind is not the only way for the substratum of a joint endeavour to collapse. Unexpected circumstances may prevent the parties from carrying out their intentions. For example, if Flora and Olivia’s commercial premises were irrevocably damaged in a flood, they could no longer rent it out as part of their joint endeavour. This could cause the substratum of the joint endeavour to fall away but, instead of it collapsing due to the parties’ being unable to agree, it collapses due to the parties’ intentions being unable to be carried out.

However, because the parties can agree to whatever they wish, the windfall equity only applies to when the parties cannot agree. For example, if Flora and Olivia’s joint endeavour comes to an end due to flood damage, it does not necessarily mean that the windfall equity applies. It is entirely open for Flora and Olivia to act with personality and simply agree on how to wind up their joint endeavour. If the parties agree on how to wind up their affairs, then this takes primacy over anything else, unless one party’s consent was obtained through unconscionable conduct. This is why if a contract exists between the parties that provides a way to wind up the joint endeavour, or if some other statutory mechanism exists, then the parties’ intentions or that

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30 *Rankin v Official Trustee in Bankruptcy* (2005) 220 ALR 723, 731 [45]–[47].

31 See the discussion in the previous chapter regarding the simplified Amadio example.
statutory mechanism should be given effect.\textsuperscript{32} This is also why the windfall equity often occurs in ‘unforeseen circumstances’, even in sophisticated contractual arrangements that do not account for a specific scenario.\textsuperscript{33}

As has been seen earlier in this thesis, it may only be necessary for the substratum of the joint endeavour to be threatened to satisfy this aspect of the windfall equity. This is shown in \textit{Sui Mei Huen}.\textsuperscript{34} However, after analysing the principles in \textit{Muschinski v Dodds} as giving rise to the joint endeavour principle and windfall equity, this is not the correct approach. The better approach is not to think of the windfall equity as a cause of action for when a joint endeavour may be threatened but, instead, the second limb of the joint endeavour principle should be all that is necessary to consider. Because a trust may be construed in a joint endeavour by operation of law, then if some dispute arises with someone external to the joint endeavour, there is no need to plead a cause of action to seek a remedy. Instead, the joint endeavour principle may be relied upon to show that a trust was construed by operation of law and to ask the court to recognise the constructive trust by a declaration if necessary. This highlights the confusion in the case law. The windfall equity should not be used to claim a remedy in \textit{Sui Mei Huen} where the joint endeavour was threatened with breaking down: instead, the joint endeavour principle should be used to claim that a constructive trust exists by operation of law.

\section*{B Unconscionable Retention of Benefit}

So long as the parties can no longer act with congruent personality, then the substratum of the joint endeavour falls away. At this point, it must be considered whether there has been an unconscionable retention of benefit.

It was discussed above that a joint endeavour must be shown to exist and to then fail. This relies on a consideration of the first limb of the joint endeavour principle. Similarly, an unconscionable retention of benefit can only occur if the second limb of the joint endeavour principle applied. This means that property must have been mixed for the purposes of the joint endeavour, and thus held on constructive trust. Whether or not any breach of trust exists, at the very least, an unconscionable retention of benefit (the denial of personality in relation to property held on trust) must be shown before a cause of action in the windfall equity can operate. If property has

\textsuperscript{32} See, eg, \textit{Hawker v Barretts Bowyangs Pty Ltd} [2001] NSWSC 913; \textit{Arrow Custodians Pty Ltd v Pine Forests of Australia Pty Ltd} [2008] NSWSC 839.

\textsuperscript{33} See, eg, \textit{John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd} [2010] NSWSC 150.

\textsuperscript{34} See \textit{Sui Mei Huen v Official Receiver for Official Trustee in Bankruptcy} (2008) 248 ALR 1.
not been mixed for the purposes of the joint endeavour, then no trust has been construed, and the windfall equity cannot apply. If there is no property to return, the windfall equity has no purpose.

As discussed earlier, the first limb of the joint endeavour principle shows how the substratum of a joint endeavour is formed and, when the substratum falls away, the windfall equity may apply. The second limb of the joint endeavour principle is similar in that property construed to be held on trust is deemed to be held as such due to the substratum of the joint endeavour.

Property held on trust pursuant to a joint endeavour can only be dealt with for the purposes of the joint endeavour and, if that cannot be achieved, it must be returned to the contributing party. This is because if the substratum of the joint endeavour falls away, then so too does the substratum of the property being held on constructive trust. If the property can no longer be used for the purposes for the joint endeavour, then the only remaining duty upon the constructive trustee is to return the property to its rightful owner, unless that rightful owner decides otherwise. If this is not done, then the retention of that property becomes unconscionable. This is what is meant by an ‘unconscionable retention of benefit’.

Further, unless the property is indistinguishable, like money, then property must be returned in specie. Like with Timo and Jens, property is to be returned in specie to prevent one party from effecting a forced sale of property. If the property still exists, it is held on trust and must be returned in specie: compensation in lieu is not sufficient. Of course, if that property no longer exists, then compensation may be required.

This can be demonstrated with the Flora and Olivia example. Assume that, apart from their respective $300,000 contributions, their bank provided the balance purchase price and took a mortgage over the commercial property. After many years, their endeavour has broken even. They are not seeing the profits they envisaged and the market looks bleak, and under the terms of the mortgage, the bank decides to exercise its power of sale before the market crashes. The bank takes possession, finds a buyer, and sells the property. By a stroke of luck, the sale price was enough to pay out the balance owed to the bank plus any fees, leaving a $600,000 surplus to distribute to Flora and Olivia.

Unfortunately, Flora and Olivia forgot to instruct the bank as to how that surplus should be paid. The bank follows their usual procedure, of which Flora and Olivia are aware, which is to provide bank cheques to Flora and Olivia for $500,000 and $100,000 respectively, reflecting each parties’ respective legal 5/6ths and 1/6ths interests in the property. Olivia asks Flora to pay her

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$200,000, but Flora refuses. Is this unconscionable? An example with boxes will show whether or not the retention is unconscionable.

| $500,000 – | $100,000 – |
| 5/6th     | 1/6th     |

<table>
<thead>
<tr>
<th>Flora</th>
<th>Olivia</th>
</tr>
</thead>
</table>

> Sale >

| $500,000 | $100,000 |

The above examples reflect the ownership of the commercial property before the sale on the left, and the share of sale proceeds after sale on the right. Although the examples appear identical, it must be recalled that it is not only the material balance between the parties which is relevant. What is important is whether there has been a normative upset – have the parties acted with personality?

The example on the left is supported by the substratum of the joint endeavour – it was the parties’ intentions that, despite contributing equally to the purchase price, they would take their respective legal interests as 5/6ths and 1/6th to better suit their tax arrangements. Despite the large transfer of value, the arrangement on the left is not unconscionable. This is because it is supported by the substratum of the joint endeavour: the parties’ interests are congruent. Both parties have consented to this state of affairs for the purpose of the joint endeavour.

Because of this, of Flora’s 5/6ths interest, 2/6ths is held on constructive trust for Olivia due to the second limb of the joint endeavour principle. As the trust over that 2/6ths interest is supported by the substratum of the joint endeavour, it may only be dealt with according to that substratum. Flora may then use the property she is holding on trust for the purposes of the joint endeavour, without fear of dealing with that property improperly. However, this means that, should it become impossible to use that 2/6ths interest for the purposes of the joint endeavour,

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then there is no authorised use of that 2/6ths interest for anything and it must be returned to the contributing party.

It is for that reason that the example above on the right becomes unconscionable, despite there being no change in the value of the parties’ interests. As the substratum has fallen away, any property held on trust pursuant to the second limb of the joint endeavour principle can no longer be used for the purposes of the joint endeavour. It must be returned to the beneficiary.

Without the substratum supporting Flora’s retention of that $200,000, it would be unconscionable to retain it to the exclusion of Olivia who is beneficially entitled to it under the constructive trust that arose in her favour years ago when she made that contribution to the joint endeavour. It is unconscionable because, despite Olivia being entitled to that property, she is not in a position to be able to choose what she can do with it. Flora, holding legal control of the property, is making that choice for her. Olivia is being denied personality. If Olivia chose to treat this as a gift to Flora after the fact, then it would not be unconscionable as she is acting with purposive agency, and possession is not necessary to make the gift if the donee already holds the property. But as her control over the money has been surrendered to Flora involuntarily, if she chose to assert title to the money, she would not be able to; likewise, if she wanted to make a gift of that money to someone else other than Flora, she would also not be able to do so. This denial of personality is unconscionable. It this reason why the second limb of the joint endeavour principle construes such a trust.

