BAUMGARTNER V. *BAUMGARTNER*, THE CONSTRUCTIVE TRUST AND THE EXPANDING SCOPE OF UNCONSCIONABILITY

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I. INTRODUCTION

The decision in *Baumgartner* v. *Baumgartner*[1] has been described by one academic commentator as amounting to "a dramatic change in direction, supporting a considerably more flexible and ambulatory construction of the nature and role of the new constructive trust" and authorising inferior courts to adopt "an increasingly unfettered vision of the trust's definition and ambit."[2] It will be suggested here that *Baumgartner* involves a development of principles evident in earlier decisions of the High Court, extending, but not overturning, previous authority. It will be argued that the principles governing the imposition of a constructive trust, as defined by *Baumgartner*, have an underlying theme in the recognition of unconscionability as a unifying principle in equitable remedies. Although the decision expands the circumstances in which a constructive trust might be recognised, it will be suggested that it is no wider charter of liberation for lower courts.

II. THE FACTS

The parties had lived in a de facto relationship for a period of nearly four years. In October 1979 the de facto husband ("the appellant") had purchased certain land upon which a house was to be built as the couple's future residence, obtaining sole legal title to that land. The purchase monies were

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1 (1988) 62 ALJR 29. Subsequent page references to this case occur in parentheses in the text.

2 J. Dodds, "The New Constructive Trust: An Analysis of its Nature and Scope" (1988) 16 *MULR* 482, 483.

provided by the appellant alone, from monies derived from the sale of a unit of which he was the sole proprietor. The trial judge found that the parties had, from the time they commenced living together, pooled their earnings for the purposes of the relationship. Over the period of the relationship, the appellant had contributed 55% and the de facto wife ("the respondent") 45% of the pooled fund. The pooled fund had been used to reduce the mortgage on the appellant's unit and subsequently to repay the mortgage upon the new property. After the separation of the parties, the appellant claimed that the house was his exclusive property, while the respondent sought a declaration that she was beneficially entitled to one half of the property. She later amended her claim to seek a declaration that the appellant held his interest in the property on trust for her.

At first instance the court dismissed the respondent's claim and her amended claim. The trial judge concluded that the parties had no common intention to create a trust and that there was no basis on which a constructive trust arose in favour of the respondent. The Court of Appeal of the Supreme Court of New South Wales, Mahoney JA. dissenting, relied on a common intention attributed to the parties in granting a declaration that the appellant held the legal interest in the property on trust for the respondent and himself as tenants in common, subject to charges for certain specific amounts in favour of the appellant. The High Court overturned the finding of the Court of Appeal that a constructive trust had been established on the basis of common intention, but held that a constructive trust would be imposed in equity on the ground that the appellant's conduct in asserting exclusive title to the property was unconscionable.

III. CONSTRUCTIVE TRUSTS AND COMMON INTENTION

A constructive trust is traditionally characterised as a trust which arises independently of the intention of the parties, being imposed by the court to prevent a person having legal title to property profiting from behaviour which is unconscionable or amounts to equitable fraud, for example the fiduciary's breach of duty or the knowing receipt of property deriving from a breach of trust.[3] In *Allen* v. *Snyder*,[4] the Court of Appeal of the Supreme Court of New South Wales were of the view that a constructive trust was not established by the fact of a contribution to the acquisition or improvement of property by one partner to a de facto relationship, unless there was evidence of a subjective intention common to both parties that the contribution would give rise to a beneficial interest in the property. That common intention may have been expressly communicated between the parties or might be inferred by the

3 *Keech* v. *Sandford* (1726) 25 ER 223; A.J. Oakley, *Constructive Trusts* (1978) 1, 9; R.P. Meagher & W.M.C. Gummow, *Jacobs' Law of Trusts* (1986) (5th ed.) para 1301; M. Stone, "The Reification of Legal Concepts: *Muschinski* v. *Dodds*" (1986) 9 *UNSWLJ* 63, 73.

