COMMERCE AND CONSCIENCE: THE HIGH COURT'S DEVELOPING VIEW OF CONTRACT

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Starting with the flood of cases that reached it in 1982–1983, the High Court has had the opportunity in the last decade to reform or restate most aspects of the general law of contract. In doing so it has moved away from English law in many significant respects, not least of which being its embrace of the concept of unconscionability as the central element in a variety of doctrines. However, important issues remain to be addressed by the Court, including the extent to which the notion of unconscionability can or should be used to police opportunistic commercial conduct, the inhibiting effect of the established forms of action on the development of restitutionary remedies, and the importance of the Court providing clear guidance on matters of contract law to the "consumers" of its judgments.

INTRODUCTION

It has been one of the great strengths of Australian contract law that the High Court has jurisdiction to hear appeals in contract disputes. Although applications for special leave are often now refused, the High Court does not, unlike the highest tribunals in some other federal systems, restrict itself to constitutional and human rights cases. With the advent of the Federal Court, and the increasing use of the remittal power under section 44 of the Judiciary Act 1903 (Cth), the High Court rarely now exercises original jurisdiction over contract matters, despite the fact that under section 75 of the Constitution it has exclusive jurisdiction over disputes involving the Commonwealth or a State, or between residents of different States. However, in hearing appeals from the States and Territories, the High Court has been able to mould the common law of contract in Australia, the more so because its decisions

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are treated as binding in every jurisdiction, not merely in that from which the appeal originated.[1]

This article attempts to analyse the High Court's contribution to contract law over the past 30 years, first, by charting the development of the Court's approach during that time, and then by considering some of the challenges that lie ahead in terms of exploring some of the new directions the Court has taken. As far as the historical section is concerned, the last 30 years has been divided into three distinct periods. The first covers some 20 years during which little happened to disturb the pattern established during the preceding six decades of deference to the decisions of the English courts. By contrast, the second period comprises only two years, 1982 and 1983, when a remarkable flood of contract litigation reached the Court and, for the first time, a distinctively Australian contract law began to emerge. Finally, we consider the decade since then, a period marked by the seemingly inexorable rise of principles founded on notions of conscience and good faith. Before embarking on this task, it is important to give some indication of what we actually mean by "contract law". It seems to us that we ought to take a broad approach to that question. At one level, this means overlooking (for present purposes at any rate) the fact that different rules often apply to different types of transaction. While there are inevitably exceptions, particularly in relation to the legislative re-casting of various consumer transactions,[2] most such rules can be regarded simply as context-specific modifications to principles which are otherwise of general application. It remains, in our view, meaningful to speak of a general law of contract, even if in some instances the principles involved are relevant only as a starting point for understanding the modifications. Similarly, a broad view can be taken as to which doctrines can be considered as part of contract law rather than belonging to some other branch. Thus, the influence of equity on contract law militates against excluding cases on equitable doctrines in the context of contracts. It is true that in many such cases the courts see themselves as applying principles of equity, as if "equity" still existed, rather than contract principles as such.[3] Nevertheless, the equitable rules relating to misrepresentation, mistake,

1. See eg *Meehan v Jones* (1982) 149 CLR 571, resolving a difference of opinion between courts in New South Wales and those elsewhere as to the enforceability of "subject to finance" clauses.
2. See eg the radical changes wrought by the Insurance Contracts Act 1984 (Cth) and by the uniform consumer credit legislation.
3. See generally G Muir "Contract and Equity: Striking A Balance" (1985) 10 Adel LR 153; P D Finn "Equity and Contract" in P D Finn (ed) *Essays on Contract* (Sydney: Law Book Co, 1987) 104.

undue influence and unconscionability all depend on a conception of consent in contract, just as the operation of equitable estoppel may hinge on the limits of the doctrines of consideration or election. Again, the growing importance of restitutionary principles and remedies implies that the distinction which commentators may formerly have drawn between contract and so-called quasi-contract should not be accepted. In many restitution cases, though by no means all, a court is asked to give relief where a contract remedy is not available, has been refused or is barred.

THE STORY SO FAR

1. The quiet years

By the time that Sir Garfield Barwick became Chief Justice of the High Court in 1964, nearly every major component of contract doctrine as decided by the English courts had been adopted by the High Court. English decisions were not always slavishly followed; and in Sir Owen Dixon Australia had produced a judge considered the equal of any in the common law world and whose judgments had made a major contribution to the elucidation of contract law not only in this country but in many others. Nevertheless, in no significant respect did the High Court's conception of contract law in 1964 diverge from that of the House of Lords, a proposition that continued to hold true when Barwick departed the Court in 1981.

Without being especially critical of Barwick's personal contribution,[4] very few of the judgments written in this period promised much for the development of contract law. The only major exceptions were the cases in which Windeyer J delivered judgments characterised by the highest level of learning and scholarship.[5] At times his observations bordered (in relative terms at least) on the revolutionary. In his dissenting judgment in *Coulls v Bagot's Executor & Trustee Co Ltd*,[6] aside from producing the (then) definitive analysis of the doctrine of privity, he also stated that there was no reason for "limiting by particular categories, rather than by general principle,

4. His judgment in *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd ("The New York Star")* (1978) 139 CLR 231 is an obvious highlight, and was regarded by the Privy Council as better than that of the majority: (1980) 144 CLR 300.
5. See eg *Thomas National Transport (Melb) Pty Ltd v May & Baker (Aust) Pty Ltd* (1966) 115 CLR 353 (analysis of the impact of breach by deviation on exclusion clauses); *Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd* (1968) 121 CLR 584 (analysis of warranties in sale of goods transactions).
6. (1967) 119 CLR 460.

the cases in which orders for specific performance will be made".[7] Unfortunately the opportunity has not arisen in subsequent cases for the High Court to develop this idea. Similarly, for many years no one noticed that in *Mason v State of New South Wales*[8] he had referred to the principle of unjust enrichment in the context of duress. This was not a contract case and little regard has been paid to what he said. Of course, today unjust enrichment is a recurring theme of the High Court in contract and related cases. By the same token though, Windeyer J also showed great respect for English cases and was in this sense conservative.[9]

Following *Coulls v Bagot's Executor & Trustee Co Ltd* in 1967, there were very few cases of note prior to 1982, with the possible exception of *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*,[10] where the Court showed refreshing flexibility in holding that the public interest may sometimes be better served by allowing enforcement of a contract formed or performed in contravention of a statute. On the whole the High Court seems to have been somewhat complacent, perhaps reflecting the buoyant economic conditions of the time. There was substantially full employment, a long term of conservative government provided stability, and the political uncertainty of the mid 1970's was not translated into contract litigation. It can perhaps be said that in this period the Australian law of contract went to sleep.[11]

2. The cultural revolution of 1982–1983

The period 1982–1983 saw a most dramatic increase in contract activity in the High Court. One volume of the Commonwealth Law Reports, Volume 149, was almost completely filled with contract related cases. In the absence of a genuinely Australian contract text, a gap not filled until 1986,[12] Volume