It must also be remembered that, unless the property in question is something like money, property must be returned in specie, lest a forced sale of property contrary to a party’s wishes occurs. For example, if Flora provided a table worth $5,000 to the joint endeavour, which Olivia now holds, the relative value does not matter. It is not open for Olivia to only claim $195,000 and assert ownership of the table, nor is it open for Flora to only give $195,000 to Olivia and tell her to keep the table. Olivia is entitled to $200,000 and Flora is entitled to the table, and the parties must return this property to its contributor. Of course, the parties may agree to make

35 Further, once Olivia makes it a gift to Flora, she owns it outright. It is not unconscionable to assert title to something that a party has full beneficial ownership of. See, eg, *Millner v Secretary, Department of Social Security* [1986] AATA 287; *Marshall v Secretary, Department of Social Security* [1989] AATA 314; *Tokolyi v Secretary, Department of Social Security* (1992) 26 ALD 97; *Slaven v Secretary, Department of Social Services* [2015] AATA 427. However, if Olivia’s consent to this gift (or any other agreement to wind up the joint endeavour) was obtained through unconscionable conduct, then that is a different matter. Her consent cannot be relied on, and consistent with the principles of unconscionable conduct, Flora will not be able to insist on Olivia’s consent if Olivia later claims in the windfall equity and can substantiate that her previous consent was obtained through unconscionable conduct.
this sale of the table, but it cannot be forced upon any party unilaterally. Flora must refund the $200,000, and as one must do Equity to seek Equity, Olivia must likewise return the table.

C Without Attributable Blame

The final element in the windfall equity is that the joint endeavour must have broken down without attributable blame. The concept of attributable blame needs analysis to understand what this means.

The concept of attributable blame has not been adequately addressed in case law. It has been suggested that attributable blame may work to deny a remedy to a claimant; it may be bound up in questions of unconscionability; it may simply cease to be relevant as any meaningful notion; or it may simply be a reminder against attributing fault when a finding of fault is not necessary to wind up the parties’ relationship. These suggestions will be discussed in turn.

From the case analyses in previous chapters, attributable blame does not seem to deny a remedy to a claimant. If it did, it would also run counter to the concept of correlative. As the parties’ rights are correlative, the unwinding of a joint endeavour necessarily affects both parties. If a party could not claim under the windfall equity because they are blameworthy, this would have no effect on the other party from claiming under the windfall equity – but when that other party claims under the windfall equity, the blameworthy party would have their interests addressed, too. This is because their rights in relation to the joint endeavour are necessarily correlative, and to seek Equity, one must do Equity – one who receives a benefit must bear its burden. Clearly, attributable blame does not deny a claim in the windfall equity, given the correlative nature of the parties’ rights.

There is a good argument that ‘attributable blame’ may simply be inherent in unconscionability and is not a separate element. This approach can be taken due to this chapter separating the windfall equity and the joint endeavour principle. The joint endeavour principle may lead to other causes of action that do involve attributable blame, such as breach of fiduciary duty and breach of trust. Perhaps if a joint endeavour breaks down with attributable blame, then that may simply mean that there might be another cause of action that is applicable, such as breach of fiduciary duty and breach of trust, as these are possible outcomes due to the two limbs of the

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joint endeavour principle. There may be other considerations applicable as well, such as a claim for equitable estoppel. This would naturally also affect the remedies that the parties could seek, such as an account of profits for breach of fiduciary duty.

The remaining two suggestions have similar merit. At least in relation to the windfall equity, attributable blame is not a meaningful notion. It also means that, when considering a claim under the windfall equity, a court is not required to make any finding of blameworthiness. The blame of the parties is irrelevant, as the windfall equity simply seeks to unwind the parties’ joint endeavour so that they may go on with their lives. This would also mean that, even if there was attributable blame, the windfall equity may be an alternative pleading, as unlike breach of trust, no blame is needed to be proven in the windfall equity. This would, however, have ramifications for the remedy. For example, whilst a party may be able to seek an account of profits due to a breach of fiduciary duty, for a party to succeed, they must in fact show that breach of fiduciary duty. If that cannot be shown, then although an account of profits may not be available, that party can at least have a cause of action in the windfall equity.

It seems that blameworthiness is irrelevant to the windfall equity. Blameworthiness merely indicates the potential existence of other causes of action, such as breaches of fiduciary duty and breaches of trust, which might have a different remedy compared to the windfall equity. Otherwise, attributable blame is not an element of the windfall equity.

D Remedy

The remedy for the windfall equity is one that seeks to unwind the parties’ joint endeavour by reference to any property that has been unconscionably retained by one party to the exclusion of the other. This is in contrast to equitable estoppel, which looks to the detriment suffered in not fulfilling a promise.  

The corrective justice model developed in the previous chapter provides that the remedy should restore the personality of the plaintiff. In this case, this is done by returning any property that was construed to be held on trust to the parties who are beneficially entitled to it.

This remedy is supported by the fact that the second limb of the joint endeavour principle construes a trust over any property contributed to the joint endeavour, unless the intentions of the parties show the contrary. It is from this constructive trust that all remedies flow in the

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37 See Henderson v Miles (No 2) [2005] NSWSC 867.

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windfall equity, as it provides a principled basis to both protect property during the joint
endeavour and protect property once the joint endeavour has broken down. Once the property
has been identified and traced, it is simply a matter of identifying who made the contributions
and whether they had intended beneficial ownership to pass to another party. Once that is done,
the identification of constructive trusts follows, and then contributions will be restored
accordingly.

In the Flora and Olivia example, $200,000 is being held on trust by Flora after the breakdown of
the joint endeavour. This $200,000 can be identified as having been contributed by Olivia for
the purposes of the joint endeavour, and no beneficial ownership was intended to pass.
Therefore, in order to restore the ability for Olivia to act with purposive agency in relation to her
property, legal possession should be returned to her.

\[
\begin{array}{c|c|c|c|c}
$500,000 & $100,000 & $300,000 & $300,000 \\
\hline
\text{Flora} & \text{Olivia} & \text{Flora} & \text{Olivia} \\
\end{array}
\]

In this case, the example on the left shows the unconscionable retention of benefit by Flora to
the exclusion of Olivia. The appropriate remedy restores the parties’ contributions to their initial
state, as shown by the example on the right.

The remedy flows from the existence of a constructive trust. As seen from the previous chapters,
this remedy will be the minimum required to do justice. This could involve recognising that the
constructive trust continues as the ultimate remedy, or it may be appropriate to simply find
equitable compensation, whether or not it is supported by an equitable charge. It must be
remembered that, if there are no property issues to resolve, the windfall equity cannot apply as
there is nothing to resolve.

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This remedy for the windfall equity is different from other potential causes of action, such as breaches of fiduciary duty and trust. This distinction is important to make, as during a joint endeavour these breaches may be committed. As discussed, attributable blame is not an element to prove to claim the windfall equity. The windfall equity merely seeks to wind up the parties’ joint endeavour, not to apportion blame. This means that, although a breach of fiduciary duty or trust may entitle a claimant to remedies including an account of profits, this is not the case for the windfall equity. Contributions must simply be returned to the parties in the windfall equity. If a party can substantiate blame, then they may be entitled to claim a cause of action with blame as an element, but they may still resort to the windfall equity as an alternative cause of action if they cannot substantiate blame.

A note should be made about shortfalls and surpluses in winding up a joint endeavour. If all initial contributions cannot be restored, then there is a shortfall. If all initial contributions can be restored with funds remaining, then there is a surplus. Shortfalls and surpluses are dealt with by the windfall equity by determining what the intentions of the parties were in relation to shortfalls and surpluses. In short, they are governed by the substratum of the joint endeavour.

In dealing with the surplus, *Muschinski v Dodds* is a helpful example. Here, the parties received a refund of their contributions to the joint endeavour, being 10/11ths and 1/11th. However, the surplus was distributed equally, according to their legal interests as tenants in common in equal shares. Justice Deane considered that there might be circumstances where one party might be able to assert a proportionately greater interest in a surplus but did not elaborate on why, beyond unconscionability needing to be shown.  

In accordance with this and the previous chapters’ conception of unconscionability and corrective justice, then it follows that a disproportionate share should be given if it can be shown that the parties intended that. For example, if Flora and Olivia agreed to share any profit equally, then in accordance with this substratum, any surplus from the joint endeavour’s failure should be treated in this way. Similarly, if the parties agreed to share in the profits disproportionately, for example, 60 per cent and 40 per cent, then the surplus should similarly be distributed in this manner. This is in order to give as full effect as possible to the parties’ intentions which form the substratum of the joint endeavour.

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38 *Muschinski v Dodds* (1985) 160 CLR 583, 623 (Deane J).

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However, if no such intention can be found, how should the surplus be dealt with? Justice Deane distributed the surplus according to the parties’ legal interests, saying that Equity can only operate if it positively appears that such a legal interest would be unconscionable.\textsuperscript{39} It is for this reason, if the parties have agreed to some manner of distribution of any profit, that the joint endeavour should be wound up in a way that reflects the parties’ intentions in order to preserve the parties’ intentions as far as is possible. These intentions may be express or implied.

However, if that intention does not exist, whether express or implied, then there needs to be some ‘positive’ reason why that legal interest should be unconscionable. As has been seen from the previous chapters, courts will not impute intention. If the parties have not considered a matter, then that is the end of it. It is not open to impute an intention on the basis of what the parties \textit{might} have done had they considered it.\textsuperscript{40} By imputing an intention, the court is supplanting the parties’ purposive agency. The role of a court in Equity, based on this and the previous chapter, is to restore the personality of a party—it is not the role of a court to act in a party’s stead. For this reason, if there is no guidance to show why it would be unconscionable to apportion the surplus according to the parties’ legal interests, then there is no reason to depart from those interests.

