THE DEFENCE OF ACQUIESCENCE TO A BREACH OF TRUST

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This paper is a comprehensive analysis of the barring of suits by *cestuis que trust* against their trustees for breach of trust. The defence of acquiescence is examined, with a specific focus on its meaning and constituent elements, after an analysis of the recent decision of the High Court of Australia in *Byrnes v Kendle.* Through this focus, and a review of relevant English and Australian authorities, this paper deals with issues such as the overlap with other equitable defences and finally a consideration of proposals for a unified doctrine of estoppel and the amalgamation of particular equitable defences under that doctrine.

I INTRODUCTION

The exact extent and nature of the defence of acquiescence is unclear. Articles providing a principled view of how the defence of acquiescence is best understood and justified are highly deficient. This paper will examine the meaning of acquiescence, the elements necessary for a defence of acquiescence and its overlap with other equitable defences, in particular consent. Its aim is to show that much of the confusion surrounding the defence of acquiescence is attributable to the multiplicity of circumstances that may legitimately be regarded as constituting acquiescence.

It will become evident from this discussion that some reform of equity is necessary for doctrinal coherence and certainty. A unification of doctrine has been the subject of much extra-judicial

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comment in England and Australia. There is, moreover, some recognition in modern cases of an emerging general doctrine of estoppel. However, judges and academic writers in this area cannot agree as to whether, and how, to unify estoppel.

A consideration of the development of a general doctrine of estoppel prompts a number of questions in relation to a defence of acquiescence. This paper aims to consider whether there is any need to retain a separate defence of acquiescence or whether acquiescence can be amalgamated, along with other equitable defences, under a single overarching doctrine of estoppel. It accepts, though, that a clear answer to these questions awaits further articulation and support in future High Court cases.

The High Court of Australia's recent decision in *Byrnes v Kendle*[1] dealt with the law of the defence of acquiescence to a claim for breach of trust. A defence of acquiescence was pleaded in the District Court of South Australia over nine lines in the pleadings and without distinction from several other equitable defences.

The High Court of Australia's decision in *Byrnes v Kendle*[2] is discussed in Part II. Part III considers proposals for reform of equity in this area. Part IV will provide some conclusions in relation to a defence of acquiescence.

II BYRNES V KENDLE

In this part, it will be shown that *Byrnes v Kendle*[3] exemplifies the existing confusion surrounding the law of the defence of acquiescence.

1 (2011) 243 CLR 253.
2 Ibid.
3 Ibid.

A *Facts*

Byrnes v Kendle[4] concerned a claim that Mr Kendle had committed a breach of trust by failing to collect rent. The respondent, Mr Kendle, and the second appellant, Mrs Byrnes, were husband and wife. In 1994, Mr Kendle purchased a property in Brighton, South Australia. Legal title to the property was held by Mr Kendle. However, at the instigation of Mr Martin Byrnes, a solicitor and son of Mrs Byrnes', Mr Kendle and Mrs Byrnes signed an Acknowledgement of Trust ("the 1989 Deed") which under clause 1, declared a trust in favour of Mrs Byrnes over one undivided half interest in the Brighton property.[5] The Brighton property was sold with its proceeds applied to a property in Rachel Street, Murray Bridge ("Rachel Street").[6] In 1997, again at the instigation of Mr Martin Byrnes, Mr Kendle and Mrs Byrnes signed a second deed, identical in terms to the 1989 Deed.[7]

In 2001, Mr Kendle and Mrs Byrnes left Rachel Street and moved to another property purchased by Mr Martin Byrnes, Mrs Byrnes' son. Mr Kendle let Rachel Street, the subject of the Acknowledgement, to his son Kym. Kym lived in Rachel Street for just over six years. During this period, Mr Kendle collected rent for only the first two weeks and took no steps to collect any arrears. The total amount of rent that should have been paid was $36, 150.[8] In 2007, Kym's occupancy of Rachel Street was terminated at the instigation of Cathy, Mr Kendle's daughter and Rachel Street was let by Mr Reece Smith. Thereafter, Mr Kendle and Mrs Byrnes separated. Soon after, Mrs Byrnes assigned by deed to Martin Byrnes in consideration of $40,000 both her interest in Rachel Street and her rights under the Acknowledgment.[9] In 2008, Martin Byrnes commenced proceedings against Mr Kendle in the District Court of South Australia, claiming that Mr Kendle was in breach of trust by failing to ensure that rent was paid by Kym. Rachel Street was sold

4 Ibid.
5 Ibid 268 (Gummow and Hayne JJ).
6 Ibid 269.
7 Ibid.
8 Ibid 270.
9 Ibid.

three days after the commencement of the proceedings for $145,000. Mrs Byrnes was later joined as a plaintiff.[10]

Several issues arose for determination at trial: did the Acknowledgement create Mr Kendle trustee of a half share in Rachel Street for Mrs Byrnes; did Mr Kendle have a positive duty to rent Rachel Street and to take appropriate steps to collect that rent; did Mr Kendle breach those duties; and then the issue which is pertinent here, did Mrs Byrnes consent to or acquiesce in Mr Kendle's breach of trust?

Mr Kendle raised the issue of consent and/or acquiescence in paragraph [19] of his defence pleaded in the District Court of South Australia:

> [19] The defendant says that the second plaintiff consented and/or acquiesced in all actions by the defendant in relation to the management of the Rachel Street Property and all decisions and actions were joint decisions by the defendant and the second plaintiff. The second plaintiff made no objection to the defendant to the management of the Rachel Street Property and the second plaintiff refrained from seeking any redress and this has resulted in prejudice to the defendant. The plaintiffs have waived any rights in relation to the Rachel Street Property and are estopped from bringing any action against the defendant.

It is apparent that pleas of consent, acquiescence, waiver and equitable estoppel were relied upon in paragraph [19] without distinction. Paragraph [19] represents what Heydon and Crennan JJ described as the 'unclarity of the applicable law'[11] in relation to the defence of acquiescence. An analysis of *Byrnes v Kendle*[12] and its principles will highlight the obscurity of this defence pleading.

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10 Ibid.
11 Ibid 293.
12 Ibid.

B *Litigation History*

At first instance, Judge Boylan upheld the defence pleaded in paragraph [19].[13] Referring to the period during which Kym occupied Rachel Street, the trial judge held that Mrs Byrnes had "co-operated" in the breach of trust, finding:

> [42] [Mrs Byrnes] was well aware of her need to protect what she saw as her proprietary rights. Kym lived in the house for a little over six years. For all of that time, or nearly all of it, she was fully aware that he was not paying rent. Further, during those 6 years, she was present at numerous discussions with her son and her husband at which Martin Byrnes spelled out his view that Mr Kendle owed a duty to Mrs Byrnes to collect rent from Kym. She was well aware of the rights her son claimed for her but, for the sake of matrimonial harmony, she took no action. I find that, although unwillingly, she consented to her husband's decision not to press for rent. Equity should not hear her complaints now, only after the marriage has broken down.[14]

On appeal to the Full Court of the Supreme Court of South Australia, Doyle CJ, with whom Nyland and Vanstone JJ agreed, also upheld paragraph [19].[15] However, Doyle CJ held that the terms "acquiescence" or "concurred" better described the conduct or inaction by Mrs Byrnes in letting the rent drift.[16] The issue is whether these two terms are synonymous or whether each carries its own meaning. It may be that the interchangeable use of the terms "acquiescence" and "concurrence" contributes to the confusion that arises in ascertaining the exact extent and nature of the defence of acquiescence. It is necessary to consider whether the judgment of the High Court of Australia provides any clarification of this issue.