7. Id, 503.
8. (1959) 102 CLR 108, 142–143.
9. See eg *Thomas National Transport* supra n 5 where he thought that he could discard much of what he intended to write on "fundamental breach" in view of the then recent decision of the House of Lords in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361. Of course that case did little to settle the English law on fundamental breach, which was only finally resolved in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.
10. (1978) 139 CLR 410.
11. Cf A Mason "Book Review" (1989) 1 JCL 265.
12. The first such text was K E Lindgren, J W Carter & D J Harland *Contract Law in Australia* (Sydney: Butterworths, 1986) and was shortly followed by D W Greig & J L R Davis *Law of Contract* (Sydney: Law Book, 1987). Even the Australian adaptation of Cheshire & Fifoot's classic English text is now moving, if gradually, away from the

149 was practically sufficient, as nearly all aspects of contract law were considered. As has been true throughout the High Court's history, many of the cases involved the sale or lease of land,[13] a pattern which reflects both the importance of primary production in Australia and the value placed on home ownership. In this familiar context, the Court reformed the law on notices to complete;[14] restated the law on conditional contracts, especially in relation to arguments of uncertainty;[15] approved the principle of promissory estoppel and rediscovered the ability to grant relief against forfeiture notwithstanding the breach of an essential time stipulation;[16] discovered an equitable jurisdiction to grant relief in respect of contracts affected by unilateral mistake;[17] considered the scope of the doctrine of rectification;[18] refined the cases on catching bargains to grant relief from an unconscionable agreement;[19] restated the law on penalty clauses in chattel leases;[20] and "reformed" the law on the recovery of damages following termination of a lease under an express provision.[21] Of course not every leading decision involved a conveyancing transaction. In the context of a building contract, the High Court restated the law on frustration, refined the requirements for the implication of terms and restated the rules governing the interpretation of written contracts.[22] There were other cases too, of less intrinsic importance, but significant as elements in the re-awakening of contract.[23]

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structure and approach of its parent: see J G Starke, N C Seddon & M P Ellinghaus *Cheshire & Fifoot's Law of Contract* 6th Aust edn (Sydney: Butterworths, 1992).

13. According to one estimate, sale of land contracts have featured in 68% of all contract cases coming before the High Court: M P Ellinghaus "An Australian Contract Law?" (1989) 2 JCL 13, 19.
14. *Louinder v Leis* (1982) 149 CLR 509; *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.
15. *Perri v Coolangatta Investments Pty Ltd*, id; *Meehan v Jones* supra n 1; *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600.
16. *Legione v Hateley* (1983) 152 CLR 406.
17. *Taylor v Johnson* (1983) 151 CLR 422.
18. *Pukallus v Cameron* (1982) 43 ALR 243, one of the few High Court decisions of this time not reported in the Commonwealth Law Reports.
19. *Commercial Bank of Aust Ltd v Amadio* (1983) 151 CLR 447.
20. *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359.
21. *Shevill v The Builders Licensing Board* (1982) 149 CLR 620.
22. *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337.
23. See *Hewett v Court* (1983) 149 CLR 639 (equitable liens); *Fencott v Muller* (1983) 152 CLR 570 (Federal Court's jurisdiction over misrepresentation actions); *Sandra Investments Pty Ltd v Booth* (1983) 153 CLR 153 (effect of condition precedent); *Ciavarella v Balmer* (1983) 153 CLR 438 (no relief against forfeiture without unconscionable conduct); *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* (1983) 153 CLR 455 (effect of time stipulation); *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 (Federal Court's jurisdiction).

By and large these cases were simply more imaginative applications of the approach which had typified the Dixon and Barwick courts. Although laying the foundations for an Australianised law of contract,[24] considerable reliance on English cases could still be discerned. It is true that in *Louinder v Leis*[25] the High Court refused to follow English cases suggesting that where time is not of the essence a promisee must wait a reasonable time following breach before serving a notice to complete, but this decision was dictated more by deductive logic than the desire to do justice or to reach a progressive decision.[26] On the other hand, in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[27] ("*Codelfa*"), the Court was content to adopt the Privy Council's formulation in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[28] ("*BP Refinery*") of the requirements for the implication of terms and to approve English decisions on the interpretation of written contracts without regard to its own earlier decisions or their consistency with the recent English cases. In fact some of the cases were far from progressive. For example, although the point seems to have gone largely unnoticed, the leading judgment of Mason J in *Codelfa* is very narrow (or perhaps inconsistent) in the statement of when evidence may be given of the factual matrix. Although Mason J said that the "broad purpose of the parole evidence rule is to exclude extrinsic evidence (except as to surrounding circumstances)",[29] he also expressed the "true rule" as being "that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning".[30] The better view, and certainly the view which the courts actually apply, is that evidence of surrounding circumstances is always admissible. Similarly, the adoption of the requirements set out by the Privy Council in *BP Refinery* has made the law on implied terms unduly mechanical, through the treatment of relevant factors as essential requirements.[31]

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24. Cf Ellinghaus supra n 13, who argues that our law cannot be considered truly "Australian" until it is infused with some element or characteristic that is distinctive to this country and its culture. From this point of view, while it can be said that the High Court has adopted contract doctrines which are *different* from those which currently prevail in England, there is nothing inherently Australian about them.
25. Supra n 14.
26. In *Behzadi v Shaftesbury Hotels Ltd* [1991] 2 WLR 1251 the English Court of Appeal has now decided to follow *Louinder v Leis*, ibid.
27. Supra n 22.
28. (1977) 16 ALR 363, 376.
29. Supra n 22, 347.
30. Id, 352.
31. Besides *Codelfa*, see also *Secured Income Real Estate (Aust) Ltd v St Martins Investments*

For most of its history, the High Court has had a strong sense of precedent in contract, and shown a reluctance to deal with issues not directly raised in the appeal. In some of the 1982-1983 cases opportunities were lost to reach genuinely reforming decisions or to settle a general principle of contract law. Thus, in *O'Dea v Allstates Leasing System (WA) Pty Ltd*[32] a majority of the Court refused to overrule *Lamson Store Service Co Ltd v Russell Wilkins & Sons Ltd*,[33] which seemingly still stands for the proposition that where a contract provides for the payment of money by instalments and the substance of the clause is that the whole sum is to become payable immediately on the payer's failure to make punctual payment, the clause is not a penalty if the contract, as a matter of form, creates a present debt, the payment of which is postponed. In addition, the Court declined to go further than saying that a clause may be a penalty if the sum is sought following breach. It did not decide, as many would have liked, that the clause may be a penalty whether the sum may become payable on breach, or is payable independently of breach. Conversely, in *Shevill v The Builders Licensing Board*,[34] the Court arguably treated a principle developed in the context of consumer contracts as applicable to contracts generally, including commercial contracts. It was held that where a lease of land is terminated on breach, in reliance on an express right of termination, the lessee does not thereby become liable to pay loss of bargain damages. Although supported by cases on the lease of goods to consumers, the decision was, apparently, contrary to the understanding of conveyancers in New South Wales, and was reached without consideration either of earlier cases suggesting a different general approach, or of whether the lessee had engaged in strategic behaviour to avoid an unprofitable lease. Taken together, these cases have created considerable difficulties in the context of penalty clauses and damages payable on termination of contracts.[35]

Three cases were undoubtedly controversial. No one could seriously have doubted that in *Legione v Hateley*[36] the High Court would accept that the

Pty Ltd (1979) 144 CLR 596; *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1986) 160 CLR 226. There have been calls for a reconsideration of the approach: see *Hospital Products Ltd v US Surgical Corp* above, 121; *Hawkins v Clayton* (1988) 164 CLR 539, 571.