4 [1977] 2 NSWLR 685.

court from conduct,[5] the drawing of the latter inference involved a degree of uncertainty in practice.[6] It appears that the basis for recognising a constructive trust based on the common intention of the parties lies in the equitable jurisdiction to prevent unconscionable conduct of the person having legal ownership in resiling from the parties' common intention.[7] The reasoning of the Court of Appeal in *Allen* v. *Snyder* was cited by the majority in *Baumgartner* without disapproval (at 32).

However, the High Court held that the Court of Appeal had been in error in drawing inferences of fact based on certain areas of common ground between the parties, without recognising areas of conflict in the evidence reflected in the decision of the trial judge. The Court concluded that the trial judge's finding of fact, that the appellant's intention was that the respondent would only obtain an interest in the property if the parties married — made where questions of credit had been in issue — had the effect that the respondent had not established an actual common intention of the parties so as to found a constructive trust (at 32-33).

IV. *BAUMGARTNER* AND LORD DENNING'S "CONSTRUCTIVE TRUST OF A NEW MODEL"

The suggestion that the courts would interfere with property rights on the basis of general notions of fairness was rejected in *Allen* v. *Snyder*, particularly in the reasoning of Glass JA.[8] That suggestion was also rejected by the High Court in *Muschinski* v. *Dodds*, where Deane J. (with whom Mason J. agreed) denied that a constructive trust might be imposed on the basis of "idiosyncratic" notions of what was just or fair, while Brennan J. observed that "[t]he flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to what is fair".[9] The proposition there rejected is that underlying Lord Denning's "constructive trust of a new model", the existence of which was revealed in *Hussey* v. *Palmer*[10] and *Eves* v. *Eves*.[11] On the

5 *Id.*, *per* Glass J.A., 691, 694; *per* Mahoney J.A., 702. As to actual common intention, see also *Muschinski* v. *Dodds* (1986) 160 CLR 583, *per* Gibbs C.J., 589-590; *per* Brennan J. (with whom Dawson J. agreed) 606-607.

6 I.J. Hardingham & M.A. Neave, *Australian Family Property Law* (1984) para 6114.

7 *Id.*, para 6105.

8 Note 4 *supra*, 690. In the United Kingdom, the earlier decisions of the House of Lords in *Pettitt* v. *Pettitt* [1970] AC 777 and *Gissing* v. *Gissing* [1971] AC 886 were themselves authority that rights of property are not dependent upon concepts of fairness or reasonableness, and that the task for the court is to identify equitable rights in property according to established equitable principles.

9 *Muschinski* v. *Dodds* note 5 *supra*, *per* Deane J., 615; *per* Brennan J., 608. For a celebration of the "buri[al]" by *Muschinski* v. *Dodds* of "the still-twitching corpse of the Denning constructive trust", see R.P. Meagher, "Constructive Trusts: High Court Developments and Prospects" (1988) 4 *Aust Bar Rev* 66, 66-67.

10 [1972] 1 WLR 1286.

11 [1975] 1 WLR 1338.

reasoning of Lord Denning, a constructive trust would be imposed where the conduct of one party was such — having regard to the financial and non-financial contributions of the parties, to improvements to and maintenance of the property, to child care, and to statements of intention and other conduct of the parties — that it was unfair to deny the other party a beneficial interest in the property.

On its face, *Baumgartner* is no exception to the consistent rejection of the reasoning of Lord Denning in Australian law. It might be asked whether the circumstances in which the unconscionable denial of an equitable interest will found a constructive trust, on the reasoning of the majority in *Baumgartner*, are more precisely defined than those founding Lord Denning's constructive trust of a new model. In reply, it would be said that the concept of unconscionability is a more precise criterion than that of fairness at large, although there is a connection between the two concepts. Moreover, the majority's reasoning in *Baumgartner* is distinguished from that of Lord Denning in *Hussey* v. *Palmer* and *Eves* v. *Eves* by the emphasis in *Baumgartner* upon the analogy with capital contributions made to a joint endeavour. That analogy confines the circumstances in which a party will have a claim to an equitable interest in property to which the other has legal title more closely than did Lord Denning's reasoning.