C *High Court of Australia*

The Byrnes' appeal to the High Court was heard by French CJ, Gummow, Hayne, Heydon and Crennan JJ. The defence of

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13 *Byrnes v Kendle* [2009] SADC 36 [39].
14 Ibid [42].
15 *Byrnes v Kendle* [2009] SASC 385 [49]-[50].
16 Ibid [46], [49].

acquiescence was rejected in all three judgments, given by French CJ, and in the joint judgments by Gummow and Hayne JJ and by Heydon and Crennan JJ.[17]

Their Honours essentially agreed on the law to be applied to a defence of acquiescence, but it is in their interpretation of the facts that differences between the three separate judgments become apparent. The result is that *Byrnes v Kendle*[18] confirms the incoherence in an already uncertain area of law, specifically, in relation to the inconsistent use of terminology and the overlapping nature of other equitable concepts.

D *The Defence of Acquiescence*

Before a closer examination of the judgments of the High Court, it is convenient to outline the law on the defence of acquiescence. In doing so, the areas of contention will become apparent. This will lead to a discussion as to whether reform of equity is feasible in order to promote coherence and certainty in the law.

1 *Multiple Senses of the Term "Acquiescence"*

The term "acquiescence" is one that has been historically admitted as possessing several meanings, giving rise to consequent confusion. Deane J, with whom Mason CJ concurred, acknowledged this in his comprehensive reasons in *Orr v Ford*,[19] describing acquiescence as having 'a chameleon-like quality which adds little besides confusion to an already vague area of equity doctrine.'[20]

That case was concerned, inter alia, with the applicability of a defence to a claim that an express trust existed over a piece of land,

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17 (2011) 243 CLR 253.
18 Ibid.
19 (1989) 167 CLR 316, 337-8.
20 Ibid 337.

which defence involved a plea of laches, acquiescence and delay.[21] Mr Orr and his uncle, Dr Stone, acquired a piece of land known as "Cockatoo" for $156,000 of which the plaintiff contributed $30,000.[22] In 1977, Dr Stone wrote to Mr Orr asserting sole beneficial ownership of Cockatoo. Mr Orr responded to that letter but did not dispute his uncle's assertion or claim an interest in Cockatoo. Mr Orr gave evidence that he expected he would inherit Cockatoo upon his uncle's death.[23] Contrary, to that belief, his uncle devised Cockatoo to his property manager, Mr Nimmo, and property sub-lessee, Mrs Nickerson. It was not until 1982 after his uncle's death, that Mr Orr claimed a beneficial interest in Cockatoo, that is, an interest proportionate to his contribution. It was not until 1985, eight years later, that Mr Orr extended his claim for 'a full half share'[24] of Cockatoo. It was argued, on behalf of Dr Stone, that by reason of the eight year delay, Mr Orr lost his right to a claim in equity.[25]

Despite the fact that Deane J delivered a minority judgment, which to a certain extent is obiter, it may be regarded as authoritative in this difficult area of law.[26] His Honour was the only High Court Justice to identify and discuss the various means by which acquiescence might give rise to a defence. The majority did not engage in any express consideration of the defence of acquiescence. His Honour's reasoning is certainly applicable in relation to his statement of principles and the enumeration of the multiple senses of the term "acquiescence." In his reasons, Deane J noted the precise meanings of "acquiescence" and related equitable concepts. First, as to acquiescence, his Honour referred to the strict sense of the term, the first of the two senses his Honour identified:

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21 Ibid 333, 335.
22 Ibid 336.
23 Ibid 335.
24 Ibid 336.
25 Ibid 337.
26 In particular, Deane J acknowledged the prospect of a unification of the various equitable defences given the 'flexibility of estoppel by conduct.' However, his Honour did not analyse the facts of the case in terms of estoppel. In fact, the defendant had not pleaded estoppel, and so it did not arise as an issue to be determined.

> acquiescence indicates the contemporaneous and informed ("knowing") acceptance or standing by which is treated by equity as "assent" (i.e. consent) to what would otherwise be an infringement of rights.[27]

That is, acquiescence is a contemporaneous act or conduct, silence or inaction, with knowledge, of a person possessed of equitable rights that another is infringing those rights, which operates in equity as a consent to the infringement of the rights in question.[28]

Deane J continued to set out the second sense of the term "acquiescence" which also gives rise to a defence. The second sense of the term acquiescence comprises several usages:

> (i) to a representation by silence of a type which may found an estoppel by conduct; or (ii) to acceptance of a past wrongful act in circumstances which give rise to an active waiver of rights or a release of liability; or (iii) to an election to abandon or not to enforce rights.[29]

The common feature in all of the above-mentioned usages of the term acquiescence in its second sense is that the rights of a *cestui que trust* may be forfeited where a person refrains from seeking redress when there is brought to his or her knowledge a violation of his rights of which he did not know at the time of the violation.[30] These usages are similar to the means by which consent may give rise to a defence in order to deprive a beneficiary of his or her rights.[31]

Deane J continued that 'a plaintiff may, however, lose his right to relief by an "inferior species of acquiescence" which does not amount to assent, waiver or election or give rise to an estoppel.'[32]

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27 (1989) 167 CLR 316, 337 (citations omitted).
28 See *De Bussche v Alt* (1878) 8 Ch D 286, 314 (Thesiger LJ).
29 (1989) 167 CLR 316, 337-8 (citations omitted).
30 *Glasson v Fuller* [1922] SASR 148, 161-3 (Poole J).
31 *Spellson v George* (1992) 26 NSWLR 666, 679.
32 (1989) 167 CLR 316, 338.

The fourth usage is the 'loss of right to relief by laches.'[33] It is this fourth usage of the term acquiescence that Deane J expands on, which, and as will be seen in the subsequent discussion,[34] underlies the confusion in this area.

As to the fourth usage of the second sense of the term acquiescence (laches), Deane J noted that there are three specific types of laches:

> First, it is sometimes used as an indefinite overlapping component of a catchall phrase incorporating "laches" or "gross laches" and/or "delay". … Secondly, acquiescence is used as a true alternative to "laches" to divide the field between inaction in the face of "the assertion of adverse rights" ("acquiescence") and inaction "in prosecuting rights ("laches") … Thirdly, and more commonly, acquiescence is used, in a context where laches is used to indicate either mere delay or delay with knowledge, to refer to conduct by a person, with knowledge of the acts of another person, which encourages that other person to reasonably believe that his acts are accepted (if past) or not opposed (if contemporaneous).[35]

It was the third type of laches, in which elements of both delay and acquiescence are present, with which *Orr v Ford*[36] itself was ultimately concerned. In that case, Deane J said that acquiescence was relied upon in the sense of:

> calculated (i.e. deliberate and informed) inaction or standing by which encouraged another reasonably to believe that his assertion of rights and consequent actions were accepted or not opposed.[37]

Deane J found that the plaintiff's delay 'served to confirm Dr Stone in the belief, upon which he acted, that he was the sole beneficial owner'[38] of the land in question.

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33 Ibid.
34 See below section E2.
35 (1989) 167 CLR 316, 338 (citations omitted).
36 (1989) 167 CLR 316.
37 Ibid 340.
38 Ibid 342.