32. Supra n 20.
33. (1906) 4 CLR 672.
34. Supra n 21. Cf B Opeskin "Damages for Breach of Contract Terminated under Express Terms" (1990) 106 LQR 293.
35. See J W Carter "Termination Clauses" (1990) 3 JCL 90.
36. Supra n 16.

principle of promissory estoppel applied in Australia. The Court so held, with Mason and Deane JJ in particular founding themselves on the opinions of Sir Owen Dixon.[37] On the other hand, the decision that the defaulting purchaser might be granted specific performance notwithstanding that its breach of an essential time stipulation had been the subject of a formally valid notice of termination caused shock waves in the profession. The decision created considerable uncertainty, since it appeared that purchasers of land could invoke their equitable interest in the subject matter to obtain an injunction to prevent action on a valid termination.

In *Taylor v Johnson*,[38] a majority of the Court formulated a principle under which persons who enter into a contract under the influence of a unilateral mistake may obtain equitable relief by way of an order setting aside the contract. The principle itself was expressed in curiously limited and cautious terms:

> [A] party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension.[39]

It is noteworthy that in reaching its decision that the vendor was entitled to relief under this principle, the High Court not only approved the approach of the Court of Appeal in disregarding a finding of the trial judge,[40] but also refused to apply, or at least questioned, a statement by Dixon CJ and Fullagar J in *Svanosio v McNamara*[41] which appeared to stand for the proposition that mistake cannot be a basis for rescission in the absence of common law fraud, misrepresentation or an express term.

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37. *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674–675. On the facts in *Legione*, a majority of the Court held that the representation relied on was not sufficiently clear and unequivocal to found an estoppel.
38. Supra n 17.
39. Id, 432. It remains a matter for debate as to whether this represents the limits of permissible intervention, or merely one illustration of a much broader principle of relief. In *Easyfind (NSW) Pty Ltd v Paterson* (1987) 11 NSWLR 98 and *Lewis v Combell Constructions Pty Ltd* (1989) 18 NSWLR 528 the former view was effectively taken, with the requirement of deliberate concealment of the mistake being rigorously enforced. However, in *Lewis* it was also held that a court should not be so strict when considering the validity of a settlement made during the court's process.
40. See Samuels J "Letter to the Editor" (1983) 57 ALJ 539.
41. (1956) 96 CLR 186, 195–196.

It is logical, indeed probably inevitable, that the High Court, in transactions involving land, should exercise a policing role in relation to unconscionable conduct. However, prior to *Commercial Bank of Australia Ltd v Amadio*,[42] ("*Amadio*") there was no case in which the undoubted jurisdiction in relation to catching bargains had been applied to a bargain which was merely unconscionable, as opposed to involving either a party of questionable capacity or a member of a "protected" category (such as expectant heirs). In *Amadio*, a deed of mortgage over the plaintiffs' property, which secured by way of guarantee all sums which might be owed by a company to the defendant without limit as to time or amount, was set aside as an unconscionable bargain. Equity and common lawyers alike expressed surprise. Yet if we consider the circumstances which count as vitiating factors in contract, the principle seems to create a logical sequence of bases for relief.[43] In the absence of misrepresentation by one party which induces the other to contract, or a procuring of contractual assent by an illegitimate threat amounting to duress, there is no positive right of rescission. However, if the parties stand in a relation in which undue influence is presumed,[44] or if undue influence is proved as a fact, there is a right to approach the court for relief. The emphasis is on the quality of the assent of the party seeking relief from the contract. Now, if there is no relation of influence, and no proved undue influence, but one party to the knowledge of the other is in a disadvantageous position or suffers from some disability of which the first party takes advantage, there is much to be said for the view — as indeed is now the law — that the court should be empowered, in its discretion, to set the bargain aside. In other words, the principal focus of unconscionability is the nature of the contract sought to be enforced against a person under a special disability, coupled with the conduct of the superior party.

3. A decade of reform

In the decisions since the cultural revolution of 1982–1983, the High Court has quite consciously striven to build on the independence of Australian contract law from English decisions.[45] In *Darlington Futures Ltd v Delco*

42. Supra n 19.
43. We say nothing as to the application of the principle to the facts, although relief might well have been granted on the ground of undue influence.
44. Including cases where the presumption is based on the particular circumstances, as in *Johnson v Buttress* (1936) 56 CLR 113.
45. See A Mason "Australian Contract Law" (1988) 1 JCL 1.

Australia Pty Ltd,[46] for example, it refused to apply English refinements, at the level of the House of Lords,[47] on the general principles of construction applicable to exclusion clauses. And in *Hungerfords v Walker*,[48] the Court indicated a willingness to award damages for the late payment of money which went beyond its own previous decisions. It expressly refused to apply the unconvincing distinction approved, again in the House of Lords,[49] between the two limbs of *Hadley v Baxendale*[50] as a basis for such awards.

However, the truly significant cases in this regard were *Waltons Stores (Interstate) Ltd v Maher*[51] ("*Waltons Stores*") and *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[52] ("*Trident*"), the former effecting and the latter presaging major shifts in established doctrine. While the 1982–1983 decisions provided casebook authors and contract teachers with a large number of leading Australian cases on subjects where formerly examples were hard to find, these two decisions went much further. No longer could the differences between Australian and English contract law be regarded as mere matters of detail, for here were developments which largely rendered irrelevant a great deal of English learning. It may be that, prior to these decisions, only the long heritage of deference to English courts (including of course the Privy Council) prevented High Court judgments from being regarded as the starting point for any consideration of the common law of contract. In any event, it now seems impossible to imagine any course or commentary on the subject not being structured around the Court's pronouncements. Together with the prohibition on misleading or deceptive conduct in section 52 of the Trade Practices Act 1974 (Cth), which is now frequently used as a port of access to the Federal Court for all manner of contractual disputes,[53] and which has no English equivalent, *Waltons Stores*

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46. (1986) 161 CLR 500.
47. *Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd* [1983] 1 WLR 964; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 AC 803, 813.
48. (1989) 171 CLR 125.
49. *President of India v La Pintada Compania Navigacion SA* [1985] AC 104.
50. (1854) 9 Ex 341, 354; 156 ER 145, 151.
51. (1988) 164 CLR 387.
52. (1988) 165 CLR 107.
53. See P H Clarke "The Hegemony of Misleading or Deceptive Conduct in Contract, Tort and Restitution" (1989) 5 Aust Bar Rev 109. Despite the apparently distinctive language and framework of s 52 and the remedies associated with it, the courts have ensured that much of the common law of tort and contract has been imported into these provisions by interpretation: see especially the High Court's emphasis on "categorising" damages claims under s 82 of the Act in *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1.

and *Trident* have ensured that the latest English Court of Appeal or House of Lords decision has nothing like the impact in this country that could have been expected in times gone by.