V. UNCONSCIONABILITY AND THE CONSTRUCTIVE TRUST

The reasoning of the Court of Appeal in *Allen* v. *Snyder* did not exclude the possibility that a constructive trust might be established on equitable grounds without requiring an actual common intention of the parties. Indeed, Samuels and Mahoney JJA. expressly recognised that in the absence of a common intention, a constructive trust might be established by a breach of fiduciary obligation, or by the defendant's unconscionable conduct.[12] Mahoney JA. observed that in some situations "the failure to recognize that the one or the other has a proprietary interest in the home is so contrary to justice and good conscience that a trust or other equitable obligation should be imposed".[13] That observation was noted by the majority in *Baumgartner*, who suggested that the reference of Mahoney J.A. to "contrary to justice and good conscience" was to be understood as a reference to behaviour that is unconscionable in equity (at 33). Their Honours also suggested that the reasoning of Mahoney JA. treated the act of refusing to recognise the existence of an equitable interest as itself constituting "unconscionable conduct", the constructive trust being imposed "as a remedy to circumvent that unconscionable conduct" (at 33). In *Baumgartner* that analysis is applied

12 Note 4 *supra*, *per* Samuels J.A., 699; *per* Mahoney J.A., 704; and see also the observations of the majority in *Baumgartner*, note 1 *supra*, 33.

13 *Id.*, 706.

to the appellant's conduct in denying that the respondent had any equitable interest in the property in issue.

The reasoning of the High Court in *Baumgartner* needs to be evaluated against the background of the Court's earlier decision in *Muschinski* v. *Dodds*,[14] and particularly the reasoning of Deane J. in that case. The parties to a de facto relationship together purchased a property with the intention of developing a cottage on the property as a craft shop and erecting a residence. The appellant provided almost all of the purchase price, with the intention that the respondent would make certain contributions in the future, and the property was conveyed to the parties as tenants in common. The parties' relationship ended before the project was completed and the appellant sought a declaration that she was the sole beneficial owner of the property.

The High Court rejected the argument that the respondent's interest in the property was held on resulting trust for the appellant. As to the imposition of a constructive trust, Deane J. (with whom Mason J. agreed) noted that:

> [t]he mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other.[15]

His Honour observed, however, that general notions of fairness and justice are "relevant to the equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity."[16] Thus, equity would impose a constructive trust regardless of the intention of the parties in order to "preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle."[17]

On the facts, their Honours held that a constructive trust had been established with effect that the parties held their respective legal interests upon trust to repay the parties' contributions and to divide the residue between them in equal shares. Gibbs C.J. agreed with the orders proposed in the judgment of Deane J., although he reached that result by different reasoning, holding that the appellant had a right to contribution from the respondent as a joint debtor as to the purchase price of the property.[18] Brennan and Dawson JJ. dissented in the result.

The reasoning of Deane J. in *Muschinski* v. *Dodds* was welcomed by one commentator as offering a basis upon which "reasoned change and development may take place", by directing attention to "those specific instances where a court of equity would regard the exercise of particular legal rights as unconscionable."[19] The High Court in *Baumgartner* also draws

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14 *Muschinski* v. *Dodds* note 5 *supra*.
15 *Id.*, 616.
16 *Ibid.*
17 *Id.*, 614.
18 *Id.*, 596-597.
19 Meagher, note 9 *supra*, 69.

upon the notion of unconscionable conduct as founding a constructive trust, in essence adopting the reasoning of Deane J. in *Muschinski* v. *Dodds*. The majority observed that where the parties' resources had been pooled for the purposes of their relationship and for their mutual benefit, "it would be unreal and artificial to say that the respondent intended to make a gift to the appellant of so much of her earnings as were applied in payment of mortgage instalments" (at 34). The majority concluded that, in such circumstances, the appellant's assertion that the property of which he was the sole legal owner "was his property beneficially to the exclusion of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent" (at 34). Gaudron J. similarly emphasised that the existence of pooled funds had facilitated the acquisition of the property, although these funds had not been directly applied to purchase the property so as to give rise to a resulting trust, and that in the circumstances a constructive trust was properly imposed to prevent the unconscionable denial of the respondent's beneficial interest in the property (at 36).