It is for this reason that the equal sharing of the surplus in \textit{Muschinski v Dodds} can be explained. Whilst Ms Muschinski never intended for her contribution to be a gift to Mr Dodds, this only related to the actual contributions made. Once those contributions were restored, then the surplus was left over and the parties had never evinced any intention in relation to a possible surplus. In this regard, guidance may only be had to the fact that the parties chose to take an equal legal interest in the property: without any reason to depart from that state of affairs, the surplus was distributed according to that equal legal interest.

Shortfalls are different. If there is a surplus, then the parties’ contributions have been fully returned and personality restored in relation to those contributions. Unfortunately, if there is a shortfall, then not all contributions have been restored to the parties. In this case, the parties’ personality has not been completely restored. A shortfall cannot be left to the parties’ apparent legal interests, as these outstanding contributions must be accounted for.

In such circumstances, as with everything else discussed in this chapter, the first step is to consider what the parties’ intentions are. If the parties have agreed to take on debts

\textsuperscript{39} Ibid.

\textsuperscript{40} See generally \textit{Roxborough v Rothmans of Pall Mall Australia Ltd} (2001) 208 CLR 516.

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disproportionate to their contribution, it must be considered if this forms part of the substratum. If it does not, then that disproportionate assumption of liability may be construed as a gift of sorts and will not form part of the shortfall. If, however, those disproportionate debts are founded on the substratum of the joint endeavour, then once that substratum falls away, that assumption of liability for those disproportionate debts also falls away.

It would be unconscionable to rely on a legal right that was supported by a substratum when that substratum no longer exists. This has been a theme throughout this chapter, and also applies to the question of who should suffer what loss in the event of a shortfall. In this scenario, there is no other course of action than to allow the parties to take an interest proportionate to their contributions. If this were departed from, then who should bear the proportionately higher loss? What makes the person bearing proportionately less of the burden more deserving? Here, other principles may provide an answer where relevant, such as equitable contribution or marshalling. In any event, corrective justice demands a return to initial proportions. In the absence of any contrary intention of the parties or other applicable principles, both parties should bear the loss in proportion to their contributions. This leaves neither party better or worse off. Proportionate balance is then restored.

IV Sword and Shield Reconciled

As was seen from the case analyses in the previous chapters, it appeared as though the windfall equity was some dimorphous concept that provided a cause of action in some circumstances, but construed trusts in other circumstances based on the same principles. Those cases did not make any distinction between these two approaches, yet the same principles appeared to give rise to two separate results. From the analysis in this chapter, it can be seen that there is no monolithic ‘windfall equity’ that covers all circumstances. Likewise, there is no distinction between ‘remedial’ and ‘institutional’ constructive trusts. Instead, it has been shown that there exist two separate mechanisms at play: the joint endeavour principle, and the windfall equity.

A The Joint Endeavour Principle

The joint endeavour principle applies to all joint endeavours. It contains two limbs. The first limb involves how to identify a joint endeavour and implies fiduciary duties, and the second limb construes a trust over property contributed to a joint endeavour.
The first limb shows that, when the parties’ intentions are so congruent as to require mutual trust and confidence to carry out those intentions, those congruent intentions form the substratum of a joint endeavour. By virtue of those intentions being so congruent, the parties may owe one another fiduciary duties, moulded by that substratum. The effect of this is that all joint endeavours may involve fiduciary duties. This includes more formal relationships, such as partnerships. This means that a contractual ‘joint venture’ can only be a joint endeavour if it involves mutual trust and confidence. Any other relationship that does not involve mutual trust and confidence is not a joint endeavour, and thus is not amenable to the joint endeavour principle. However, such a contractual joint venture may be a joint endeavour but, by virtue of the contract, fiduciary duties may be limited or absent entirely.

The corollary of fiduciary duties possibly existing in a joint endeavour is that it is possible for a party to breach their fiduciary duty. In this regard, the joint endeavour principle is not only related to the windfall equity. It regulates the existence of fiduciary duties in joint endeavours, and those duties may be breached which may in turn give rise to a cause of action for that breach of fiduciary duty.

The second limb protects property contributed to a joint endeavour by construing a trust over it in favour of the contributing party. This trust is also moulded by the substratum of the joint endeavour. This means that the joint endeavour principle does not compel the return of property: it regulates how that property may be used. If the property held on trust is not used for the purposes of the joint endeavour, then this may constitute a breach of trust, giving rise to a cause of action for that breach of trust.

In this regard, it can be clearly seen that there is no distinction between ‘remedial’ and ‘institutional’ constructive trusts. The second limb of the joint endeavour principle construes a trust to exist over property contributed to a joint endeavour at the exact moment that that contribution was made, unless the parties’ intentions show otherwise. There is no need for a ‘remedial’ response here: the fact that a trust is construed by operation of law is enough to protect property to a joint endeavour, which can be seen through its use as a ‘shield’ from the previous chapters. The trust is construed at the time the property is contributed, which is when it would be unconscionable to deal with that property in a way inconsistent with the joint endeavour, and not upon any wrongdoing.
However, despite these two limbs of the joint endeavour principle giving rise to potential causes of action for breach of fiduciary duty and breach of trust, there is one other cause of action that is unique to the joint endeavour principle. This is the windfall equity.

B The Windfall Equity

The windfall equity is a cause of action unique to the joint endeavour principle. This is because the joint endeavour principle must be used to first determine whether a joint endeavour exists, whether it has broken down, whether property was construed on trust, and whether that property has not been returned after the breakdown of the joint endeavour. In this regard the windfall equity is a cause of action that arises when a joint endeavour breaks down without attributable blame and where one party unconscionably retains property to the exclusion of the other.

As the joint endeavour exists by virtue of the congruent interests of the parties, the breakdown of a joint endeavour is when the parties’ interests are no longer congruent and when the parties cannot agree on how to wind up the joint endeavour. When this occurs, the substratum of the joint endeavour has fallen away, and so too has any support fallen away from any transfer of property undertaken for the purposes of the joint endeavour.

Any property contributed to the joint endeavour that is no longer in the hands of the contributing party is construed by the second limb of the joint endeavour principle to be held on trust. That trust is supported by the substratum of the joint endeavour. When the substratum falls away, the property held on trust can no longer be used for the purposes of the joint endeavour. It must then be returned to the contributing parties, as its retention despite the lack of its supporting substratum would be unconscionable. Unlike a Quistclose trust, this trust arises by operation of law, and both parties may hold property on trust for each other for the purposes of the joint endeavour.

Further, the windfall equity operates without attributable blame. It was shown that blame is not necessary to succeed in bringing a claim in the windfall equity, as due to the correlative nature of the rights of the parties, the winding up of the endeavour for the benefit of one party must necessarily affect the other parties to the joint endeavour. However, as the joint endeavour principle regulates fiduciary duties and construes trusts, this may give rise to potential causes of action for breaches of fiduciary duty and breaches of trust. Although these causes of action involve blame, it is open for a plaintiff who otherwise cannot prove blame to still rely on the...
cause of action of the windfall equity. Although this might not grant a remedy such as an account of profits, it at least ensures that any party to a joint endeavour can be assured that it will be wound up equitably.

The remedy for the windfall equity flows from the limbs of the joint endeavour principle. As a constructive trust arose the moment property was mixed for the purposes of the joint endeavour, from that date the property in question was protected by a trust. The appropriate remedy then flows from identifying this property held on trust and whether that is a continuation of the trust, or some ‘lesser’ remedy.

In this sense, it is no wonder that the windfall equity has had such a confusing development throughout the decades. The distinction between principle and cause of action has never been made explicit. In teasing out the boundaries of the various aspects of the windfall equity, it appears that there exists a slew of principles related to joint endeavours that can have multiple outcomes independent of the windfall equity. It just so happens that the windfall equity itself is a cause of action arising from the consequences of the joint endeavour principle. The ramifications for this will be discussed in the next chapter, the conclusion to this thesis.
I Conclusion

This thesis began with an analysis of *Muschinski v Dodds*¹ and the cases that it cites in order to establish the fundamental principles that it both relies on and espouses. From there, important cases in the development of those principles were analysed, such as *Baumgartner v Baumgartner*,² *Lloyd v Tedesco*,³ and *Henderson v Miles (No 2).*⁴ The difference in development between *Muschinski v Dodds* and *Henderson v Miles (No 2)* seemed to show that the principles in *Muschinski v Dodds* were being used in a drastically different way in *Henderson v Miles (No 2).* It seemed as if constructive trusts were not necessary to these types of joint endeavour cases, yet *Henderson v Miles (No 2)* has still been termed a constructive trust case.