In *Waltons Stores*, the Court approved an award of expectation damages, based on the enforcement of an equity, in favour of a prospective lessor of land. The terms of the contract had been agreed, but final assent had not been given. What generated the equity was (a) the lessor's assumption, encouraged by the lessee, that the contract either had been or would shortly be concluded; (b) the substantial expenditure incurred by the lessor on the faith of that assumption; and (c) the lessee's unconscionable behaviour in failing to correct the misapprehension when the opportunity existed to do so. Despite the obviously just result, the Court was in effect enforcing a promise that was not supported by consideration in the traditional sense. Yet this departure from established doctrine was not as radical or surprising as might at first appear. After all, the doctrine of proprietary estoppel had long been used to similar effect in relation to promises to grant interests in property; and as each of the judgments pointed out, the argument that promissory estoppel could be used as a "shield" but not as a "sword" was extremely difficult to support in terms of either reason or policy. Characteristically, the judgments proceeded on the basis of closely reasoned argument and a careful attention to precedent. In time-honoured common law fashion the decision was presented simply as a logical evolution.

Nevertheless, the importance of the decision cannot be understated. While it can hardly be said that the doctrine of consideration has been (to use Lord Denning's words) "overthrown by a side-wind",[54] its role has changed. In effect, promises may now be rendered legally enforceable *either* by being supported by consideration *or* to the extent that departure from an assumption encouraged by the promisor would be unconscionable. The doctrine of consideration no longer excludes from enforcement promises which do not meet its requirements. Instead, its role is more positive, privileging those promises which *are* supported by a bargained-for act or counter-promise by guaranteeing enforcement in the form of an award of damages based on expectation loss, without (a) any need to establish reliance by the promisee; (b) the exercise of judicial discretion as to whether relief should be granted at all; or (c) uncertainty as to the form in which such relief might be granted.[55]

54. *Combe v Combe* [1951] 2 KB 215, 220.

55. See eg *The Commonwealth v Verwayen* (1990) 170 CLR 394 where although it was accepted that estoppel might be used in the context of a promise not to plead a limitation period in relation to a tort action, a majority of the court (Mason CJ, Brennan, McHugh

Since *Waltons Stores* itself, there have been relatively few reported examples of estoppel being used to enforce non-contractual promises outside the context of interests in land.[56] But few would doubt that in the long term estoppel will come to be as fruitful a means of enforcement as article 90 of the Second Restatement of Contracts has been in the United States. The comparison was not lost on Mason CJ and Wilson J in particular, who made frequent reference to the American position (itself a sign of the changing attitude of the High Court to non-English sources) and who noted that "in the United States, as in Australia, there is an obvious interrelationship between the doctrines of consideration and promissory estoppel, promissory estoppel tending to occupy ground left vacant due to the constraints affecting consideration".[57]

If *Waltons Stores* involved the extension of familiar principles into new territory, *Trident* saw the Court threatening, though ultimately not effecting, a clean break with the past. As has often been pointed out, the rule that the beneficiary of a contractual promise cannot enforce it without being a party to the contract was not clearly adopted in English law until 1915,[58] by which time the American courts had already modified it by allowing "intended" (as opposed to "incidental") beneficiaries to sue.[59] Yet despite criticising the rule at regular intervals, the House of Lords has never been able to bring itself to abrogate or at least relax the rule itself, preferring instead futile appeals to the legislature for intervention.[60] Ultimately, the High Court too drew back from the brink in *Trident*, with the majority prepared only to sanction enforcement by named beneficiaries of insurance policies,[61] a reform that had been

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and Toohey JJ) would have confined the appropriate relief to an order for the costs incurred in reliance on the promise. Deane and Dawson JJ, on the other hand, considered that the plaintiffs should be allowed to go ahead and litigate, in effect vindicating the expectation created by the promise. Since Gaudron and Toohey JJ reached the same result by applying what they considered to be a separate doctrine of waiver, the plaintiffs ultimately prevailed.

56. Besides *Verwayen* id, see eg *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502; *Metropolitan Transit Authority v Waverley Transit Pty Ltd* [1991] 1 VR 181.
57. Supra n 51, 402. See further S Stoljar "Estoppel and Contract Theory" (1990) 3 JCL 1.
58. See *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847.
59. See eg *Lawrence v Fox* (1859) 20 NY 268; and see now *Restatement (Second) of Contracts*, 1981, §§ 302, 304, 305.
60. See eg *Beswick v Beswick* [1968] AC 58, 72; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, 591.
61. See also *Barroora Pty Ltd v Provincial Insurance Ltd* (1992) 26 NSWLR 170. Cf *Visic v State Government Insurance Office* (1990) 3 WAR 122 (*Trident* not applicable to claim by injured employee on employer's liability policy, where employee not named as

anticipated by the Commonwealth Parliament.[62] In so far as the privity rule might cause injustice in other contexts, most of the judgments seemed to contemplate that this could be overcome by inferring an intention to create a trust in favour of the third party, or by relying on promissory estoppel. Nevertheless, Mason CJ, Wilson and Toohey JJ gave clear notice that they were contemplating a more extensive reappraisal of the rule itself, and there seems every chance that on the next occasion a case involving privity issues comes before the Court, they at least would be prepared to take that extra step.

Besides these two landmark decisions, other important cases in the last 10 years have seen the High Court consolidating or expanding upon the 1982-1983 decisions. By far the most common issues during the period have been those relating to the power to terminate on breach or repudiation, where the Court has had to do little more than restate and refine established principles.[63] However, the Court has further explored the power to set aside unconscionable bargains,[64] as well as the power to grant relief against the forfeiture of property that would flow from an unconscionable exercise of contractual rights.[65] It has struggled with the consequences of its decision in *Shevill v The Builders Licensing Board*,[66] first applying it,[67] then indicating that it might be reconsidered.[68] The law on penalties has to some extent been clarified,[69] though many questions remain unanswered. There have also been a number of significant decisions on the calculation of damages, with lengthy judgments being devoted to the basis for the principle of mitigation of loss and its relationship with the concept of remoteness;[70] claims to recover wasted expenditure and the general effect of contingencies;[71] and the restric-

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beneficiary).