The emphasis upon unconscionability in *Baumgartner* is characteristic of recent cases in the High Court which have identified unconscionability as the underlying principle in several discrete equitable doctrines. The novelty of the analysis lies in the urge to synthesis apparent in those cases. It might also be said that to identify unconscionability as the basic principle underlying a particular doctrine is necessarily to modify its potential scope.

The principle that equity will intervene to prevent the unconscionable assertion of a legal right is itself well established.[20] That principle has been held to authorise the imposition of a constructive trust where one party asserts absolute legal title to property in an unconscionable manner.[21] In *Bannister* v. *Bannister*,[22] for example, the element of unconscionability was found in the defendant's reliance on the absence of writing to deny the plaintiff's interest under an oral agreement. It may be difficult to define in abstract the range of conduct which will be characterised as unconscionable in equity.[23]

The approach emerging from recent decisions of the High Court identifies the concept of unconscionability as underlying a number of equitable doctrines. Finn characterises that approach as seeking to "prevent an

20 P.D. Finn, "Equitable Estoppel" in Finn (ed) *Essays in Equity* (1985) 71, 73.

21 J.L. Dewar, "The Development of the Remedial Constructive Trust" (1982) 60 *Can Bar Rev* 265, 281-282.

22 [1948] 2 All ER 133, 136.

23 In *National Westminster Bank* v. *Morgan* [1985] AC 686 Lord Scarman (at 709) suggested that "[d]efinition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case". For discussion of how widely that observation should be read and of its significance in relation to rule-guided decision-making, see L.J. Priestley, "Contract — The Burgeoning Maelstrom" (1988) 1 *J of Contract Law* 15, 19.

insistence upon strict legal rights where unconscionable conduct has attended their acquisition or would inhere in their proposed exercise."[24] In *Commercial Bank of Australia Ltd.* v. *Amadio*[25] the High Court held that a remedy in unconscionability (in the traditional sense) would be available where one party unconscionably took advantage of the other's position of weakness. Mason J. observed that the equitable doctrines of unconscionability and undue influence both arose from equity's refusal to allow the enforcement of a transaction where to do so "would be inconsistent with equity and good conscience." Both Mason and Deane JJ. accepted that a transaction would be voidable for unconscionability where a stronger party sought, in a manner not consistent with good conscience, to retain the benefit of a dealing with a person under a special disadvantage.[26]

In the area of unilateral mistake, *Taylor* v. *Johnson*[27] arose from the mistake of one party as to the sale price of certain land. The majority, Mason ACJ. and Murphy and Deane JJ., held that there existed an equitable jurisdiction to rescind a contract for unilateral mistake where a party entered a written contract under a serious mistake about its content in relation to a fundamental term, founded in conduct of the other party who "knowing or having reason to know that there is some mistake or misapprehension . . . engages deliberately in a course of conduct which is designed to inhibit discovery of it."[28] In effect, a contract valid at common law may be rescinded for unilateral mistake where the transaction involves unconscientious conduct by a party not under the mistake who acts to inhibit discovery of the mistake and seeks to rely upon a legal right obtained from that mistake.[29]

The expanded doctrine of estoppel articulated in *Waltons Stores (Interstate) Ltd.* v. *Maher*[30] also draws upon the concept of unconscionability. Mason C.J. and Wilson J. identified common reasoning in the cases as to equitable estoppel, which, their Honours noted, allowed relief where the plaintiff has acted to his detriment on the basis of an assumption and the other party has played such a part in relation to that assumption that "it would be unconscionable conduct on the part of the other party to ignore the assumption."[31] Deane J., who held that estoppel by conduct had been established on the facts of the case, argued that there should be no distinction in the principles applicable to representations of present fact and representations about future conduct. One basis of his Honour's reasoning was that such a distinction "has always sat uncomfortably with the general

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24 Note 20 *supra*, 60.
25 (1982-1983) 151 CLR 447, noted A.J. Black (1986) 11 *Syd LR* 134.
26 *Id.*, *per* Mason J., 461, 462; *per* Deane J., 474. See also Priestley, note 23 *supra*, 19.
27 (1982-1983) 151 CLR 422, noted G. Davis (1985) 11 *Mon U LR* 65.
28 *Id.*, 433. Dawson J., who declined to interfere with a finding of fact of the trial judge, did not need to reach a view as to the jurisdiction to rescind a contract in equity.
29 I.J. Hardingham, "Unconscionable Dealing" in Finn note 20 *supra*, 7.
30 (1988) 62 ALJR 110, noted N. Seddon (1988) 62 *ALJ* 568.
31 *Id.*, 116.