Deane J's examination of the term acquiescence illustrates that there are two primary senses of the term "acquiescence." In the first, and strictly correct sense, acquiescence is a complete defence in itself. It has no relation to lapse of time or laches.[39] In the second sense, acquiescence is an overarching term for several equitable defences which includes defences of estoppel, waiver, release, election and laches.

In *Byrnes v Kendle*,[40] the species of acquiescence relied upon to bar the Byrnes' claim was analogous to the first strict sense of the term as identified by Deane J. There was no plea of laches. Thus, it is upon that sense that this paper will focus.

The fact that there is a multiplicity of senses which may legitimately be regarded as constituting acquiescence causes confusion, and means that the precise ground upon which a court of equity may have refused to grant relief to a plaintiff is not at all clear. The matter of confused terminology is an obvious limitation in ascertaining the scope of the defence of acquiescence and its constituent elements.

2 *Constituent Elements of Acquiescence*

As appears from the foregoing, acquiescence, in its first strict sense identified by Deane J, may be raised as a defence to defeat proceedings for a breach of trust where a beneficiary knowingly stands by in such a manner as to induce the trustee to commit the act to his or her prejudice in the belief that the beneficiary consents to its being committed.[41]

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39 *Glasson v Fuller* [1922] SASR 148, 161 (Poole J).
40 (2011) 243 CLR 253.
41 See above nn 27-8 and accompanying text.

The authors of *Jacobs' Law of Trusts in Australia*[42] observe that a beneficiary may acquiesce in a breach of trust 'provided that at the time … the beneficiary was sui juris, and did the act with full knowledge of the facts and what exactly he or she was doing and the legal effect thereof, and that the act was not the result of any undue influence.'[43]

For present purposes, the concern is with the knowledge requirement of acquiescence, specifically, the degree of knowledge a beneficiary must have to acquiesce in a breach of trust. The question is: in order to have a beneficiary's claim barred by acquiescence, what amounts to "sufficient knowledge"?[44] Does it suffice if the beneficiary knows of the surrounding facts of the breach or must the beneficiary fully appreciate the legal consequences of the known facts? Further, must the beneficiary know that what he or she is acquiescing in is a breach of trust?

The authorities make it clear that the onus of proof is on the trustee[45] to establish that the beneficiary had full knowledge of the facts.[46] However, the degree of knowledge as to the legal consequences of the trustee's acts is difficult to reconcile on the early authorities.[47] As observed in *Spencer Bower*,[48] in relation to the degree of knowledge necessary for a beneficiary to concur or acquiesce effectively in a breach of trust, 'the rule as it is now currently understood was restated by Wilberforce J in *Re Pauling's*

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42 John D. Heydon and Mark J. Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006).

43 Ibid 618.

44 Piers Feltham, Daniel Hochberg and Tom Leech (eds), *Spencer Bower: Estoppel by Representation* (LexisNexis Butterworths, 4th ed, 2004) 347.

45 *Pickering v Smoothpool Nominees* (2001) 81 SASR 175, 200 (Gray J) quoting *Farrant v Blanchford* (1862) 1 De G J & S 107, 19-20; 46 ER 42 (Lord Westbury).

46 *Farrant v Blanchford* (1862) 1 De G J & S 107; 46 ER 42; *Permanent Trustee Co Ltd v Bernera Holdings Pty Ltd* (2004) 182 FLR 431,438 (Young CJ in Eq).

47 See, eg, *Cockerell v Cholmeley* (1830) 1 Russ & My 418 see also *Stafford v Stafford* (1857) 1 De G & J 193; 44 ER 697.

48 Feltham, Hochberg and Leech, above n 44, 347.

Settlement Trusts.'[49] In that case, Wilberforce J reviewed the earlier authorities on this matter and said:

> the court has to consider all the circumstances in which the concurrence of the *cestui que trust* was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn around and sue the trustees: that, subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust.[50]

The English Court of Appeal in *Holder v Holder*[51] followed the general approach stated by Wilberforce J, with a qualification that in cases of alleged acquiescence 'there is no hard and fast rule that ignorance of a legal right is a bar, but the whole of the circumstances must be looked at to see whether it is just that the complaining beneficiary should succeed against the trustee.'[52]

In *Holder v Holder*,[53] the first defendant, Victor, purchased trust property in breach of trust. In 1956, the testator appointed his widow, one daughter and Victor executors and trustees of two farming properties.[54] In 1960, Victor specifically purported to execute a renunciation of trusteeship in order to buy the farms following tenancy disputes.[55] In 1961, Victor purchased the trust property at a public auction in the presence of Frank and his solicitors who made no objections to the sale. Victor paid a deposit for the two farms but due to mortgage difficulties, was unable to complete the purchase.[56] Frank pressed the trustees to forfeit Victor's deposit and put the trust property up for sale again. The trustees refused and in 1962 the purchase was completed, Frank

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49 [1962] 1 WLR 86 applied in *Spellson v George* (1992) 26 NSWLR 666, 670 (Handley JA), 674 (Hope A-JA), 680 (Young A-JA).

50 *Re Pauling's Settlement Trusts* [1962] 1 WLR 86, 106-08.

51 [1968] Ch 353 (Court of Appeal).

52 Ibid 394 (Harman LJ), 399 (Danckwerts LJ), 406 (Sachs LJ).

53 [1968] Ch 353 (Court of Appeal).

54 Ibid 357.

55 Ibid 358.

56 Ibid 359.

accepting his share of the proceeds.[57] In 1964, Frank by writ initiated proceedings to rescind the sale. The statement of claim correctly identified that contrary to Frank, Victor's and the trustee's belief, Victor's renunciation of trusteeship was in fact ineffective.[58] Victor argued that Frank had acquiesced in the sale because he had refrained from doing anything to assert his interest or counter-claim. Frank counter-argued that since he believed Victor's renunciation of trusteeship to be effective, he was unaware that the sale of the trust property was in breach of trust and was thus unaware of his rights at law. Simply, the argument was that even though Frank knew of the facts of the Victor's acts, he had not appreciated the legal consequences of those acts.

The issue was whether Frank's lack of knowledge of the legal consequences of the breach of trust should be taken into account in determining a claim of alleged acquiescence? The Court of Appeal found that the plaintiff had sufficient knowledge of his legal rights. Frank acquiesced in the breach of trust because he had knowledge of the facts, had affirmed the sale of the trust property and accepted part of the purchase money, thereby precluding him from objecting to it.[59] Sachs LJ went further to uphold a defence of estoppel based upon the plaintiff's conduct before and after the sale of the trust property.[60] His Lordship considered that the plaintiff by his conduct 'expressly and impliedly represented that [the defendant] could properly do the very act to which he now objects - purchase the trust property.'[61]

The effect of the decision is that there is no strict rule of knowledge, but rather the approach to determining sufficiency of knowledge should be undertaken by having regard to the particular "conduct" of the beneficiary in all the circumstances of the particular case. Indeed, the trustee may argue that in equity and unfairness may arise if the trustee is not allowed to rely on the beneficiary's conduct

[57] Ibid 360.
[58] Ibid 361.
[59] Ibid 393-4 (Harman LJ), 398-9 (Danckwerts LJ), 405-6 (Sachs LJ).
[60] Ibid 405.
[61] Ibid 404.

in a case of alleged acquiescence. It would be an infringement of the nature of equity for an equitable remedy, emanating from a court of conscience, to produce unfairness. Accordingly, the trustee may plead that the conduct of the beneficiary encouraged the trustee and was thereby relied on by the trustee to act to its detriment in breaching the trust, and the beneficiary is thus barred from asserting his or her own rights against the trustee by virtue of his or her acquiescence. Certainly, the plaintiff in *Holder v Holder*[62] had by his conduct disentitled himself to equitable relief by encouraging the defendant trustee to act to his detriment by affirming the sale of the trust property and by accepting his share of the proceeds. Such conduct meant that it was quite coherent for the Court of Appeal to infer the plaintiff's assent to the purchase of the trust property, of which he later complained.