62. Insurance Contracts Act 1984 (Cth), ss 48, 49, 51.
63. See eg *Sindel v Georgiou* (1984) 154 CLR 661; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623; *Foran v Wight* (1989) 168 CLR 385. *Ankar Pty Ltd v National Westminster Finance (Aust) Ltd* (1987) 162 CLR 549 is arguably an exception in this regard, since it involved the first clear recognition by the Court of the concept of termination for fundamental breach of an intermediate term.
64. *Louth v Diprose* (1992) 67 ALJR 95.
65. *Stern v McArthur* (1988) 165 CLR 489.
66. Supra n 21.
67. *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* supra n 63.
68. *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170, 205–207, 216–220.
69. Ibid; *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131.
70. *Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653.
71. *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

tions on the recovery of damages for distress or disappointment.[72]

The final comment in this section is reserved for the High Court's rapid recognition and development of restitutionary principles in both contractual and non-contractual contexts. Beginning with *Pavey & Matthews Pty Ltd v Paul*,[73] in which a builder who had performed work under a contract rendered unenforceable by statute was permitted to claim reasonable remuneration, the Court has proceeded apace despite, in a sense, coming late to the subject. Thus, in the few short years since then it has thoroughly reworked the principles applicable to the recovery of mistaken payments,[74] and restated (albeit in fairly traditional terms) the law as to the recovery of money paid under a total failure of consideration.[75] In conceptual terms, the "implied contract" fiction has thankfully been abandoned in these cases in favour of an acceptance that liability in restitution is imposed for the purpose of reversing or preventing unjust enrichment. It is interesting in this connection to trace the influence of British writers such as Goff and Jones, Birks and Beatson,[76] who in many ways have found in the High Court an audience more receptive to their ideas than the House of Lords or English Court of Appeal. Once again, this highlights a distinctive feature of the modern High Court compared to its predecessors: a willingness not just to be influenced, but to be *seen* to be influenced, by the ideas of living scholars — an important point for those of us in the academic profession!

WHERE TO FROM HERE?

In this final section we focus on three issues which seem likely to feature heavily in debate as to the High Court's approach to contractual disputes over the next few years. These are: the use (and abuse) of principles based on the identification of unconscionable behaviour; the evolution of the law of

72. *Baltic Shipping Co v Dillon* (1993) 67 ALJR 228.
73. (1987) 162 CLR 221.
74. *Australia & New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768.
75. *Baltic Shipping Co v Dillon* supra n 72. The willingness of the Court to take the opportunity to address this issue makes it all the more puzzling that on 2 October 1992 it refused to grant leave to appeal from *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, where the NSW Court of Appeal was confronted with one of the most contentious issues in relation to restitution following breach of contract: whether the contract price represents a ceiling for a quantum meruit award made in respect of work done under the contract.
76. See R Goff and G Jones *Law of Restitution* 3rd edn (London: Sweet & Maxwell, 1986); P Birks *An Introduction to the Law of Restitution* (Oxford: Clarendon, 1985); J Beatson *Use and Abuse of Unjust Enrichment* (Oxford: Clarendon, 1991).

restitution in the context of a continued adherence to traditional categories of action; and the vexed question of the extent to which the Court should strive to provide clearer guidance on matters of contract law to the "consumers" of its judgments.

1. The rise of unconscionability

The particular concern of the Court over the past decade in contract litigation has been to promote the concept of unconscionability. It has been made clear that unconscionable conduct is the pivot on which the concepts of estoppel and relief against forfeiture turn.[77] Similar considerations have been used to justify the adoption of unjust enrichment as a unifying legal concept which both explains why the law recognises, in a variety of contexts, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff, and also assists in determining whether the law should, in justice, recognise such an obligation in a new or developing category of case.[78]

One key to understanding the High Court's emphasis on unconscionability is the existence of a common feature in many of the important recent cases: the use not just of equitable principles but of equitable remedies. In cases as diverse as *Taylor v Johnson*,[79] *Commercial Bank of Australia Ltd v Amadio*,[80] *Waltons Stores*[81] and *Stern v McArthur*,[82] there has been a broad conception of the ability to obtain discretionary relief in the form of rescission of the contract on terms, specific performance or an injunction,[83] or damages in lieu of specific performance. The scope given to these remedies clearly matters more than the type of contract involved. The High Court has tended not to draw any explicit distinction between consumer contracts (an obvious context in which to police unconscionable conduct) and commercial transactions.[84] It is hard to imagine the Court giving the same reason as the House of Lords in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana*[85] for its refusal to grant relief against forfeiture in the context of

77. *Waltons Stores* supra n 51; *Stern v McArthur* supra n 65; *Foran v Wight* supra n 63; *The Commonwealth v Verwayen* supra n 55.
78. *Pavey & Matthews Pty Ltd v Paul* supra n 73, 256-257.
79. Supra n 17.
80. Supra n 19.
81. Supra n 51.
82. Supra n 65.
83. See *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242.
84. Cf *Photo Production Ltd v Securicor Transport Ltd* supra n 9.
85. [1983] 2 AC 694.

a time charter-party, namely, that the contract in question involved the provision of services rather than the transfer of land.

On the other hand, while we might be willing to predict that the High Court would not adopt that kind of reasoning, by the same token it would take a brave lawyer to predict the result in such a case if it came before the Court. Faced with a party to a commercial contract seeking to take advantage of a technical breach as the basis for terminating an unprofitable contract, would the Court identify this as unconscionable behaviour and grant relief? Or would it refuse to intervene in a bargain entered into on standard terms and negotiated by the parties at arms' length?[86] The High Court's emphasis on equity and unconscionability is plainly not intended to mean that contractual problems are to be solved by reference to broad considerations of "fairness". As Deane J has stressed in a number of cases, neither unconscionability nor unjust enrichment are sufficient justifications for the assertion of a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate.[87] Nevertheless, it remains unclear just how far the High Court might see the principle of unconscionability as a way to police strategic or opportunistic conduct in the context of contractual disputes. The nearest thing in the recent cases to a suggestion of such a role is the reference by Mason CJ in *Sunbird Plaza Pty Ltd v Maloney*[88] to *Panchaud Frères SA v Établissements Général Grain Co*,[89] where the English Court of Appeal came down very hard on a buyer under a CIF contract who failed to notice a discrepancy between the date of shipment on a bill of lading and a reference in the certificate of quality to dates on which samples had been drawn. The buyer was denied the right to put forward late shipment as a ground for termination and Winn LJ espoused "a requirement of fair conduct — a criterion of what is fair conduct between the parties".[90] By contrast, the State Supreme Courts have tended to shy away from this approach, evincing a clear preference for leaving commercial parties to the consequences of their

86. Cf the "hands off" approach taken to the exclusion of liability under a commercial contract in *Nissho Iwai Australia Ltd v Malaysian International Shipping Corp Berhad* (1989) 167 CLR 219.

87. *Pavey & Matthews Pty Ltd v Paul* supra n 73, 256; *The Commonwealth v Verwayen* supra n 55, 440-441; and see also *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 497-498; *David Securities Pty Ltd v Commonwealth Bank of Australia* supra n 74, 777-778.