notions of good conscience and fair dealing which underlay common law, as well as equitable estoppel by conduct."[32] In the application of the principle of estoppel to the facts of a particular case, it appears that the courts will look to the conduct of the party encouraging a mistaken assumption of fact or law or allowing that assumption to subsist, and to the disadvantage of the innocent party resulting from the other party's insistence upon his legal rights.[33]

The concept of unconscionability recurs through the High Court's approach in recent cases to undue influence and unconscionability in the strict sense, to unilateral mistake, to equitable estoppel and in *Baumgartner* to the constructive trust. The reasoning of the Court in *Baumgartner* leaves the issue before the court widely defined, as whether in a particular set of circumstances it is unconscionable for one party to refuse to recognise another's equitable interest in property. That issue may be addressed with certainty only if it is possible to identify the circumstances in which such an equitable interest arises, and then to delimit the circumstances, if any, in which denial of an equitable interest by the holder of the legal title would not amount to unconscionable conduct.

VI. THE CONSTRUCTIVE TRUST ARISING ON THE FAILURE OF A JOINT ENDEAVOUR

Thus, in order to resolve the question of whether it is unconscionable for a party to refuse to recognise another's equitable interest in property, the court must determine the circumstances in which the other obtains an equitable interest in that property. The analogy drawn by the majority in *Baumgartner* between the failure of a de facto relationship and the failure of a joint venture allowed the resolution of that issue.

In *Muschinski* v. *Dodds*, Deane J. had suggested that the rights of the participants upon the failure of a de facto relationship were analogous to the rights of partners or participants in a joint venture upon the failure of the venture in the absence of blame attributable to one party. Deane J. referred to *Atwood* v. *Maude*[34] as establishing that in such circumstances partners or joint venturers are entitled to repayment of the capital committed to the venture in proportion to their contributions. In that case the plaintiff claimed the return of a premium upon the early dissolution of a partnership of solicitors. Lord Cairns LC held that the amount of the premium proportionate to the unexpired term of the partnership should be repaid, since the premium had been paid to compensate for the inexperience of the plaintiff, on which the defendant had relied to terminate the partnership.

32 *Id.*, 136.
33 Note 20 *supra*, 92.
34 (1868) 3 Ch App 369.

Deane J. also referred to *Lyon* v. *Tweddell*.[35] With respect, that decision adds little to his Honour's reasoning. Although Jessel MR observed that where a partnership was dissolved on equitable grounds "[i]t is the duty of the Court to look at all the facts, and do what is equitable between the parties",[36] the court was there primarily concerned with the question of when it should interfere with the discretionary decision of a judge of first instance. Deane J. found in *Atwood* v. *Maude* and *Lyon* v. *Tweddell* illustrations of a principle which:

> [o]perates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.[37]

In *Muschinski* v. *Dodds*, Mason J. agreed with Deane J. that "the general principle underlying the proportionate repayment of capital contributions to joint venturers on the failure of a joint venture" was sufficiently wide to support the imposition of a constructive trust in the circumstances of the case.[38]

The majority in *Baumgartner* cited the passage from the judgment of Deane J. in *Muschinski* v. *Dodds* quoted above, and applied that analysis to the dealings of the parties. Their Honours noted the parties' pooling of earnings for the purposes of meeting expenses and outgoings, the application of the pooled earnings to pay outgoings associated with accommodation, the fact that the property in issue was acquired for the purposes of the relationship, and the absence of any indication that the respondent intended to make a gift to the appellant of her contributions to the joint fund (at 33-34).