In order to determine whether this approach is justified, an analysis of all Australian cases that cite *Muschinski v Dodds* was undertaken. In analysing over 600 cases, it was found that the principles in *Muschinski v Dodds* seemed to be used as a cause of action to find a remedial constructive trust in failed joint endeavours, and also as a principle to find the existence of an institutional constructive trust by operation of law. This distinction was never made explicit in

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¹ *Muschinski v Dodds* (1985) 160 CLR 583.
² *Baumgartner v Baumgartner* (1987) 164 CLR 137.
⁴ *Henderson v Miles (No 2)* [2005] NSWSC 867.

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the case law, and much commentary focuses on remedial constructive trusts. Joint endeavours do not appear to be discussed with anywhere near as much regularity as remedial constructive trusts.

With the principles in Muschinski v Dodds supporting two separate approaches in case law, the thesis postulated that Muschinski v Dodds, rather than being a touchstone in remedial constructive trusts, could instead be authority to construe trusts in joint endeavours and to provide a cause of action for when a joint endeavour breaks down without attributable blame, called the joint endeavour principle and the windfall equity respectively.

In order to test this hypothesis, the thesis adapted theories of corrective justice to Equity in Australia. In doing so, it was shown that Equity in Australia seems to restore a plaintiff’s ability to act in their own interest. The joint endeavour principle and the windfall equity were recast in light of this theoretical framework. From this framework it was seen that the joint endeavour principle may in fact be a set of principles which underpin joint endeavours generally, regardless of their level of formality. Part of this regulation by the joint endeavour principle also regulates fiduciary duties and construes trusts in joint endeavours. It was also seen that the windfall equity acts as a cause of action for when a joint endeavour breaks down. It acts without blame needing to be found and seeks to unwind the parties’ joint endeavour as far as is possible.

This chapter will now summarise the content of each chapter in this thesis, will provide a brief restatement based on the principles discussed and analysed throughout this thesis, and will conclude with closing remarks about the future of the windfall equity and joint endeavour principle.

II Chapters 2 and 3: Foundation and Development

Chapter 2 discussed Muschinski v Dodds which involved a joint endeavour in the context of a de facto relationship that broke down without attributable blame. When the relationship broke down, so too did the joint endeavour. One party asserted his legal half-interest to the property despite his actual contribution being much less than his legal interest. As the legal interest was predicated on his performance during the joint endeavour, without that performance, it would be unconscionable for him to assert ownership to property without contributing to it as contemplated. In recognising this, a constructive trust was awarded, but it took effect as of the date of judgment in order to avoid potential prejudice to third parties.
Whilst commentators to this day focus on the remedial constructive trust aspect of Muschinski v Dodds, this was not the only aspect. In developing the law on constructive trusts, the High Court also found a principled basis upon which to award the constructive trust. This principled basis was derived from general equitable principles that do not let unexpected gains and losses lie where they fall if it would be unconscionable to do so. These general principles find themselves expressed in many specific principles, such as restitution for failure of consideration, but most importantly, for the unexpected end of a partnership. It was particularly the analogy to equitable principles in partnership law that formed the principled basis in Muschinski v Dodds that allowed a constructive trust to be awarded. This principled basis cannot be forgotten when considering Muschinski v Dodds, and it arises whenever a joint endeavour fails unexpectedly without attributable blame, and where property may be retained by one party to the exclusion of another in circumstances not contemplated by the parties.

Chapter 2 then concluded with a summary of the principles derived by and from Muschinski v Dodds in order to develop a prototypal framework for this thesis’s ultimate restatement.

Chapter 3 went on to discuss a number of important cases that cite Muschinski v Dodds in order to discuss the development of the principles in Muschinski v Dodds and how they have changed. The first case examined was Baumgartner v Baumgartner which was decided two years after Muschinski v Dodds. Baumgartner v Baumgartner considered a joint endeavour which broke down in the context of a de facto relationship. This was the first and only time the High Court has revisited the principles in Muschinski v Dodds. Baumgartner v Baumgartner went on to affirm the principles in Muschinski v Dodds and did not develop the law much beyond what was stated in Muschinski v Dodds. The High Court again awarded a remedial constructive trust.

The next case considered was Lloyd v Tedesco. This was a case heard in Western Australia and that used the term ‘joint endeavour principle’. This case concerned an alleged joint endeavour within the context of a de facto relationship. However, whilst a de facto relationship was found, no joint endeavour was found. Without a joint endeavour, there could be no remedy based on Muschinski v Dodds. The court did say that, had the claim been made out, then rather than a constructive trust, a remedy that fell short of a trust should instead be imposed.

The plaintiff in Lloyd v Tedesco relied on precedent in Western Australia to draft their pleadings in a formulaic way. This way of drafting the pleadings was not entirely consistent with the principles in Muschinski v Dodds. This was noted before the High Court when an application for
special leave was sought, but was refused.\(^5\) It was held that, due to the formulaic way in which the case was pleaded, it was an inappropriate vehicle to revisit the principles in *Muschinski v Dodds* and *Baumgartner v Baumgartner*.

The further importance of *Lloyd v Tedesco* is that it made the distinction between a de facto relationship and a joint endeavour. A de facto relationship by itself, without something more, is not a joint endeavour. Criticism was also levelled at the South Australian decision of *Parij v Parij*\(^6\) which may have applied principles of family law, which grant wide statutory discretion to courts, to an area of Equity where such a wide discretion is not permissible.

The final case discussed in depth was *Henderson v Miles (No 2)*. This case coined the term ‘windfall equity’ and credited *Muschinski v Dodds* as the first windfall equity case. Rather than a de facto relationship, this case concerned a family relationship between a mother and her daughter and son-in-law. The case concerned a joint endeavour to build a ‘granny flat’ on the daughter and son-in-law’s property to be financed by the mother. When the parties could no longer live together due to personal differences, the mother could not occupy the house she built. She sued and received an amount of equitable compensation secured by an equitable charge.

Rather than find a constructive trust, *Henderson v Miles (No 2)* did not consider constructive trusts in any capacity. The court, having found a joint endeavour that broke down without attributable blame, instead found the minimum equity to do justice to restore the mother’s contributions. This case is particularly notable for this reason, by treating the principles in *Muschinski v Dodds* as giving rise to a cause of action for a failed joint endeavour and providing a remedy accordingly without relying on finding a constructive trust.

The problem with this case was that the arguments led by the mother were centred on estoppel. A significant majority of the case law considered by the court related to estoppel, but the court noted that, whilst the windfall equity is similar to estoppel, it is different to estoppel. In that regard, the court said that estoppel operates based on a failure to fulfil a promise, but the windfall equity operates on the basis that the promise is undertaken but the joint endeavour comes to an uncontemplated end. Despite this, *Henderson v Miles (No 2)* has been considered

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by some to be an estoppel case. This issue of how the windfall equity operates was discussed in
the theory chapter, along with *Muschinski v Dodds* and *Lloyd v Tedesco* in relation to taxonomy.

This chapter concluded with an examination of the case law that cites *Henderson v Miles (No 2)*.
The majority of this case law takes the same view as *Henderson v Miles (No 2)* in that the windfall
equity is a cause of action, but many cases cite it in relation to estoppel, and only a few consider
constructive trusts at all. Chapter 3 summarised the principles that could be derived from the
cases discussed. These principles were finally contrasted with those identified in Chapter 2 to see how the law had developed between 1985 and 2005.

III Chapters 4 and 5: the Shear between Sword and Shield

As Chapters 2 and 3 justified the need to plot the development of the principles in *Muschinski v Dodds* to determine whether those principles have developed properly, Chapters 4 and 5 undertook an analysis of over 600 cases that cite *Muschinski v Dodds*. The cases in this analysis were split into two overarching categories. Chapter 4 addressed this first category of ‘sword’ cases in which the principles in *Muschinski v Dodds* were used as a cause of action between parties to a joint endeavour. Chapter 5 addressed this second category of ‘shield’ cases in which the principles in *Muschinski v Dodds* were used to construe trusts in joint endeavours in order to thwart the claims of third parties against property of the joint endeavour.

The ‘sword’ cases in Chapter 4 were found to be split into two subcategories. The first subcategory involved cases related to family which also included commercial cases that involved families. The second subcategory involved commercial cases only which did not involve families.

It was seen in this first subcategory of sword cases that the principles in *Muschinski v Dodds*
continued to be used in a way similar to *Muschinski v Dodds* and *Baumgartner v Baumgartner*. Of particular interest was the use of the principles in *Muschinski v Dodds* after 2009 where, in most jurisdictions, the *Family Law Act 1975* (Cth) began to include de facto relationships within the family law regime. It was seen that, despite de facto partners being able to access the family law regime, there still existed a large number of cases involving family members who could not access the family law regime and who had to rely on *Muschinski v Dodds* to have their interests recognised. Many of these cases concerned family members who were not spouses, such as cases between parents and children. These parties could only intervene in family law cases if their interests as third parties were otherwise being affected by proceedings before the family

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courts. It also became increasingly more common for family members to be involved in family businesses which have increasingly added a commercial context to these cases.