88. Supra n 63, 263.

89. [1970] 1 Lloyd's Rep 53.

90. Id, 59. It is by no means settled that the principle applies in England: see J W Carter "Problems in Enforcement" (1992) 5 JCL 199, 211–212.

actions, no matter how cynical the conduct of one or both parties.[91] It is not surprising then that the denial by some members of the High Court[92] of any current equitable jurisdiction to grant relief against penalty clauses has been followed with some relish by the New South Wales Supreme Court.[93]

The uncertainty as to the High Court's approach to opportunistic commercial conduct is a product not only of the ad hoc nature of decision-making inevitably associated with doctrines such as relief against forfeiture and estoppel, and with discretionary remedies generally, but of the essentially negative nature of the concept of unconscionability.[94] There is no obligation, as such, to behave "conscionably": rather, certain forms of unacceptable behaviour *may* be identified as unconscionable and penalised in a wide variety of situations. This approach works well in relation to extreme behaviour, especially where there is a clear disparity between the parties in terms of economic power, bargaining skill or possession of information. But it struggles to cope with the situation where the parties are merely conforming to established patterns of self-interested behaviour. *If* the law is to intervene in commercial relationships and require parties to respect each other's interests in certain ways (a question on which we refrain from expressing an opinion), it would make more sense to accomplish this task by fashioning a general obligation of good faith and fair dealing similar to that imposed by Article 1-203 of the Uniform Commercial Code in the United

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91. See eg *State Rail Authority of NSW v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 (refusal to give effect through estoppel to oral representations known by representee to be contradicted by terms of written agreement); *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (no estoppel where prospective lessee had made deliberate gamble that contract would not materialise and prospective lessor broke off negotiations after obtaining valuable information and representing that lease would be agreed); *Tricontinental Corp Ltd v HDFI Ltd* (1990) 21 NSWLR 689 (strict compliance required with conditions precedent in underpinning agreement, even though no breach by party seeking to enforce the agreement); *Commonwealth Bank of Australia v TLI Management Pty Ltd* [1990] VR 510 (comfort letter stating that company would make takeover offer held to be a mere statement of intention and not promissory).

92. See *AMEV-UDC Finance Ltd v Austin* supra n 68, 191 (the equitable jurisdiction to relieve against penalties withered on the vine). Cf *Acron Pacific Ltd v Offshore Oil NL* (1985) 157 CLR 514.

93. See *PC Developments Pty Ltd v Revell* (1991) 22 NSWLR 615 (no relief against forfeiture in context of contract for the sale of commercial real estate, and the clause was not a penalty). Cf *CRA Ltd v NZ Goldfields Investments* [1989] VR 873 (provision in joint venture agreement not subject to distinction between liquidated damages and penalties).

94. We stress here that we are concerned not so much with the specific doctrine of relief from unconscionable bargains recognised in *Commercial Bank of Australia Ltd v Amadio* supra n 19, as with the broader and less defined notion of unconscionability that has become a central feature of doctrines such as estoppel and relief against forfeiture.

States.[95] Even though such an obligation might prove in practice to be as empty of predictable content as the standard of unconscionability can be, it would at least have the merit of being cast in positive terms; the fact of its application could not be disputed, even if its precise import were unclear. The failure of Australian law to adopt such a general obligation,[96] outside the nebulous realms of fiduciary relationships[97] and the somewhat anomalous context of insurance,[98] can in large measure be attributed to the courts' preoccupation with unconscionable behaviour in the atypical situation.

The challenge then for the High Court is to explain what role the standard of unconscionability is intended to play, if any, in regulating cynical though not unusual commercial behaviour.[99] In passing, it may be noted that it is the failure to appreciate this point that constitutes the principal flaw in the draft codification of the law of contract recently produced by the Victorian Law Reform Commission.[100] Released shortly before the Commission's otherwise untimely demise at the hands of the incoming Kennett administration, this remarkable document attempts to enshrine a workable law of contract in just 27 short Articles. As the Discussion Paper makes clear, "the high level of generality in the Code is made possible by the central role played by the concept of 'unconscionability'".[101] Article 27 goes so far as to state that "[a] person may not assert a right or deny an obligation to the extent that it would be unconscionable to do so". Unconscionability is to be judged "by reference both to the values of the wider community and to the accepted morality of the particular environment in which it occurs".[102] The Discussion Paper's central thesis is that unconscionability is already so pervasive in the law of contract, and the courts so prone to find ways of manipulating doctrine so as to reach the "just" result in each case, that such an approach would if

95. See H O Hunter "The Duty of Good Faith and Security of Performance" (1993) 6 JCL 19. It is interesting to speculate what might have happened if s 52A of the Trade Practices Act 1974 (Cth) had been framed in such terms, rather than simply mirroring the common law doctrine of unconscionable dealings.

96. See *Hospital Products Ltd v US Surgical Corp* supra n 31; H K Lücke "Good Faith and Contractual Performance" in Finn *Essays on Contract* supra n 3, 155. Cf *Renard Constructions (ME) Pty Ltd v Minister for Public Works* supra n 75, 263–268; P Finn "Commerce, the Common Law and Morality" (1989) 17 MULR 87.

97. See P D Finn "Contract and the Fiduciary Principle" (1989) 12 UNSWLJ 76.

98. See Insurance Contracts Act 1984 (Cth), Pt IV, Div 3; A A Tarr, K-L Liew and W Holligan *Australian Insurance Law* 2nd edn (Sydney: Law Book, 1991) 80–85.

99. See further J W Carter "Problems in Enforcement (Part II)" (1993) 6 JCL 1.

100. Victorian Law Reform Commission *An Australian Contract Code* (Discussion Paper No 27, 1992).

101. Id, 6.

102. Id, 9.

anything increase certainty "by removing the veil of complexity and abstraction which traditional doctrine places over the process of applying contract law, and substituting instead a single line of enquiry".[103]

The obvious criticism to be made of the Discussion Paper is that it wildly exaggerates the tendency or indeed capacity of courts to reach the "fairest" result at all costs.[104] In practice, for all that references to "good conscience" are becoming more and more frequent in contract decisions, the present position is that any relief against unconscionability must be specifically sought by one of the parties, and then only on the basis of (or at least by analogy to) some established principle. The draft Code, by contrast, would potentially make unconscionability the focus of every dispute. The problem is that in the context of commercial transactions, where certainty of obligation and predictability of result are especially important, the courts have not yet developed a body of authority as to what "commercial morality" demands in the typical rather than unusual case of self-interested conduct. The Code could only operate with any predictability if the courts had already reached some kind of consensus on this. Since they have not, and show no signs of doing so, it is hard to see how the Code could avoid descending in practice into the "palm-tree justice" the Paper professes to avoid.[105]