Both Toohey and Gaudron JJ. accepted the majority's approach, although Toohey J. also developed an alternative approach based in unjust enrichment. Toohey J. agreed with the majority that the appellant's assertion of exclusive beneficial title amounted to unconscionable conduct authorising equitable intervention and the imposition of a constructive trust (at 35). Gaudron J. referred to the relationship between the doctrine of resulting trust and the concept of unconscionability. Her Honour observed that, had the pooled funds been applied directly to the purchase of the property, then a resulting trust would have been established under the principles established by *Calverley* v. *Green*[39] (at 37). Recognising that no resulting trust arose on the

35 (1881) 17 Ch D 529.
36 *Id.*, 531.
37 *Muschinski* v. *Dodds* note 5 *supra*, 620.
38 *Id.*, 599.
39 (1984) 155 CLR 242.

particular facts, Gaudron J. adopted the reasoning of Deane J. in *Muschinski* v. *Dodds* in holding that a constructive trust would arise where the acquisition of land and the building of a house upon it "constituted a joint undertaking designed to further [the parties'] relationship" and "[t]he substratum of that relationship and undertaking was removed without attributable blame", the extent of the interest being referable to contributions to a joint fund which was applied in part to the reduction of the mortgage debt (at 37).

The analogy with a joint endeavour developed by Deane J. in *Muschinski* v. *Dodds* and adopted by the Court in *Baumgartner* would extend to a de facto relationship where the parties had contributed property on the faith of the relationship.[40] In the writer's view, the analogy would not extend to circumstances where the parties had maintained separate financial affairs, each retaining income for his or her own use and each retaining property in his or her own name. It is submitted that in that situation neither party has an equitable interest in the property of the other, and there is nothing unconscionable in either party relying upon his or her legal title.

Clearly the analogy adopted by Deane J. has limitations. The reference to the failure of the venture "without attributable blame" has a proper application in the failure of a partnership or contractual joint venture, where blame attributed to one party for the dissolution of a partnership might involve breach of the partnership articles or joint venture agreement or other misconduct. That application reflects the origin of the principle in *Atwood* v. *Maude*.[41] The concept of "attributable blame" raises greater difficulties in its application to the failure of a non-commercial relationship.

Whatever else the significance of "without attributable blame", Evans is surely correct in observing that the concept is not directed to matters of matrimonial fault, in the matrimonial causes sense.[42] The concept of "attributable blame" might be given content by the court considering evidence of disqualifying conduct in the sense given to that term in family provision legislation. Such legislation (for example, the Family Provision Act 1982 (N.S.W.)) authorises the court to decline to make orders in favour of an applicant where the conduct of the applicant is such that, in the opinion of the court, it disentitles the applicant to an order. Conduct amounting to disentitling conduct for this purpose will be conduct which would explain the testator's not making greater provision for the applicant.[43] There are, however, substantial differences between a dependent family member's claim against the estate of a deceased person, and the situation where one party to a relationship asserts an equitable interest in property to which the other

40 M. Evans, "De Facto Property Disputes: The Drama Continues" (1987) 1 *Aust J of Fam Law* 234, 239.

41 Note 34 *supra*, Lord Cairns L.C., 372-373.

42 Note 40 *supra*, 246-247.

43 I.J. Hardingham, M.A. Neave & H.A.J. Ford, *Wills and Intestacy in Australia and New Zealand* (1983) 478.

holds legal title on the basis of the claimant's contributions of money or property to a joint fund. In the writer's view, there is no reason in principle why conduct which would sufficiently explain the testator's failing to make voluntary provision for a particular person, amounting to disentitling conduct under the family provision legislation, should disentitle a party from relief against the refusal to recognise an interest arising from contributions to a pooled fund in the course of a de facto relationship.

Accepting that the constructive trust is an equitable remedy imposed in the court's discretion, it is doubtful that an inquiry into the conduct contributing to the collapse of a relationship to establish whether a party was blameworthy could be an appropriate exercise in principle or in policy. In the writer's view, the courts might well refuse to inquire into the reasons for failure of a de facto relationship, treating such failure as occurring without fault of the parties. This involves an assumption that whereas commercial partnerships may fail for breach of the partnership agreement or on the breakdown of mutual confidence "render[ing] it impossible that the partnership can continue with advantage" to either partner,[44] the breakdown of de facto or domestic relationships of its nature derives from the failure of mutual confidence. Of course, established equitable defences such as the principle of unclean hands may be available in some circumstances, with effect that the court would refuse relief where the conduct of the party seeking relief was improper and the impropriety had an immediate relationship with the equity on the basis of which relief is sought.[45]