As stated extra-judicially by Justice Richard White of the Supreme Court of South Australia, 'the reference to encouragement of the other is to be noted. Encouragement is also an element of acquiescence in the strict sense….'[63] Lord Eldon LC in *Dann v Spurrier*,[64] a case concerning a disputed lease term summarised the principle:

> this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using terms of encouragement.[65]

Encouragement focuses on the conduct of the party who is alleged to have acquiesced in the breach of trust, which is thereby relied upon by the trustee to believe that his or her acts were either accepted or at least not opposed. So, the two primary elements of acquiescence in its first strict sense are first, knowledge of the acts of the trustee and their legal consequences and secondly, encouragement by the

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62 [1968] Ch 353 (Court of Appeal).

63 Justice Richard White 'When does Quiescence become Acquiescence?' (Paper delivered at Trusts Symposium 2012, Adelaide, 9 March 2012) 16.

64 (1802) 7 Ves Jun 231; 32 ER 94.

65 Ibid 235-6.

beneficiary towards the trustee that he or she is not opposed to the trustee's acts.

In summary, in a case of alleged acquiescence in its first strict sense, the trustee has the onus of proving that the beneficiary had full knowledge of his or her rights, as a matter of both fact and law. There is no more specific test for the requisite degree of knowledge to acquiesce in a breach of trust. However, whether the beneficiary has "sufficient knowledge" of the legal consequences depends on all the circumstances of the particular case, with a specific focus on the beneficiary's "conduct." Without knowledge of the facts of the breach and its legal consequences, the beneficiary's so-called acquiescence will be no bar to a claim for breach of trust against his or her trustee.

It is suggested that, in dealing with the acquiescence defence in *Byrnes v Kendle*,[66] the High Court did not give the knowledge requirement sufficient weight. Instead, the High Court placed emphasis on Mr Kendle and Mrs Byrnes' "matrimonial relationship" to dismiss Mr Kendle's defence of acquiescence. It is true that acquiescence may exist within a matrimonial relationship. As Justice White has aptly remarked:

> It might reasonably be said that when it comes to relationships with others, acquiescence occurs not infrequently in matrimonial or domestic relationships. Despite the idyllic pictures, it is probably unusual in such relationships for both parties to be of the one mind on absolutely everything.[67]

His Honour proceeded to give some examples of how acquiescence might be manifested in such a relationship. Nonetheless, as appears in the following discussion,[68] the High Court disregarded these considerations and held that the acquiescence failed.

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66 (2011) 243 CLR 253.

67 Justice Richard White 'When does Quiescence become Acquiescence?' (Speech delivered at Trusts Symposium 2012, Adelaide, 9 March 2012) 17.

68 See below nn 69-82 and accompanying text.

E *High Court of Australia Decision*

1 *Heydon and Crennan JJ*

Heydon and Crennan JJ cited Deane J's first strict sense of the term acquiescence as the correct approach to be taken to the acquiescence defence in the case before them. Put simply, their Honours found that 'there was no evidence to support contemporaneous consent by [Mrs Byrnes]'[69] sufficient to establish acquiescence.

2 *Gummow and Hayne JJ*

Gummow and Hayne JJ placed much reliance on Deane J's explanation of the various meanings of the equitable concept of acquiescence. However, rather than adopting the first strict sense of acquiescence, their Honours considered that a defence of acquiescence was to be understood as:

> requiring calculated (that is, deliberate and informed) inaction by her or standing by, which encouraged Mr Kendle reasonably to believe that his omissions were accepted or not opposed by her.[70]

One can immediately identify that explanation as falling under the third type of laches referred to by Deane J in *Orr v Ford.*[71] It is in that context that elements of both acquiescence and laches are present.[72] Inevitably, a question arises as to whether Gummow and Hayne JJ considered Mr Kendle's defence as raising a plea similar to that raised in *Orr v Ford.*[73] In *Orr v Ford*[74] the plea of laches was said to flow from Mr Orr's eight year delay in claiming a half share interest in the land, despite Dr Stone making it clear that he was the sole beneficial owner. Gummow and Hayne JJ concluded that, on the evidence, counsel for Mr Kendle failed to establish 'that there

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69 (2011) 243 CLR 253, 294.
70 Ibid 279.
71 (1989) 167 CLR 316, 338. See above nn 35-37 and accompanying text.
72 See above nn 35-37 and accompanying text.
73 (1989) 167 CLR 316.
74 Ibid.

was no need for him to take steps to recover arrears of rent or to evict Kym because Mrs Byrnes accepted the actions and did not oppose to their continuation.'[75] However, their Honours went on to note that Mr Kendle in paragraph [19] of his defence did not plead laches.[76] The question must accordingly be answered in the negative. It is in this sense that their Honours judgment differs slightly from the other two judgments in the High Court in this case.

3 *French CJ*

French CJ considered that the defence of acquiescence to equitable relief is used in at least two different senses:

- A person who is aware that an act is about to be done to his or her prejudice takes no step to object to it.
- A person being aware of a violation of his or her rights which has occurred fails to take timely proceedings to obtain equitable relief. This is acquiescence after the event which founds the defence of laches.[77]

The first sense is analogous to consent by silence. That consent is given before the breach, and may be equated with an anticipatory breach of a contract and obligations. The second sense is a form of laches. "Timely proceedings" is significant here. It emphasises the requirement of delay on the part of the plaintiff. The delay is subsequent to the breach of trust as opposed to a prior consent by silence to the breach.

His Honour considered that Mr Kendle's plea was analogous to the former since Mr Kendle had not raised a plea of laches in paragraph [19] of his defence.[78] However, in this case, in his Honour's opinion, no such acquiescence in the first sense had occurred or was likely to have occurred. His Honour referred to the

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75 (2011) 243 CLR 253, 280.
76 Ibid.
77 Ibid 267.
78 Ibid.

evidence which counsel for the Byrnes' had contended made a plea of acquiescence inappropriate in the circumstances:

> - Mr Kendle's evidence in examination-in-chief and in cross-examination that he and Mrs Byrnes discussed the non-payment of rent from time to time and that both hoped that his son would pay the rent.
> - The absence in Mr Kendle's evidence of any suggestion that his inaction was attributable to or induced by anything Mrs Byrnes did or failed to do.
> - Mr Kendle's evidence that he decided family matters concerning his family and that Mrs Byrnes decided matters concerning her family.
> - Mrs Byrnes' evidence that, for the sake of matrimonial harmony, she did not take action to insist upon Mr Kendle pursuing his son for rent.[79]

The evidence available was in French CJ's view inconsistent with an inference that 'acquiescence on Mrs Byrnes' part in Mr Kendle's failure to discharge his duty as trustee of her interest in the house and land'[80] had occurred:

> Mrs Byrnes' inaction, if it can be called that, is to be understood by reference to the matrimonial relationship and the fact that a member of Mr Kendle's family was at the centre of his ongoing failure to insist on the rental payment.[81]

Accordingly, French CJ concluded that 'there was no acquiescence in the relevant sense, there was no evidence of reliance by Mr Kendle upon Mrs Byrnes' inaction.'[82] His Honour goes no further to explain his findings on acquiescence.