The second subcategory of sword cases involved the commercial-only context. Whereas the previous chapters concerned cases that seemed to treat the principles in *Muschinski v Dodds* as a form of quasi-family law for parties to de facto relationships, this subcategory of sword cases shows that this is not meant to be the case. Instead, these cases show beyond doubt that the principles in *Muschinski v Dodds* may apply to purely commercial transactions (often involving sophisticated contractual joint ventures) as equally as they may apply to loose family arrangements. Importantly, the principles in *Muschinski v Dodds* are often used in these cases to ‘fill in the gaps’ of incomplete agreements: not only can the principles find a remedial constructive trust, but they can step in to assist parties to a joint endeavour that fails. From these sword cases it can be seen that the context of the case does not matter, so long as a joint endeavour can be shown to exist. The cases also show that the principles that determine whether a joint endeavour exists seem to be identical to the principles that find fiduciary duties exist in certain types of contractual joint ventures. It would then be folly to develop the principles in *Muschinski v Dodds* analogously to family law when the principles may equally apply to commercial areas of law where family law has no application.

The ‘shield’ cases in Chapter 5, on the other hand, were split into four subcategories. These four subcategories included cases within the contexts of taxation, criminal law, social security, and insolvency.

The taxation ‘shield’ cases analysed show that a constructive trust may arise by operation of law without it being necessary to claim it as a remedy. This has allowed parties to a joint endeavour to claim that property has been held on trust pursuant to a joint endeavour, and thus the party has been able to avail themselves of the statutory exemptions for trustees in tax law and to avoid tax levied on that property.

The criminal law ‘shield’ cases mostly involved family members of accused persons, but interestingly enough, these cases concern the statutory confiscation of property by a State, usually as the property is related to crime in some way. Many of these cases failed as they only established a familial relationship, and not a joint endeavour. However, a few plaintiffs were successful in establishing that a joint endeavour existed between the family members and the accused. Because of this joint endeavour, a trust was found to exist over the property that the accused held, and because of the trust, the accused was not the beneficial owner of the property...
and the State was not entitled to confiscate the property. This constructive trust was not a ‘remedy’: it clearly arose at a time prior to any action of the State to confiscate property, as otherwise, without priority, there was no way the constructive trust could have taken precedence over statute.

The social security ‘shield’ cases also often involved family members. These cases concerned appellants who were denied social security benefits and pensions because they had failed an assets test. The appellants in these cases alleged that, for one reason or another, whether due to a joint endeavour or estoppel, another person was beneficially entitled to the property that the appellant legally owned. In many cases, because the appellant was not the beneficial owner of the property they legally held, that property was excluded from their assets tests on appeal.

The final subcategory of ‘shield’ cases, the insolvency context, involved personal and corporate insolvency. This involved trustees in bankruptcy controlling the affairs of persons involved in a joint endeavour, or liquidators, administrators and the like taking control of corporate entities involved in a joint endeavour. In the bankruptcy cases, it was often alleged that a joint endeavour existed between the parties. If this joint endeavour existed, then it was often the case that the trustee in bankruptcy could not lay claim to certain property of the bankrupt party, as that property may be held on trust for the other party to the joint endeavour. For similar reasons, this was also often the case in the corporate insolvency cases. However, in recent years, courts have been opting for the minimum equity to do justice and have not been finding constructive trusts as readily as they once did.

There were a number of common threads in the cases analysed by Chapters 4 and 5. The first such thread is that, despite the ‘sword’ and ‘shield’ cases being wildly different, they are still based upon the principles in Muschinski v Dodds. This follows on to the second thread, which means that there is some unifying set of principles between the ‘sword’ and ‘shield’ cases, but this has never been made explicit in the case law. This appears to be related to constructive trusts. It was said by Deane J that the distinction between remedial and institutional constructive trusts was ephemeral, and if the link between the two is identical, it follows that the distinction really is ephemeral. The third common thread is that Muschinski v Dodds is not, and never has been, restricted solely to family members and cohabitation. The principles in Muschinski v Dodds were found to apply equally to any type of joint endeavour, whether it is a loose family arrangement or a sophisticated commercial arrangement. This is further supported by the fact that Muschinski v Dodds derived principle by analogy from partnership and joint venture law.

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The fourth and final common thread is perhaps the most important. Whereas there appears to be no distinction between remedial and institutional constructive trusts, there does in fact appear to be a difference in their use. *Muschinski v Dodds* does not only discuss constructive trusts. As foreshadowed at the beginning of this chapter, the principled basis discussed in *Muschinski v Dodds* cannot be ignored. Whereas *Muschinski v Dodds* can find a constructive trust to exist in a failed joint endeavour as a remedy, the principled basis also seems to give rise to a constructive trust *during* a joint endeavour.

On the cases discussed in Chapters 4 and 5, it is undeniable that there are two separate concepts in operation that have never been distinguished. The distinction between the two concepts can be directly related to the ‘sword’ and ‘shield’ cases. There exists a cause of action for when a joint endeavour breaks down: this is the windfall equity, inherent in the ‘sword’ cases. There also exists a set of principles that relate to joint endeavours generally, which include identifying when a joint endeavour exists, when fiduciary duties might exist, when trusts are construed, and generally assisting any otherwise deficient joint endeavour. This is the joint endeavour principle, inherent in the ‘shield’ cases.

**IV Chapters 6 and 7: Theory and Application**

Although distinctions can be drawn based on the case analyses undertaken in Chapters 4 and 5, the distinctions are unclear and they are never directly stated. With the case law in this state, it is necessary to analyse how this conception of the principles in *Muschinski v Dodds* may operate to give rise to the joint endeavour principle and the windfall equity.

Chapter 6 addresses this topic by first discussing the issues with the case law, which were identified in previous chapters, and then discussing the problems with commentary. It was shown that commentators have often analysed *Muschinski v Dodds* as a remedial constructive trust case. In doing so, they have often taken an approach based on, or similar to, unjust enrichment. Unfortunately, these analyses ignore the principled basis upon which the constructive trust arose, which was within the context of a joint endeavour. The cases show that the principles in *Muschinski v Dodds* can and do give rise to a constructive trust during a joint endeavour, and that it arises by operation of law, and not through wrongdoing. An approach based on unjust enrichment whereby the constructive trust is purely remedial cannot be maintained.
It also appeared that commentators have been led astray by the case law itself. One aspect of this is the High Court in *Muschinski v Dodds* altering the date of the constructive trust to take effect at the date of judgment, but this is not authority for a ‘date of judgment’ constructive trust which some commentators have adopted. Rather, it was shown that a constructive trust arises during a joint endeavour but *may be* defeated by or deferred to other claims, which may necessitate changing the operative date of the constructive trust. Another aspect is the overwhelming weight of estoppel cases raised in *Henderson v Miles (No 2)*. This case, whilst influential, suffers due to the estoppel cases raised by the plaintiff, which means joint endeavour cases were only considered in passing when discussing *Muschinski v Dodds*.

In noting the discrepancy between the case law and the commentary, the chapter took the view that views of purely remedial constructive trusts based on unjust enrichment are an incorrect reflection of the true reality of the case law. Given the failure of unjust enrichment to address this, and given the acceptance of unconscionability by Australian Equity in preference to unjust enrichment, the chapter sought to develop a theoretical framework based on unconscionability. This approach was also chosen because Australian law is based on incremental development of the law on a case-by-case basis. As such, a theoretical framework based on the case law itself was chosen in order to conform with this approach by Australian courts, rather than seeking to have the law conform to an external theory.

The theoretical framework chosen was corrective justice. In particular, the corrective justice theories of Professor Ernest Weinrib were chosen to be adapted. The point made here was that Weinrib’s work on corrective justice, when adapted to suit Australian notions of unconscionability, is persuasive to explain not only when parties may gain at the expense of the other, but also when such a circumstance becomes unconscionable and thus amenable to equitable intervention. This circumstance involves a violation of a norm, which in this case was identified as being autonomy and free agency – the ability to act with purposive agency.

This normative element is not limited to any particular philosophy of thought. Rather, it was shown through examples in Australian Equity, such as the cause of action for unconscionable conduct, that Equity in Australia values this norm and, if the defendant has been found to deny or take advantage of the plaintiff’s inability to act with purposive agency, then any such act by the defendant supported by that inability of the plaintiff would likely be unconscionable. Equity thus restores the ability of the plaintiff to choose, regardless of whatever philosophical background a judge may have. This approach is consonant with the case law in Australian Equity.
Chapter 6 then continued to adapt Weinrib’s corrective justice framework for unconscionability in Australia. It was in Chapter 7 where the joint endeavour principle and windfall equity were analysed based on this framework.

It was found that the joint endeavour principle has two limbs: the first limb says when a joint endeavour exists (which is tied to when fiduciary duties may exist), and the second limb says when contributions to a joint endeavour will be held on trust. This conception of the joint endeavour principle provided a unified foundation for all joint endeavours to rest upon, regardless of their level of formality. It also provided protection for parties to joint endeavours by regulating fiduciary duties to protect people and construing trusts to protect property. This also means that the joint endeavour principle, by regulating fiduciary duties and construing trusts, may make the parties to a joint endeavour liable to commit a breach of fiduciary duty or a breach of trust.