2. Forms of action and the law of restitution

Many years ago Dixon J uttered what was no doubt thought to be a truism, namely, that in Australian law what amounts to an infringement of rights in respect of a chose in possession is a question governed by categories of specific wrong.[106] Even today, there still seems to be a fascination with forms of action, something that has serious implications for the future development of the law of restitution, especially in a contractual context. Thus, much of the discussion in *Pavey & Matthews Pty Ltd v Paul*[107] was concerned with the nature of the action in indebitatus assumpsit and the contrast between that form of action and special assumpsit. Deane J was, to be fair, concerned to repel the suggestion that the delay in adoption of the judicature system in New South Wales was substantively inhibiting. That

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103. Id, 10–11.
104. Cf P Drahos and S Parker "Critical Contract Law in Australia" (1990) 3 JCL 30.
105. Cf Young J "Codifying Contract" (1993) 67 ALJ 85.
106. *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 224. (Actually, and symptomatically, he referred to the position in "English law".) See further *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.
107. Supra n 73.

being so, the combination of his recognition of unjust enrichment as a rational basis for restitution and his reference to a restitutionary obligation to pay "fair and just compensation"[108] for an accepted benefit might legitimately have been regarded as liberating. Similarly, in *The Commonwealth v Amann Aviation Pty Ltd*[109] he referred to the diminishing significance for most purposes of the differences between contract and tort, describing them as largely the result of "historical considerations". Moreover, he suggested that it is "desirable to keep in mind the importance of the doctrine of restitution or unjust enrichment as the rational basis of significant parts of the common law in determining the content of particular rules in some of the persistently grey areas of the law of damages".[110]

However, it is one thing to suggest that we can learn in one area (contract) from developments in other areas (tort and restitution), but quite another to put this into practice when there is still an insistence on categorising actions. This is particularly evident in addressing the situation where a contract breaker derives benefits from the breach which do not result in any subtraction from the actual or expected wealth of the promisee, and for which compensatory damages in their traditional form are therefore not appropriate. If the promisee is to be able to seek restitution, it must be restitution in its "secondary" or "wrong" sense, rather than "primary" or "subtractive" sense.[111] The analogy would be with waiver of tort, where the victim of a tort is permitted to elect between claiming restitution of the benefits secured by the tortfeasor and damages for loss actually caused. However, apart from some tantalising dicta,[112] the High Court has not developed this concept of restitutionary damages for breach of contract.[113] There may well be convincing arguments as to why restitutionary damages of this sort should not be available, especially if one subscribes to the view that the law should permit "efficient breach".[114] But the issue should ideally be resolved as a matter of

108. Id, 256. This reference to "compensation" might suggest that the cause of action here was one based on a wrong. Whatever the true "form of action" in cases such as *Pavey*, however, it is certainly not based on a wrong leading to compensation.
109. Supra n 71, 116. Cf *Hawkins v Clayton* supra n 31, 539, 583-584.
110. Supra n 71, 117.
111. See Birks supra n 76, pp 314ff.
112. Both before and after *Pavey*: see *Hospital Products Ltd v US Surgical Corp* supra n 31, 124–125; *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* supra n 52, 146.
113. Use may be made of the constructive trust, but this must rest on the basis of a fiduciary relation, typically absent from contracts: cf *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.
114. Cf P Birks "Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity" [1987] LMCLQ 421.

policy by reasoned consideration of the advantages and disadvantages of recognising such an action, not simply by reference to whether it can be fitted into an existing common law category.

Unfortunately, the emphasis of the High Court on forms of action, which still continues,[115] is one reason why we do not yet have a statement of the elements of unjust enrichment. The idea that the scope of restitution is limited by the forms of action has been perpetuated by the Court's failure in its recent cases to recognise that there can be such a thing as a cause of action for unjust enrichment.[116] If the High Court has made such inroads into traditional doctrine in contract and elsewhere, why do we need to worry today about forms of action? Thus, when set against the reasoning in relation to a cause of action for unjust enrichment, the reasoning in *Hawkins v Clayton*[117] seems peculiar. Apparently that case stands for the proposition that a contractual duty of care should not be superimposed on a tortious duty arising from the application of general rules on duty of care.[118] One would expect that, if we have still to insist on forms of action in either contract or tort, rather than an obligation to make compensation for breach of duty, the logical basis for a claim against a party standing in a contractual relation is the agreement of the parties, not a duty imposed by law. In any event, there remains much work for the Court to do in considering and reassessing the boundaries between contract, tort and restitution.

3. A plea for guidance

In introducing a forum on the writing of judgments at a Law and Literature Conference in 1990, Sir Laurence Street posed this question: for whom is a judgment written?[119] Not all the participants took up the challenge, but Young J of the New South Wales Supreme Court made the obvious point

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115. See eg *Baltic Shipping Co v Dillon* supra n 72, 234 where Mason CJ (with whom Brennan, Toohey and Gaudron JJ agreed) said that an action "to recover money paid on a total failure of consideration is on a common money count for money had and received to the use of the plaintiff". According to Deane and Dawson JJ, 246, "in a modern context where common law and equity are fused with equity prevailing, the artificial constraints imposed by the *old* forms of action can, unless they reflect coherent principle, be disregarded where they impede the principled enunciation and development of the law" (emphasis added). This says nothing, of course, about the modern forms of action.
116. See also *Winterton Constructions Pty Ltd v Hambros Aust Ltd* (1991) 101 ALR 363.
117. Supra n 31.
118. Or at least that the modern trend is to regard the liability of a solicitor to a client lying in tort: *Johnson v Perez* (1988) 166 CLR 351, 363.
119. "The Writing of Judgments: A Forum" (1992) 9 Aust Bar Rev 130.

that "not only must the judge consider the interests of the parties, but he must also remember that his decision could affect a large number of other people in subsequent cases involving similar problems both in Australia and overseas".[120] In the case of the High Court's role in contractual litigation, the argument can be made that this need to consider the interests of a broader readership is, if anything, more important than the Court's duty to the parties before them to spell out their decision in clear terms. After all, few if any contract disputes reach the High Court these days without having come through an intermediate court of appeal. If the concern is simply to ensure that any obvious errors made by the trial judge are corrected, why cannot this be left to the first appellate tribunal? The answer, of course, is that the High Court's consideration may be needed in order to clarify disputed points of law, especially where different judges, or judges in different jurisdictions, appear unable to arrive at any consensus.

All this is obvious enough, but it takes on a special importance in relation to contract law. Whatever the evidence as to the tendency of those in business to operate in disregard of their strict contractual rights and obligations,[121] it is clear that many transactions are planned and many disputes over transactions are fought by reference to what the parties and their legal advisors believe to be the law. Whatever the content of the rules themselves, the smooth operation of trade and commerce demands a reasonable degree of predictability as to the legal framework. Accordingly the High Court has at least a moral obligation to use its proceedings to clarify contract law wherever possible. Unfortunately, this is an aspect of the High Court's modern approach which gives cause for deep concern. There is room for criticism both as to the extent to which it has chosen not to deal fully or finally with various issues and as to its frequent failure to speak with one voice.