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79 Ibid.
80 Ibid 267-8.
81 Ibid 268.
82 Ibid.

4 *What is the Ratio Decidendi of Byrnes v Kendle Regarding Acquiescence?*

Ultimately, the High Court found that Mr Kendle, as trustee, failed to discharge the onus of establishing that Mrs Byrnes acquiesced in the breach of trust. In doing so, the Court approached the defence of acquiescence on the particular facts differently.

Heydon and Crennan JJ treated acquiescence as an instance of consent, and their joint judgment was the only one expressly to adopt Deane J's explanation of acquiescence in its first strict sense. On the other hand, the joint judgment of Gummow and Hayne JJ treated acquiescence as a delay which founds the defence of laches.

The judgment of French CJ is highly ambiguous. At paragraph [27] his Honour introduced concepts of consent and delay finding that the case was analogous to the former. At paragraph [28] his Honour set out evidence that seem to be instances of both consent and delay. At paragraph [30] his Honour ostensibly contradicted his finding at paragraph [27] and placed emphasis on Mrs Byrnes' "inaction" which was the basis of his conclusion that Mrs Byrnes had not acquiesced.

It is arguable that French CJ considered that acquiescence operates as a delay given his apparent focus on inaction. If this is correct, it is not inconsistent with the meaning of acquiescence in its first strict sense, whereby a beneficiary's standing by with knowledge of the facts and law operates as a "consent" in equity to the trustee's infringing act. This is because delay in these circumstances is a manifestation of consent. The concern is the reason for the delay, that is, at the time the breach occurred, there was a consent given and a subsequent delay in the institution of proceedings. It is something more than mere delay, which is not a defence in itself.[83]

[83] See, eg, John Mowbray et al. (eds), *Lewin on Trusts* (Sweet & Maxwell, 18th ed, 2008) 1598-9.

The result is that the decision in *Byrnes v Kendle*[84] was ultimately a 3:2 split in favour of acquiescence operating as a delay. It is in the interpretation of the facts that the judgments of the High Court vary: that is, in their interpretation of Mrs Byrnes' conduct, and specifically, whether or not her conduct gave rise to an inference of acquiescence, sufficient to bar the claim for equitable relief. This highlights a source of contention about the defence of acquiescence and means that *Byrnes v Kendle*[85] has not at all clarified the law on the matter.

F *Other Equitable Defences*

Other related equitable defences received scant attention in the High Court once the defence of acquiescence was dismissed. However, as will become evident from the reasons in the three separate judgments, the overlapping nature of these equitable defences is significant. It remains to be seen whether the overlap is broad enough to warrant reforming the defence of acquiescence.

1 *Consent*

The defence of consent provides that it is incoherent for a court of equity to 'enforce an equitable obligation in favour of a party who consented to its breach against a party who acted with knowledge of that consent.'[86]

The High Court found that Mr Kendle's defence of consent had not been made out on the evidence.[87] In doing so, the judgment of French CJ and the joint judgment of Gummow and Hayne JJ dealt with the defence of consent on the basis that it might operate as an

[84] (2011) 243 CLR 253.
[85] Ibid.
[86] *Spellson v George* (1992) 26 NSWLR 666, 669 (Handley JA).
[87] This supports the finding that the High Court considered that acquiescence in its first strict sense operates as a delay. See above section E4. Certainly, the High Court dealt with the defences of acquiescence and consent separately.

estoppel.[88] Handley JA in the New South Wales Court of Appeal decision of *Spellson v George*[89] indicated that consent is used to signify a range of conduct which may give rise to an estoppel:

> Consent may take various forms. These include active encouragement or inducement, participation with or without direct financial benefit, and express consent. Consent may also be inferred from silence and lack of activity with knowledge. However consent means something more than a state of mind. The trustee must know of the consent prior to the breach.[90]

That passage was expressly adopted in the reasons of French CJ, and in the joint judgment of Gummow and Hayne JJ, to confirm the notion that consent may operate as an estoppel and to reveal the overlap between the concepts of consent and acquiescence.[91] The overlap between consent and acquiescence is evident to the extent that both may be inferred from silence or lack of activity with knowledge, since acquiescence denotes the absence of activity in circumstances where the plaintiff is expected to act. Of course, however, the beneficiary may consent to the breach by positive acts, which is certainly more common.[92]

Further, a defence of consent will fail unless the beneficiary had 'full knowledge of all the material facts.'[93] Evidence concerning the beneficiary's subjective state of mind is relevant to determine whether the beneficiary had "full knowledge" so as to be able to consent to the breach.[94] Wilberforce J in *Re Pauling's Settlement*

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88 See *Byrnes v Kendle* (2011) 243 CLR 253, 266-7 (French CJ), 279 (Gummow and Hayne JJ).

89 (1992) 26 NSWLR 666.

90 Ibid 669-70.

91 (2011) 243 CLR 253, 266, 279.

92 See *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 which concerned positive acts of the beneficiaries which amounted to consents to the breaches of trust.

93 See, eg, *Spellson v George* (1992) 26 NSWLR 666, 670; *Re Pauling's Settlement Trusts* [1962] 1 WLR 86, 106-8; *Life Association of Scotland v Siddal* (1861) 3 De GF & J 58, 74; 45 ER 800, 806; *Farrant v Blanchford* (1863) 1 De G J & S 107, 119; 46 ER 42, 46-7.

94 *Spellson v George* (1992) NSWLR 666, 675 (Hope A-JA).

Trusts,[95] in relation to the defence of consent, set out the requirement that in deciding whether it is fair and equitable to allow the beneficiary to sue the trustee, all the circumstances of the case must be considered. That would require a consideration of at least some, if not all, knowledge of matters by the plaintiff which are not expressed or communicated.[96] As revealed in the foregoing analysis of the defence of acquiescence, knowledge is a required element for a beneficiary to acquiesce in a breach of trust.

Notwithstanding those considerations, Heydon and Crennan JJ in *Byrnes v Kendle*[97] decided that Mr Kendle had not discharged the burden of proof. Their Honours referred to evidence insufficient to establish that Mrs Byrnes had consented to the breach of trust.[98]

Gummow and Hayne JJ concluded that the findings of the trial judge in paragraph [42][99] 'fell short of providing a sufficient basis for defences of consent and estoppel.'[100] This joint judgment went no further to explain the reasoning for this finding.