It was then found that the windfall equity is a cause of action that operates when a joint endeavour breaks down and when property has been unconscionably retained. The benefit of the windfall equity is that it is a cause of action that applies regardless of blame. Although the joint endeavour principle may make it possible for a breach of fiduciary duty or a breach of trust to exist, some level of blame must be found in order to substantiate these claims. However, in the windfall equity, no blame is necessary. Regardless of blame, the windfall equity may operate as an alternative cause of action to wind up a joint endeavour. However, unlike a breach of fiduciary duty or breach of trust, as the windfall equity does not require blame, the remedial options are limited to unwinding the joint endeavour and cannot include remedies such as an account of profits.

The ultimate remedy was found to flow from the joint endeavour principle. So long as a trust is construed pursuant to the second limb of the joint endeavour principle then, if a joint endeavour breaks down, any remedy may flow on from the constructive trust that was found to exist. Whether this continues to take the form of a constructive trust or some lesser remedy depends on the facts and circumstances of the case and the discretion of the court. However, if the joint endeavour has not broken down, then the windfall equity cannot apply. Although it was found in the case analysis that a constructive trust may be found if a joint endeavour is threatened, the better view is that this is not a remedy but, rather, it is merely a consequence of the second limb of the joint endeavour principle.
V The Restatement

Based on the case analyses and theoretical analysis undertaken by this thesis, the joint endeavour principle and windfall equity can be restated.

Although there have been attempts by courts to put forth formulae for claims under the windfall equity, these formulae do not account for the joint endeavour principle and instead treat Muschinski v Dodds as a source of monolithic principle. This conflation of principle and cause of action has only fuelled the confusion identified in earlier chapters. What follows in this chapter is a conclusion to this thesis with a restatement of how the joint endeavour principle and windfall equity should be treated.

A Legitimate Development

As foreshadowed throughout this thesis, the development of Equity must be principled. This restatement is no exception. The windfall equity and joint endeavour principle are derived from general equitable principles which find their expression in partnership law and other principles leading to restitution, similar to other forms of relief such as equitable estoppel.

The windfall equity and joint endeavour principle grew out of the “general equitable principle” identified by Deane J in Muschinski v Dodds which does not let a gain or a loss lie where it falls if it would be inequitable to leave it where it falls. This general principle has found its expression historically in partnership law. In order to expand this principle, Deane J also drew upon joint venture law in the United States, which together were used by Deane J to extend that general principle’s application to joint endeavours generally by analogy. The case law in Australia since Muschinski v Dodds appears to treat this principle as applying in any ‘joint endeavour’ which could include a ‘joint venture’ or a partnership, and has also been considered occasionally even when a claim for failure of consideration would succeed.

Further, the joint endeavour principle is closely tied to maxims related to benefit and burden, whereby if someone accepts a benefit, they must also accept its corresponding burden. This is

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also related to the maxim that one who seeks Equity must do Equity. These maxims have been used in the case law examined in this thesis.

As such, this restatement does not indulge in “idiosyncratic notions of fairness and justice”: it is firmly founded in legitimate precedent. Although the windfall equity and joint endeavour principle have developed out of precedent as required by Australian law, this thesis has shown how their development has been clouded in misconception and misuse, made worse by pleadings of parties mischaracterising the principles in Muschinski v Dodds. Commentators have also often taken a purely remedial view of constructive trusts which is not supported by this thesis based on the case analyses and theoretical analysis it has undertaken.

B  The Joint Endeavour Principle

The joint endeavour principle provides general principles that relate to joint endeavours generally. Whilst these principles relate to the construal of trusts, this is not all. The principles also determine when a joint endeavour exists and when fiduciary duties may exist. In this regard, the joint endeavour principle can be thought of as an overarching theory of joint endeavours, regardless of the form it takes, from a loose family arrangement, to a sophisticated contractual joint venture, to a partnership.

Rather than ‘filling in the gaps’, Equity provides the substrate for all of these types of joint endeavour to fall back on as a contingency. Because of that, if contract law, partnership law, or even legislation falls short and the parties cannot resort to that source of law to resolve their situation, the joint endeavour principle and windfall equity will catch it. However, if some other law such as contract law does provide a basis for relief, then that should be given as much effect as possible before resorting to Equity. As has been discussed, the substratum of the joint endeavour may restrict or eliminate fiduciary duties, such as by contract but, even if this was the intention, it is possible that some unforeseen circumstance may arise. In such a scenario, the joint endeavour principle may still apply.

The joint endeavour principle has two limbs. The first limb provides for principles that determine the existence of a joint endeavour and regulate fiduciary duties. The second limb provides for principles that determine when contributions are made to a joint endeavour and when trusts are construed.

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1 First Limb: Intention and Fiduciary Duties

The first limb of the joint endeavour principle concerns the existence of joint endeavours, and by extension, the regulation of fiduciary duties. A joint endeavour may be found under this limb if the intentions of the parties are congruent: that is, if the parties are acting towards a common goal, even if the object of that common goal is for their own selfish interests. However, this congruent intention must be such that the parties must rely upon mutual trust and confidence. It is this requirement of mutual trust and confidence that turns a simple arrangement into a joint endeavour. These same principles also necessarily regulate the fiduciary duties of the parties to the joint endeavour in line with the parties’ congruent intentions.

In this regard, the principles that regulate fiduciary duties in contractual ‘joint ventures’ are identical to the principles that determine the existence of a joint endeavour. The first limb of the joint endeavour principle then applies to any kind of joint endeavour, whether it is a loose family arrangement, a sophisticated contractual joint venture, or a partnership. However, the more sophisticated the arrangement, such as a contract or a partnership, the more likely it is that the laws of contract and partnership will apply – but if that should otherwise fail, the joint endeavour principle and, if necessary, the windfall equity will apply. It is posited by this thesis that contractual joint ventures, if they have the requisite degree of mutual trust and confidence, are in fact joint endeavours. However, depending on the substratum of that joint venture (being the contract), fiduciary duties may be restricted or may not exist at all.

Because the first limb of the joint endeavour principle regulates fiduciary duties, the parties may be in a fiduciary relationship to one another – and as discussed, the same principles that determine the existence of a joint endeavour also regulate fiduciary duties. In this regard, this means that the substratum of the joint endeavour necessarily forms the content of the fiduciary duties owed by the parties to one another. As such, a consequence of the joint endeavour principle is that it is possible for a party to breach and be liable for a breach of these fiduciary duties. The law relating to breach of fiduciary duty will then apply from that point forward, but the windfall equity may still be an alternative cause of action if that breach cannot be proven.

2 Second Limb: Contribution and Constructive Trusts

The second limb of the joint endeavour principle concerns the contributions made to a joint endeavour and when a trust may be construed over the contributions made to a joint endeavour. This limb cannot operate unless the first limb relating to intention has been satisfied.
as, if no joint endeavour exists, none of the principles in this second limb can apply. Further, before the windfall equity can apply as a cause of action, the second limb of the joint endeavour principle must also be in effect: without unresolved property issues in a joint endeavour, there is no cause of action in the windfall equity.

The joint endeavour principle construes a trust to exist over any contributions made to the joint endeavour by the parties. This is because, in a joint endeavour, the property and contributions of the parties are often mixed and legal and equitable ownership may no longer coincide. This mixture of property, when done on the basis of the substratum of the joint endeavour, is supported by the parties’ mutual trust and confidence. This mutual trust and confidence already give rise to fiduciary duties between the parties. This means that, as soon as property becomes mixed for the purpose of the joint endeavour, then whether or not any value has been transferred, that property is subject to a constructive trust held in proportion to each party’s contributions. Those contributions, as far as is possible, are held on trust in specie and are held on trust for the purposes of the joint endeavour. These assumptions can be modified by the intentions of the parties.

The trust is construed to exist the moment the parties’ legal and equitable interests are no longer one and the same. There cannot be a constructive trust unless that property has somehow been mixed between the parties. This is because it is not unconscionable to assert ownership over something that one has absolute unburdened title to.

However, once the property is mixed, the constructive trust is not remedial. Nor does the constructive trust arise in response to wrongdoing. Rather, a constructive trust arises whenever it would be unconscionable to assert full beneficial ownership. As it would be unconscionable to use the property of another party to a joint endeavour without consent, a constructive trust arises by operation of law and charges that person with the duties of a trustee to secure the other party’s rights. It is important to note that the constructive trust does not compel the parties to return the property: rather, it compels the parties to use that property for the purposes of the joint endeavour. If the parties’ interests are no longer congruent (that is, when the joint endeavour ends), then the property cannot be used for any purpose other than returning it to the rightful owner unless otherwise agreed.

This trust is similar to but distinguished from a common intention constructive trust and a Quistclose trust. It is distinguished from a common intention constructive trust for the simple reason that the constructive trust under the second limb is imposed regardless of the parties’
intentions. It is distinguished from a Quistclose trust as, whereas a Quistclose trust generally construes a secondary trust to return property if it cannot be used for a specific purpose, there often may not be a specific identifiable purpose for property contributed in a joint endeavour. This is also complicated by the fact that the substratum of the joint endeavour may change, affecting that purpose for which the property is held on trust. Further, all parties may hold property on trust for one another, further confusing the bounds of beneficial ownership. The constructive trust arises pursuant to the second limb simply to provide protection at the earliest possible time in case the other party deals with the property unconscionably.