To a large extent, of course, the High Court cannot choose the cases that come before it. In the absence of any mechanism to give advisory opinions, it must be a prisoner of the peculiar circumstances that drive disputants not just to go to court but to expend the large sums necessary to pursue a final appeal. Nevertheless, once an appeal is made, the Court has considerable freedom, assuming leave is granted at all,[122] as to the issues which it will address, and in particular as to the extent to which it will use the case not just

120. Id, 142.

121. See eg S Macaulay "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 Am Soc Rev 55; H Beale & T Dugdale "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 Brit J of Law & Soc 45.

122. For a surprising example of the Court refusing to grant such leave, see supra n 75.

to resolve the specific dispute, but to deal with related matters for the benefit of the lower courts. Naturally this must be done sparingly, owing to the obvious dangers in handing down premature decisions of importance to future litigants. Although the Court is entitled to hear argument on significant issues, counsel should not be expected to deal with the problems of future litigants at the expense of their own clients. Nevertheless, all those who approach the High Court must be aware that, to a certain extent, they are giving the members of the Court an opportunity to say something whose importance may transcend their own immediate concerns.

Our criticism of the modern Court in this respect is not principally directed to its choice of issues. If there have been times when litigants may well have preferred the discipline of the Dixon Court in saying nothing about hypothetical situations, there have also been occasions when the Court has neglected to offer much-needed guidance.[123] Rather, the problem has lain with the Court's tendency in certain instances to raise doubts about established doctrine, but either to fail to indicate the full extent of its desire to change the law,[124] or to adopt a new principle but refuse to give at least a workable outline of it, even if not a comprehensive definition. The former is exemplified by *Trident*,[125] where Mason CJ and Wilson J stressed that "regardless of the layers of sediment which may have accumulated, we consider that it is the responsibility of this Court to reconsider in appropriate cases common law rules which operate unsatisfactorily and unjustly".[126] Yet in the end none of the judges in the case who expressed disquiet with the doctrine of privity were prepared to give a clear indication as to how they

123. Two examples that come to mind are the failure to resolve uncertainties about knowledge in the context of an election to affirm a contract in *Khoury v Government Insurance Office of NSW* (1984) 165 CLR 622, and the refusal in *Gates v City Mutual Life Assurance Society Ltd* supra n 53 to reconsider the restrictive view taken in *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133 as to the recognition of collateral contracts.

124. The new practice of including footnotes in High Court judgments causes some concern in this regard, in that the status of an observation consigned to a footnote may be less than clear. In *Baltic Shipping Co v Dillon* supra n 72, 234, for instance, Mason CJ commented in fn 37 that the reasoning of the House of Lords in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (as to recovery of money paid under a contract which has been terminated rather than rescinded ab initio) is now to be preferred to the High Court's earlier decision in *Re Continental C & G Rubber Co Pty Ltd* (1919) 27 CLR 194. While we would applaud the overruling (if that is what it is) of *Re Continental* (see A Stewart & J W Carter "Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal" [1992] CLJ 66, 73), it would surely have been better to make the point in the text of the judgment.

125. Supra n 52.

126. Id, 123.

would deal with a case arising outside the context of insurance. As for the latter tendency, there is no better illustration than *Taylor v Johnson*,[127] where having made it clear that it would now recognise an equitable jurisdiction to relieve against unconscionable advantage being taken of another's mistake, the majority refused to explore its potential application to situations other than presented by the facts of the instant case.

It is particularly disquieting to find statements which suggest that the principle applied in the case before the Court should not be seen as necessarily applicable in future cases. *Esanda Finance Corp Ltd v Plessnig*[128] is a good example of this. Although the High Court was unanimous in deciding[129] that whether a clause is a penalty falls to be decided at the time of contract formation, and that, in cases where the clause operates on termination for breach, the loss suffered as a consequence of termination can be taken into account, there were also very strong hints that the Court might strike down a clause allowing the recovery of loss of bargain damages. References to unconscionable conduct, unfairness, unjust enrichment and relief against forfeiture in this context,[130] without proper explanation of the extent to which they can apply, are simply not helpful to those drafting or applying such clauses.

Then there is the issue of multiple judgments. It is not surprising that in the ferment of ideas over the last decade there should be disagreements between members of the High Court. Unfortunately, however, many of the recent cases all too frequently reveal differences of opinion which make it very difficult to determine the content of significant principles. We have become used to long judgments. We have had to cope with cases containing five or more judgments, often leading to the same conclusion but always couched in different terms. Perhaps this is to be expected in cases such as *Legione v Hateley*[131] and *Waltons Stores*,[132] which broke new ground. However, we might have been entitled to expect that in subsequent decisions, such as *Stern v McArthur*[133] and *The Commonwealth v Verwayen*,[134] the judgments would explain the content of the new principles in a way which enabled their subsequent application by lower courts. But all too frequently

127. Supra n 17.
128. Supra n 69.
129. On the basis of *AMEV-UDC Finance Ltd v Austin* supra n 68.
130. Supra n 69, 143-144, 151, 155.
131. Supra n 16.
132. Supra n 51.
133. Supra n 65.
134. Supra n 55.

it has been impossible to ascertain the ratio decidendi[135] and the value of these cases, except to academics intent on raw material for journal articles, has been substantially less than it ought to be. Nor has this phenomenon been confined to the cases on unconscionable conduct. The judgments in *Foran v Wight*,[136] now the leading case on proof of repudiation, are virtually impenetrable even to those familiar with the cases discussed—even though the decision appears to have done little more than confirm that the doctrine of estoppel provides the basis for the principle that a promisee is absolved by a repudiation from the obligation to perform or to cause the fulfilment of a contingency to which the promisor's obligation to perform was subject.[137] A similar criticism might be made of *The Commonwealth v Amann Aviation Pty Ltd*,[138] where the straightforward proposition that damages are awarded in contract to place the plaintiff, so far as money is capable, in the same situation as if the contract had been performed resulted in extremely long and involved judgments from which much may be learned, but not the ratio of the case.

It is easy to have sympathy for the members of what many commentators (ourselves included) would regard as the most talented group yet to grace the bench in this country. Clearly, most of the Court have a great many interesting and valuable ideas that they wish to take the opportunity to explore and communicate, something that is always easier to achieve in a sole-authored judgment. Nevertheless, if there was one development we would wish for from the Court in the field of contract law, it is not the change of any single doctrine, but a greater willingness on the part of the High Court to give unanimous or at least majority judgments.

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135. This is especially true of *Verwayen*, where the respondents prevailed despite failing to win a majority on each of their main arguments!
136. Supra n 63.
137. Cf *Bowes v Chaleyer* (1923) 32 CLR 159; *Peter Turnbull & Co Pty Ltd v Mundus Trading Co (Australasia) Pty Ltd* (1954) 90 CLR 235.
138. (1991) 174 CLR 64. See also *Burns v MAN Automotive (Aust) Pty Ltd* supra n 70 (disagreement on the relation between mitigation and remoteness).