French CJ was adamant that despite some overlap, the defences of consent and acquiescence 'are not congruent'[101] and remain two distinct defences. His Honour referred to Young A-JA in *Spellson v George*[102] who differentiated acquiescence after breach from concurrence in the breach. His Honour found that Mrs Byrnes' unwillingness to press Mr Kendle to enforce the payment of rent did not amount to consent. Further, Mr Kendle was neither induced by, nor relied upon Mrs Byrnes' position, as would be necessary to

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95 *Re Pauling's Settlement Trusts* [1962] 1 WLR 86, 106-8.
96 *Spellson v George* (1992) NSWLR 666, 675 (Hope A-JA).
97 (2011) 243 CLR 253.
98 Ibid 293.
99 Judge Boylan found that Mrs Byrnes was well aware that Kym was not paying rent and of her rights under the Acknowledgment. Although unwillingly, Mrs Byrnes consented to Mr Kendle's decision not to press Kym for rent.
100 (2011) 243 CLR 253, 279.
101 Ibid 266.
102 (1992) 26 NSWLR 666, 681.

prove the elements of estoppel.[103] The elements of estoppel require proof of an induced assumption and detrimental reliance on that assumption.[104]

III UNIFIED DOCTRINE

In this part, a proposal for reform of the law of the defence of acquiescence will be considered. The proposal arises from the decision in *Byrnes v Kendle*[105] and concerns specific and possible future developments in equity. The proposal requires consideration of two aspects; first, whether scope exists in Australia to formulate a unification of doctrine within the framework of estoppel and, second, if so, whether the equitable defences of acquiescence and consent may be subsumed within such overarching doctrine?

It is evident that consent and acquiescence are, to a certain extent, overlapping equitable defences.[106] Consent looks for prior conduct on the part of the beneficiary that amounts to a consent to the breach of trust, or to an agreement concluded before the breach occurs not to sue the trustee.[107] Acquiescence, in its first strict sense, is the failure on the part of the beneficiary to bring an action for breach of trust, coupled with activity that would reasonably and objectively suggest that the beneficiary consents to the breach of trust which has taken or is taking place.[108]

An analysis of *Byrnes v Kendle*[109] demonstrated the extent of overlap between these equitable defences and the consequent

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[103] (2011) 243 CLR 253, 267.
[104] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (‘*Waltons Stores’*). The elements of estoppel were elaborated into seven principles by Priestley JA in *Silovi v Barbaro* (1988) 13 NSWLR 466, 472.
[105] (2011) 243 CLR 253, 267.
[106] See above section F1.
[107] *Spellson v George* (1992) 26 NSWLR 666, 679 (Young A-JA).
[108] *Holder v Holder* [1968] Ch 353 (Court of Appeal).
[109] (2011) 243 CLR 253.

confusion arising from a failure to acknowledge the peculiar requirements of the particular defence pleaded. The High Court undoubtedly differed with respect to the correct interpretation to be placed on the facts of the case when dealing with the defence of acquiescence, thus leaving the defence in its present ambiguous state.

It is necessary to consider whether the development of equity may provide for a more coherent and certain approach to the law of the defence of acquiescence. The question is whether there should be a general doctrine of estoppel.[110] To be more precise, should there be a general doctrine of estoppel in circumstances where it would be unconscionable[111] for the defendant to resile from his or her statement, act, silence or inaction which has been relied upon by the plaintiff to his or her detriment in reasonable and foreseeable belief that he or she has or will be given an immunity from liability?[112]

To date, the High Court of Australia, and it may be added the House of Lords (now the Supreme Court of the United Kingdom), has not endorsed a general doctrine of estoppel. This may be attributed to the fact that 'the terminology and taxonomy of this part of the law are … far from uniform.'[113] Nonetheless, there are persuasive arguments in relation to the possible future development of estoppel. Relevant English and Australian authorities are replete both with obiter that categorisation of the different forms of estoppel is elusive and unhelpful, and with growing support for the emergence of a general doctrine of estoppel. Characterisation of

[110] References to a general doctrine of estoppel relates to the fusion of common law and equitable estoppel.

[111] The term 'unconscionable' is used in this paper in such a way as to encompass 'unconscientious' dealings following the judgment in *Tanwar Enerprises v Cauchi* (2003) 217 CLR 315.

[112] See Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press, 2000) 63-64. Cooke articulates a unification of doctrine within the framework of 'reliance-based estoppel.'

[113] *Thorner v Major* [2009] 1 WLR 776, 797 (Lord Walker).

equitable estoppel has been described as 'a parlour game for legal academics, which obfuscates rather than illuminates.'[114]

Lord Scott in *Cobbe v Yeoman's Row Management Ltd*[115] recently stated that proprietary estoppel is 'a sub-species of promissory estoppel.'[116] That idea is not without support, having been recognised by Scarman LJ in the earlier case of *Crabb v Arun District Council*[117] which was then approved by Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd.*[118]

Oliver J's judgment in *Taylors Fashions*[119] is generally cited as the authoritative support for a move towards a unification of doctrine. Oliver J opined that he was not convinced that 'it is desirable or possible to lay down hard and fast rules'[120] or that 'so inflexible an approach'[121] was supported by the authorities. His Lordship concluded that in light of the more recent cases the principle:

> requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.[122]

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[114] Lord Neuberger of Abbotsbury, 'Thoughts on the law of equitable estoppel' (2010) 84 *Australian Law Journal* 225, 237.
[115] [2008] 1 WLR 1752 ('*Cobbe*').
[116] Ibid 1761.
[117] [1976] Ch 179.
[118] [1982] QB 133, 153 ('*Taylors Fashions*'). See also comments by Lord Oliver reflected in the speech of Lord Templeman in *Attorney-General (Hong-Kong) v Humphreys Estate Ltd* [1987] AC 114,123-4 in which Lord Oliver concurred.
[119] [1982] QB 133.
[120] Ibid 148.
[121] Ibid.
[122] Ibid 151-2.

Several subsequent English, Australian and New Zealand judgments have endorsed the ideas in this passage from Oliver J's judgment,[123] that is, that there is a 'wider doctrine'[124] whereby unconscionability underlies all forms of estoppel in a unified estoppel system. The focus is on "detrimental reliance," occasioned by conduct or inaction, as 'an invariable component of unconscionability.'[125]

The notion that unconscionability governs the various forms of estoppel saw significant development in Australia in *Waltons Stores*[126] and *Commonwealth of Australia v Verwayen.*[127] Mason CJ and Deane J are the leading judicial advocates from the High Court of Australia for a unification of doctrine. In *Commonwealth of Australia v Verwayen*[128] Mason CJ made the most 'radical claim'[129] for unity. After identifying that a 'consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules,'[130] his Honour stated:

> it should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity may do what is required, but no more, to prevent a person who has relied upon an assumption as

[123] See, eg, *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank* [1982] QB 84, 122 (Lord Denning MR); *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265, 1285, 1286 (Court of Appeal) (Oliver J); *Attorney-General (Hong-Kong) v Humphreys Estate Ltd* [1987] AC 114, 123-4 (Lord Templeman); *Waltons Stores* (1988) 164 CLR 387, 403-04 (Mason CJ and Wilson J), 420 (Brennan J), 447-53 (Deane J); *Foran v Wight* (1989) 168 64 CLR 385, 411-13 (Mason CJ), 433-7 (Deane J); *Verwayen* (1990) 170 CLR 394, 409- 13 (Mason CJ), 431-46 (Deane J); *Gillies v Keogh* [1989] 2 NZLR 327, 331 (Cooke P), 346 (Richardson J) (Court of Appeal of New Zealand); *Wellington City Council v New Zealand Law Society* [1990] 2 NZLR 22, 26 (Cooke P) (Court of Appeal of New Zealand); *Rattrays Wholesale Ltd v Meredyth-Young & A'Court Ltd* [1997] 2 NZLR 363, 377-8 (Tipping J) (High Court of New Zealand).