It also gives the parties a level of protection from the other parties to the joint endeavour and against third parties. This is the benefit of the institutional nature of the constructive trust. Much like the first limb, the consequences of the second limb mean that the party that holds property on trust becomes a trustee. As a constructive trustee, that party owes the duties of a trustee. This property must be used for the purposes of the joint endeavour. If the property is dealt with in a way inconsistent with the joint endeavour, then the party holding the property on trust may be committing a breach of trust which is its own cause of action.

A trust arising under the second limb arises over property in specie. This means that the relative value of any property held on trust is irrelevant. This is important because, if relative value did matter, then it would be possible for one party to effect a sale of property by claiming that the property of the other party that they hold has been offset by money they have paid to the other party. On the analysis in Chapter 6, this would be a forced sale without the consent of the other party, and thus unconscionable. As such, all property must be returned in specie as far as is possible.

C The Windfall Equity

The joint endeavour principle does not compel any party to return property: it imposes duties, construes trusts, and says how and when these things occur. In other words, the joint endeavour principle regulates the conduct and property of parties to a joint endeavour. It is only when the joint endeavour may not be able to continue does the cause of action of the windfall equity arise. This may give rise to a number of remedies that flow from the consequences of the joint endeavour principle.

For the windfall equity to apply, both limbs of the joint endeavour principle must have been engaged. This means that a joint endeavour must have existed and that there must have been
property that was held on trust without ownership of that property yet to be resolved. This means that the windfall equity will apply if a joint endeavour has broken down and property has been unconscionably retained by one party to the exclusion of another party and if there is not another contemplated way of finalising the parties' joint endeavour, such as by contract or statute.

However, attributable blame is not an element. This does not mean that the parties must be entirely innocent of any conduct that caused the joint endeavour to fail – rather, the concept of blame is entirely irrelevant and is unnecessary to consider.

This is what makes the windfall equity a flexible cause of action. This can be contrasted with the consequences of the joint endeavour principle. The first limb of the joint endeavour principle regulates fiduciary duties, which may be breached and may lead to a cause of action for breach of fiduciary duty. The second limb of the joint endeavour principle construes a trust, which may be breached and may lead to a cause of action for breach of trust and other potential actions including knowing receipt.

The windfall equity does not require a breach of fiduciary duty to be shown. Nor does it require a breach of trust to be shown. Further, it is entirely irrelevant even if a breach of fiduciary duty or breach of trust has occurred: the windfall equity may comfortably sit alongside these causes of action as an alternative, in the event that such breaches cannot be factually shown. The purpose of the windfall equity is to provide a safety net for parties to untangle their interests in a joint endeavour. However, if another cause of action can be shown, such as a breach of fiduciary duty, or even a breach of contract or partnership law, then it is far more likely that those causes of action will apply first instead of the windfall equity.

Part of the reason why courts have consistently conflated the windfall equity as a cause of action with the joint endeavour principle is that the windfall equity can only operate if both limbs of the joint endeavour principle have applied. This means that any claim in the windfall equity must necessarily first consider the joint endeavour principle.

The first limb of the joint endeavour principle must be considered to see whether a joint endeavour has in fact been in existence. Identifying the intentions of the parties will also help to determine whether contributions made under the second limb have in fact been held on constructive trust. In this regard, identification of the constructive trust is integral to finding a remedy in the windfall equity.

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After using the joint endeavour principle to determine the existence of and contributions made to a joint endeavour, the windfall equity must consider two main elements: removal or failure of the substratum of a joint endeavour, and an unconscionable retention of benefit.

1  **First Element: Removal/Failure of Substratum of Joint Endeavour**

For a joint endeavour to break down, its substratum must be removed in circumstances not otherwise contemplated by the parties (or otherwise not contemplated by statute, if relevant). The substratum of a joint endeavour is removed when the intentions of the parties are no longer congruent. This means that the parties cannot carry on the joint endeavour, whether because they have changed their minds and cannot agree, or because otherwise some circumstance has arisen which means they cannot continue their joint endeavour but cannot agree on a way to continue or wind up the joint endeavour.

Even if a joint endeavour can be established to have existed and broken down, the circumstances of that break down must not be contemplated by the parties. If a mechanism for winding up the joint endeavour already exists or is contemplated by the parties, such as by contract or by statute, then the circumstances clearly were contemplated. In that case, those avenues should be pursued and the windfall equity can only apply as an alternative if those other claims are not made out.

Once the joint endeavour has been identified and the content of its substratum is determined to have collapsed, then if there is no other mechanism for winding up the joint endeavour, the first element of the windfall equity is satisfied.

2  **Second Element: Unconscionable Retention or Assertion of Property**

The second limb of the joint endeavour principle is related to the second element of the windfall equity. The second limb of the joint endeavour principle construes a trust to exist when parties to a joint endeavour mix their legal and equitable title for the purposes of the joint endeavour. Unless the substratum indicates otherwise, this property is construed to exist in proportion to the contributions of each party to the joint endeavour, and reflects, as far as is possible, trusts over property in specie. This trust is subject to using the property to carry out the purposes of the joint endeavour.

Whilst the trustee may be withholding the property from the beneficial owner, this is not unconscionable during the joint endeavour as it is being held for the purpose of the joint

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endeavour as contemplated by the parties. However, when the substratum falls away, the property can no longer be used for the purposes of the joint endeavour. At this point there is no other way to deal with the property except to account for the property to the beneficial owner. When this is not done, this becomes an *unconscionable* retention of benefit. It is a denial of another person’s beneficial interest in property. It is this denial which is unconscionable and triggers the second element of the windfall equity. Although the trustee is withholding property, it is not a breach of trust at this stage: there may be a genuine dispute over beneficial ownership of the property, as there is no express trust.

3  **No Attributable Blame Necessary**

As first set out in *Muschinski v Dodds*, the windfall equity operates when the substratum of a joint endeavour is removed without attributable blame. However, this does not mean that the parties must be completely innocent of any wrongdoing. Nor does it mean that any blame or wrongdoing will deny a remedy. Instead, blame or wrongdoing is simply not necessary.

This is because the windfall equity simply seeks to wind up a joint endeavour when nothing else can. This makes the windfall equity a flexible cause of action. Even if there *has* been attributable blame, such as a party to the joint endeavour breaching their fiduciary duty, the windfall equity can still apply. Because it is not concerned with attributable blame, it can be used by parties as an alternative pleading if another cause of action such as breach of fiduciary duty cannot be satisfactorily proven. It gives parties the ability to wind up their joint endeavour when all else fails.

4  **Remedies**

The remedy for the windfall equity is simple. The remedy flows from any constructive trusts that were identified by the joint endeavour principle. If suitable, then that property will simply be declared to be held on constructive trust. Otherwise, if there is some other reason to prefer a lesser remedy, such as by being defeated by or deferred to another claim, then the operative date of the constructive trust will be modified or a lesser remedy as is appropriate will apply.

Unlike remedies for breaches of fiduciary duty or breaches of trust, the windfall equity does not have any remedy for an account of profits. This is because the windfall equity does not require a finding of any attributable blame. This means that the remedy for the windfall equity is not measured by reference to any party’s wrongdoing. Nor is it measured by the inability to complete the joint endeavour. Instead, unlike other cases involving blame or not fulfilling a

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promise, the remedy in the windfall equity looks to “the detriment of losing a fund to the other party to the arrangement through unexpected circumstances, where such loss would result in the other having an unconscionable gain.”

However, it must always be remembered that the constructive trust in a joint endeavour has been construed by operation of law due to the second limb of the joint endeavour principle. This means that, even if a constructive trust has been declared as a remedy, this does not deprive the constructive trust of its institutional characteristics. As such, the constructive trust can be asserted and relied upon by a party to the joint endeavour against any other party making a claim to that property. This does not rely on the windfall equity being applicable, that is, the joint endeavour need not break down – as the trust is construed by operation of law, a party may simply rely on the second limb of the joint endeavour principle to assert their right to that property held on constructive trust.

There is, in fact, no distinction between a remedial or institutional constructive trust in joint endeavours. The trust arises, and the remedy flows from that consequence. This means that, when looking to find the remedy in the windfall equity, the court will simply have regard to the second limb of the joint endeavour principle to ascertain who made what contributions to the joint endeavour and determine what is held on trust pursuant to the second limb.

Courts should note that, in considering a claim for the windfall equity, there must have been a constructive trust at some point for the windfall equity to apply. Whilst a lesser remedy may suffice, this should only be considered after the consequences of the institutional nature of the constructive trust in the case have been addressed, if necessary. The institutional characteristics of the constructive trust cannot be ignored without comment. This is especially so with potential third-party interests.