[124] *Amalgamated Investment & Property Co Ltd (In Liquidation) v Texas Commerce International Bank* [1982] QB 84, 104 (Robert Goff J).

[125] Cooke, above n 112, 111.

[126] (1988) 164 CLR 387 ('*Waltons Stores'*).

[127] (1990) 170 CLR 394 ('*Verwayen'*).

[128] Ibid.

[129] Cooke, above n 112, 61.

[130] *Verwayen* (1990) 170 CLR 394, 410-11.

> to a present, past or future state of affairs … which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness.[131]

The foregoing represents the core of a general doctrine of estoppel. To establish the relevant estoppel, the defendant must prove that the plaintiff induced the defendant to hold an assumption, the defendant relied on the assumption, the defendant suffered detriment and the plaintiff failed to act to avoid that detriment.

The High Court of Australia has since been less willing to discuss and develop this matter of doctrinal convergence. In *Giumelli v Giumelli*,[132] the most recent opportunity for the High Court of Australia to consider a move towards a unification of doctrine, the Court declined to discuss the issue. The judgment delivered by Gleeson CJ, McHugh, Gummow and Callinan JJ, Kirby J agreeing, stated:

> There is no occasion in this appeal to consider whether the various doctrines and remedies in the field of estoppel are to be brought under what Mason CJ called 'a single overarching doctrine' or what Deane J identified as a 'general doctrine of estoppel by conduct'. These theses were advanced by their Honours in *The Commonwealth of Australia v Verwayen* but not accepted by Dawson J or McHugh J. Brennan J approached the subject on the footing that 'equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having a promise to another who acts on it to his detriment, seeks to resile from the promise.'[133]

However desirable unity may seem to some judges and academic writers, there are evident problems which may accompany a general doctrine of estoppel. There are several obstacles to the acceptance of such a doctrine which those who reject a unification of doctrine strongly advocate. Perhaps these problems are the reason why a unification of doctrine has not won 'universal allegiance.'[134]

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[131] Ibid 413.
[132] (1999) 196 CLR 101.
[133] Ibid 112-13.
[134] Cooke, above n 112, 62.

Each form of estoppel has been established on a principled basis with its own constituent elements. Handley J in his article 'The three High Court decisions on estoppel 1988-1990'[135] emphasised that any 'similarities warrant their recognition as a form of estoppel, but their differences make them distinct.'[136] He stressed that 'each form [of estoppel] has a separate history and a distinct source'[137] thereby suggesting that a unification of doctrine may render ambiguous the necessarily different requirements, which despite areas of overlap, do not wholly coincide.[138] He suggests that the developments of equity in *Verwayen*[139] cannot be accepted and indeed have not been accepted by the High Court.[140] Brereton J, writing extra-judicially[141] agrees with that view and further argues that there cannot be a general doctrine of estoppel because of the 'disparate operation of the different estoppels.'[142] Specifically, equitable estoppels are concerned with conscience whilst common law estoppels are not.[143] It is submitted, with respect, that this argument can no longer be logically justified. The impression given by modern cases is that the distinctions between each form of estoppel are 'breaking down'[144] and thus it seems that 'the differences are more hypothetical than practical, and, insofar as they have any effect … they should not exist.'[145] A continuation of the current approach where each form of estoppel is separate and distinct is proving to obscure the law rather than clarifying it and so much can be seen in *Byrnes v Kendle.*[146] It is important that a general doctrine of estoppel develops adequately so that it can be said that it is no longer necessary to rely on the different categories of estoppel.

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135 (2006) 80 *Australian Law Journal* 724.
136 Ibid 737.
137 Ibid.
138 See also *Republic of India v India Stemship Co Ltd* [1998] AC 878, 914 (Lord Steyn).
139 (1999) 196 CLR 101.
140 Ibid 112-13.
141 Paul LG Brereton , 'Equitable estoppel in Australia: The court of conscience in the antipodes' (2007) 81 *Australian Law Journal* 638.
142 Ibid 643.
143 Ibid.
144 Cooke, above n 112, 62.
145 Lord Neuberger, above n 114, 237.
146 (2011) 243 CLR 253.

A further problem concerns the increase in scope for judicial discretion. The notion of unconscionability, with a specific focus on detrimental reliance, is touted as the basis of a general doctrine of estoppel. The purpose is to give the courts a wider discretion to be exercised in relation to the effect of a representation by conduct or inaction, and detrimental reliance thereon,[147] and thus it may be argued that any move to a general doctrine involving increased judicial discretion might thereby yield uncertain decisions. Certainly, Lord Walker in *Cobbe*[148] had "some difficulty" with the idea of a unification of doctrine expressing that it should not be 'a licence for abandoning careful analysis for unprincipled and subjective judicial opinion.'[149] Michael Spence in his article 'Australian Estoppel and the Protection of Reliance,'[150] however, purported to remedy this problem of uncertainty by enunciating a non-exhaustive list of factors a court might consider in determining whether alleged unconscionable conduct is proved.[151] The factors include a determination of the part played by the defendant in inducing an assumption or belief, the content of the assumption or belief, the knowledge of the relative parties, the parties' relative interests, the context of the parties' relationship, strength and context and whether the defendant has taken any steps to prevent detriment to the plaintiff.[152] If this approach is taken by a court of equity then detrimental reliance is not determinative of unconscionability. Rather, a determination of unconscionability is a 'multifaceted inquiry'[153] looking first at detrimental reliance and secondly at other factors which may be deemed appropriate in the circumstances of the particular case. Undeniably, given the underlying discretionary nature of equity, any judgment will be a value based judgment. However, it is submitted that adherence to this approach may confine the problem of uncertainty vis-à-vis increased judicial discretion in the move towards a general doctrine of estoppel.

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147 Feltham, Hochberg and Leech, above n 44, 23.
148 [2008] 1 WLR 1752.
149 Ibid 1179-80.
150 (1997) 11 *Journal of Contract Law* 203.
151 Ibid 212-17. See also, Cooke, above n 112, 84.
152 Michael Spence, 'Australian Estoppel and the Protection of Reliance' (1997) 11 *Journal of Contract Law 203,* 212-17.
153 Cooke, above n 112, 88.

While the broad significance of a unification of doctrine is clear from the authorities, it must be conceded that neither the High Court of Australia, nor the Supreme Court of the United Kingdom considers that the various forms of estoppel come within the umbrella of a general doctrine of estoppel. The law in this area is unquestionably in a state of flux. The most that can be said for present purposes is that there seems to be emerging an acceptance by some judges and academic writers that given equity's flexibility, estoppel may be viewed as a general doctrine governed by an overarching notion of unconscionability. But the acceptance of this view awaits further articulation and support in future cases in the High Court of Australia.

Assuming that a general doctrine of estoppel is accepted by the High Court of Australia, the question is whether the defences of acquiescence and consent can be subsumed within that doctrine. It will be submitted that a general doctrine of estoppel would appear to encompass the defences of acquiescence and consent. Certainly, defences of acquiescence, consent and estoppel are not mutually exclusive.

Acquiescence is an equitable defence falling within the framework of a general doctrine of estoppel. Elizabeth Cooke in her monograph *The Modern Law of Estoppel*[154] observed that acquiescence is 'a word used in the cases to denote estoppel within the *Ramsden v Dyson*[155] tradition but triggered by silence, by standing by without warning another that one's rights are being infringed.'[156] Poole J had earlier stated that the silence, by failing to say or do anything to prevent the infringement of rights implies 'either that the party acquiescing has abandoned his right, or that he is estopped by his conduct from asserting it.'[157] Further support for the view that acquiescence is a form, instance or application of estoppel is found in *De Bussche v Alt*[158] where Thesiger LJ

[154] Cooke, above n 112.
[155] (1866) LR 1 HL 129.
[156] Cooke, above n 112, 65.
[157] *Glasson v Fuller* [1922] SASR 148, 162 (Poole J).
[158] *De Bussche v Alt* (1878) 8 Ch D 286.

described acquiescence in its first strict sense as 'no more than an instance of the law of estoppel by words or conduct.'[159]

Sachs LJ in *Holder v Holder*[160] considered that the plea of acquiescence in that particular case had a close resemblance to one of estoppel by conduct. His Honour held that the plaintiff had by his conduct expressly and impliedly represented that the defendant could do the very act of which he later objected, the purchase of the trust property, and was thereby estopped.[161]

A clear example of a case where acquiescence operated as an estoppel is *Glasson v Fulle*r.[162] That case concerned a defence of laches and acquiescence raised in relation to the ordinary use of land. Glasson owned a farming property nearby land owned by Fuller, the first defendant. In 1902, Fuller constructed a dam across a creek and made channels throughout his land. The dam and channels were maintained by Ragless, the second defendant, after the land was transferred in 1913.[163] During the floods of 1909 and 1918, large amounts of water from the dam and channels passed over the first and second defendants' land and overflowed onto Glasson's land resulting in the raising of the water table and consequent damage and depreciation to Glasson's land.[164] On both occasions, Glasson did not make any complaints.[165] It was not until 1920 that Glasson brought a claim in nuisance against both Fuller and Ragless. Ragless, raised in his defence pleadings that Glasson, by reason of his delay, laches, acquiescence and consent or licence, could not bring proceedings for the acts complained of.[166] Poole J considered that the defence was, in shape, a plea of estoppel.[167] As to the

[159] Ibid 314 (Thesiger LJ). See also, Sir Alexander K Turner (ed), *Spencer Bower and Turner: Estoppel by Representation* (LexisNexis Butterworths, 3rd ed, 1977) 285.
[160] [1968] Ch 353 (Court of Appeal).
[161] Ibid 403-4.
[162] [1922] SASR 148.
[163] Ibid 150.
[164] Ibid 151.
[165] Ibid.
[166] Ibid 152.
[167] Ibid 161.

defence of acquiescence, his Honour held that the defence failed. There was no evidence that Glasson knew of his right to restrain the first and second defendants from allowing the water escape on their own land so as to cause damage to his land. Nor did Glasson encourage the first and second defendant's in their acts or give leave or licence or an operative consent.[168]

It is also suggested that equity treats acquiescence as a "consent" to the infringement of rights, and that consent itself is an equitable concept capable of giving rise to an estoppel. Handley JA in *Spellson v George*[169] noted several English cases that support an estoppel based rationale to a defence of consent to a breach of trust.[170] The essence of those cases is that a beneficiary who concurs in a breach of trust is forever estopped from enforcing his or her rights against the trustee. Handley JA further identified that 'if [consent] does operate by way of estoppel it would require proof of inducement and reliance thereon by the trustee.'[171] Thus, the question of whether a beneficiary can resile from his or her consent is the same as asking whether the beneficiary is estopped from resuming his or her rights.

Further, it may be recalled that Wilberforce J in *Re Pauling's Settlement Trusts,*[172] in relation to the second prong of the defence of consent, noted that the court must consider all the circumstances in which the consent was given to determine whether it would be "fair and equitable" for the beneficiary to be permitted later to complain of the breach.[173] It is arguable that the "unfairness" aspect of the second prong introduces an unconscionability foundation which is

[168] Ibid 163.
[169] (1992) 26 NSWLR 666, 670.
[170] See, eg, *Swan v Perpetual Executors and Trustees Association of Australia Ltd* (1897) 23 VLR 293, 309 (Holroyd J); *Phillipson v Gatty* (1848) 7 Hare 516, 523; 68 ER 213, 217 (Wigram V-C); *Chillingworth v Chambers* [1896] 1 Ch 685, 704, 708; *Holder v Holder* [1968] Ch 353, 403 (Sachs LJ) (Court of Appeal).
[171] *Spellson v George* (1992) 26 NSWLR 666, 670.
[172] [1962] 1 WLR 86, 106-108.
[173] See also, *Spellson v George* (1992) 26 NSWLR 666, 669 (Handley JA), 673 (Hope A-JA), 680 (Young A-JA).

the essence of a general doctrine of estoppel. It is submitted that the same can be said of acquiescence in its strict sense which, as established earlier also requires consideration of all of the circumstances of the case.[174]

It is also submitted that the defence of waiver may be subsumed within a general doctrine of estoppel. Elizabeth Cooke in *The Modern Law of Estoppel*[175] noted that although grammatically the word "waiver" is not the same as "estoppel," it may simply denote the 'giving up of a right.' In this sense waiver is equivalent to an estoppel. Indeed, Gummow and Hayne JJ in *Byrnes v Kendle*[176] observed that on the facts of the case, rather than representing a discrete defence in its own right, '"waiver" is best understood as a genus comprising consent, estoppel and acquiescence.'[177]

The foregoing discussion shows that a general doctrine of estoppel encompasses numerous equitable concepts. It has been shown that having separate equitable defences renders the law ambiguous. Several equitable defences were relied upon, without any clear distinction between them, in paragraph [19] of Mr Kendle's defence pleading. If the equitable defences of acquiescence, consent and waiver are subsumed within a general doctrine of estoppel, a defendant to a claim of breach of trust would only have to prove the elements of a general doctrine of estoppel. It is submitted that there is no longer any need for a separate defence of acquiescence.

[174] *Holder v Holder* [1968] Ch 353, 394 (Harman LJ), 399 (Danckwerts LJ), 406 (Sachs LJ) (Court of Appeal).
[175] Cooke, above n 112, 66-9.
[176] (2011) 243 CLR 253.
[177] Ibid 279.

IV CONCLUSION

The preceding analysis shows that the law surrounding the defence of acquiescence is ambiguous. That principles underpinning the defence are not clearly understood is evident in *Byrnes v Kendle*.[178] The diversity of interpretation of the same set of facts is troubling. Confusion results from the various meanings of the term acquiescence and its consequent overlap with other equitable defences, especially consent and estoppel.

In order to promote certainty and coherence, reform should be welcomed under the rubric of a general doctrine of estoppel. The effect of the authoritative judgments of Lord Oliver in *Taylors Fashions*[179] in the English High Court and Mason CJ and Deane J in both *Waltons Stores*[180] and *Verwayen*[181] in the High Court of Australia was to stress the idea that unconscionability underpins all forms of estoppel in a unified estoppel system and to move away from the current inflexibility of having different categories of estoppel.

The acceptance of a general doctrine of estoppel will, in turn, help clarify the law of the defence of acquiescence to a breach of trust. Adherence to historical categories of estoppel which keeps each form of estoppel separate and distinct is proving to obscure the law rather than clarifying it.

[178] (2011) 243 CLR 253.
[179] [1982] QB 133, 151-52.
[180] (1988) 164 CLR 387, 403-4, 447-53.
[181] (1990) 170 CLR 394, 409-13, 431-46.