In determining the value of the remedy, the calculation is not based on the detriment of the joint endeavour not being carried out, nor is it calculated due to lost expectations or potential future gains by another party – it is calculated by reference to the detriment suffered by a party losing a fund to another. This is because the party who unconscionably retains property is not returning property that they hold on trust for the beneficial owner. The remedy must necessarily reflect the property lost by the party beneficially entitled to it. This property must either be

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8 *Henderson v Miles (No 2)* [2005] NSWSC 867, [95].

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returned in specie or, if that is not possible, by appropriate compensation and, where relevant, secured by an equitable charge.

Because the constructive trust exists, even if property had been disposed of, a personal remedy will still apply, if not a proprietary remedy. This is because, if it is impossible to transfer title to property either at law or in Equity, such as prohibition by statute or disposal then, whilst the proprietary nature of the constructive trust cannot apply, the personal nature of the constructive trustee’s position as a trustee will not be affected and a personal remedy may be found. A declaration may also be all that is necessary, such as when a party simply raises a constructive trust as a bar to a claim under the second limb of the joint endeavour principle.

Finally, one who seeks Equity must do Equity. As the parties’ rights in a joint endeavour are necessarily correlative and, as blame is not necessary, if one party seeks to unwind the joint endeavour, they must also do all they can to assist. That means, if both parties hold property of the other, then one party claiming in the windfall equity must also be willing to return any property they may hold on trust for the other party. In this regard, as discussed earlier, unless the property involved is liquid like money, the relative value of the property held on trust is irrelevant: the property should, as far as is possible, be returned in specie.

D Complete Operation
The complete operation of the joint endeavour principle and the windfall equity in a joint endeavour can be summarised by the flowchart set out above.

Before anything else can be considered, a joint endeavour must first be identified to have existed. If no joint endeavour exists, then neither the joint endeavour principle nor the windfall equity can apply. This is the first limb of the joint endeavour principle.

If a joint endeavour can be identified to exist, then by virtue of the principles that identify joint endeavours necessarily regulating fiduciary duties, the scope and content of fiduciary duties (if any) can also be identified. This means that, in a joint endeavour, it is possible for the parties to breach any fiduciary duty they may owe to one another. If a breach of fiduciary duty occurs, then that forms a cause of action for breach of fiduciary duty.

Whether or not a fiduciary duty has breached, the second limb of the joint endeavour principle may operate to identify any mixture of property during a joint endeavour. If no property can be identified to have been mixed, then the windfall equity does not apply and the second limb of the joint endeavour principle cannot construe a trust. However, because the first limb did operate, fiduciary duties may still exist in relation to the joint endeavour.

If property can be identified as having been mixed for the purposes of the joint endeavour, then the moment that property becomes mixed is the moment when a constructive trust arises. The purpose of this trust is to recognise the original party’s interest in that property if it was contributed for the purposes of the joint endeavour. This means that a constructive trustee may be able to commit a breach of trust. Other principles, such as knowing receipt, may also apply because of this consequence.

Whether or not there has been a breach of trust, if the joint endeavour has not come to an end, then the windfall equity cannot operate to wind it up. However, the joint endeavour principle, at this point, will have likely found fiduciary duties and a constructive trust to exist. This means that, if some unrelated party attempts to make a claim against property of a joint endeavour, then a constructive trust, having arisen at the moment the property became mixed, may operate as an institution to deny that other party’s claim. This constructive trust arises by operation of law and does not need to be claimed as a remedy unless the joint endeavour has broken down.

However, whether or not a breach of trust has been committed, the windfall equity may still apply if a joint endeavour has collapsed. This is because, whether or not there has been a breach of fiduciary duty or a breach of trust, the windfall equity may still operate as an alternative cause.
of action which does not rely on any finding of blame. However, as the windfall equity does not rely on blame being found, there is no need for an account of profits. The remedy will be ascertained by virtue of any constructive trusts that arose during the joint endeavour. The remedy for the windfall equity is found by simply recognising the existence of those constructive trusts over property and ordering its return. However, if a lesser remedy will suffice, or if there is no property to return in specie and no property can be traced, or if the constructive trust would otherwise be defeated by or deferred to another claim, then a remedy short of a trust may be found, such as equitable compensation or an equitable charge.

VI Final Remarks

It is hoped that, in future, courts will apply the joint endeavour principle to all joint endeavours, where necessary, in accordance with the reasoning in this thesis. These principles should also be distinguished from the windfall equity as a cause of action in order to avoid confusion between the two different concepts. Further, it is hoped that commentators will treat Muschinski v Dodds and thirty-plus years of case law since then appropriately by not casting constructive trusts in a purely remedial way that conforms with theories of unjust enrichment, and will instead recognise the institutional nature of constructive trusts in joint endeavours that seek to prevent unconscionable acts in relation to property.
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I The Case List

This appendix lists the cases that were selected for the case analysis. These cases cite Muschinski v Dodds\(^1\) and Henderson v Miles (No 2).\(^2\) The lists are separated into categories based on the ‘context’ tags as discussed in Chapter 1 regarding methodology and are then arranged in chronological order.

1. Sword cases:
   a. Family only;
   b. Commercial only;
   c. Family and commercial;

2. Shield cases:
   a. Taxation;
   b. Criminal;
   c. Social security;

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\(^1\) Muschinski v Dodds (1985) 160 CLR 583.
\(^2\) Henderson v Miles (No 2) [2005] NSWSC 867.

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d. Insolvency.

The cases that cite Henderson v Miles (No 2) are far less numerous and are noted at the end of this Appendix. There may be cases that cite both Muschinski v Dodds and Henderson v Miles (No 2).

II Muschinski v Dodds: Sword Cases

A Family only

2. Baumgartner v Baumgartner (1987) 164 CLR 137
5. Arthur v Public Trustee (1987) 86 FLR 462
12. Altmann v Dunning [1995] 2 VR 1
24. Hogan v Baseden [1996] NSWSC 533
25. Wright v Wright [1997] FamCA 13
27. Parij v Parij (1997) 72 SASR 153
30. Tracy v Bifield [1998] WASC 142
32. Weston v Public Trustee [1998] WASC 207
34. Brown v George (1998) 147 FLR 1
38. Evans v Public Trustee [1998] TASSC 159
40. Cruz v Osborne [1999] WASC 8
41. Whitehead v Pilgrim [1999] WASC 25
42. Bertei v Feher [1999] WASC 40
43. Sullivan v McMahon [1999] WASC 84
44. Sykes v Equity Trustee Executors & Agency Co Ltd [1999] VSC 218
45. Oates v Blackburne [1999] WASC 112
46. Radonich v Radonich [1999] WASC 165
47. Cierpiatka v Cierpiatka (1999) 25 Fam LR 548
49. Howland v Ellis [1999] NSWSC 1142
50. Palmioti v Palmioti [1999] WASC 272
51. Dridi v Fillmore [2000] NSWSC 175
52. Engwirda v Engwirda [2000] QCA 61
56. Erickson v Stevens [2000] QDC 253
57. Del Gallo v Frederiksen (2000) 27 Fam LR 162
59. Dries v Ryan [2000] NSWSC 1163
60. B v B [2001] FMCAfam 13
64. Lloyd v Tedesco [2001] WASC 99
68. Carruthers v Manning [2001] NSWSC 1130
69. Lloyd v Tedesco (2002) 25 WAR 360
70. Lawrence v Branch [2002] WASCA 292
72. Lydon v Ryding [2002] WASC 308
73. Gadsdon v Gadsdon [2003] WASC 48
74. West v Mead [2003] NSWSC 161
75. Nguyen v Scheiff [2003] NSWSC 253
76. Waterhouse v Power [2003] QCA 155
77. Branch v Lawrence [2003] WASC 124
78. Hardman v Hobman [2003] QCA 467
79. Drakeford v Bromhead [2003] NSWSC 296
80. Findlay v Besley [2003] VSC 247
81. Turnbull v McGregor [2003] NSWSC 899
82. Werner-Zolotuchin v Public Trustee (NSW) [2004] NSWSC 358
83. Giller v Procopets [2004] VSC 113
84. Armstrong v Armstrong [2004] WASC 121
85. A v M [2004] FMCAfam 431
86. Little v Saunders [2004] NSWSC 655
87. Silvester v Sands [2004] WASC 266
88. Anson v Anson [2004] NSWSC 766
89. Hill v Hill [2004] NSWSC 1205
90. Koczka v Koczka [2004] NSWSC 343
92. Saba v Xu [2004] NSWSC 858
93. Michaelopoulos v Pomering [2004] NSWSC 939
94. Hall v Hall [2004] QDC 183
95. Read v Nicholls [2004] VSC 66
96. Henderson v Templeton [2004] WASC 192
97. Stoklasa v Stoklasa [2004] NSWSC 518
98. Neilson v Letch [2004] NSWSC 1246
100. Thornton v Hyde [2004] 32 Fam LR 71
102. Bartha v O’Riordan [2004] QSC 205
103. Henderson v Miles [2005] NSWSC 710
104. Sirtes v Pryer [2005] NSWSC 1082
105. Henderson v Miles (No 2) [2005] NSWSC 867
106. Bonaventura v Bonaventura [2005] QSC 270
108. Shepherd v Doolan [2005] NSWSC 42

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