VII. THE CONSTRUCTIVE TRUST AS AN INSTITUTION OR REMEDY

It has often been suggested that Anglo-Australian law has characterised the constructive trust as an institution, whereas American law has approached it as a remedial institution.[46] While one would not wish to suggest that the discussions of whether the constructive trust is an institution or a remedy have been without jurisprudential interest, it might appear that the real question is that of the circumstances in which the constructive trust will arise as institution or be imposed as remedy. There is little to suggest any difference in the criteria which Australian courts would adopt in answering that question, whether it is formulated in institutional or remedial terms. To characterise the constructive trust as having a partly or wholly remedial function is not, in itself, to accept a wider view of the circumstances in which the remedy is available. There is no contradiction in recognising the remedial function of the constructive trust and at the same time accepting that such

44 Note 34 *supra*, Lord Cairns L.C., 373.

45 *Meyers* v. *Casey* (1913) 17 CLR 90; *Harrigan* v. *Brown* [1967] 1 NSWR 342; R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity: Doctrines and Remedies* (1984) (2nd ed), paras 325-326.

46 Oakley, note 3 *supra*, 3.

a function only has effect where supported by equitable principles, however widely or narrowly such principles are viewed.

Certainly, there is English and Australian authority recognising the remedial operation of the constructive trust.[47] Such a characterisation may be most apt where the trust is imposed on the basis of an equitable obligation, rather than in recognition of an equitable property right existing prior to the imposition of the trust.[48] In *Muschinski* v. *Dodds* Deane J. adopted a sensible view, recognising that "in a broad sense the constructive trust is both an institution and a remedy of the law of equity", although it has a remedial function in that it may be imposed under equitable principles to avoid the retention of the benefits of unconscionable conduct.[49] In *Baumgartner*, Toohey J. similarly recognised that the object of the constructive trust is remedial in that such a trust seeks to "redress a position which otherwise leaves untouched a situation of unconscionable conduct or unjust enrichment" (at 36).

The characterisation of the constructive trust as remedy or institution may be significant in defining the extent of the court's discretion as to the terms of the trust. Particularly if it were said that a constructive trust generally arises at the time of the unconscionable conduct giving rise to the remedy rather than at the time of judgment, the imposition of such a trust would involve a substantial risk of prejudice to third party creditors holding equitable securities.[50] In *Muschinski* v. *Dodds* Deane J. held that the trust might be "moulded and adjusted to give effect to the application and interplay of equitable principles in the circumstances of the particular case."[51] That reasoning allows the court to limit the effect of the imposition of a constructive trust upon third party rights by framing its declaration of the trust so that "the consequences of its imposition are operative only from the date of judgment or formal court order or some other specified date."[52] It might be suggested that such an approach, although offering protection to unsecured creditors and third parties potentially affected by the imposition of a constructive trust, allows insufficient weight to the logical interdependence of the conduct giving rise to the trust and the time at which the trust comes into existence. That interdependence should, prima facie, have the effect that

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47 *English* v. *Dedham Vale Properties Ltd.* [1978] 1 All ER 382 *per* Slade J., 398; *Hospital Products Ltd.* v. *United States Surgical Corporation* (1984) 156 CLR 41 *per* Mason J, 100; *per* Deane J, 125; Meagher & Gummow, note 3 *supra*, para 1310.

48 L.S. Sealy, "Some Principles of Fiduciary Obligation" [1963] *Camb LJ* 119, 123.

49 *Muschinski* v. *Dodds* note 5 *supra*, 613; to similar effect, Sir Anthony Mason, "Themes and Prospects" in: Finn note 20 *supra*, 246.

50 Meagher & Gummow, note 3 *supra*, para 1331; G. Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty" (1968) 84 *LQR* 472, 498; A.J. Black, "Dworkin's Jurisprudence and *Hospital Products*: Principles, Policies and Fiduciary Duties" (1987) 10 *UNSWLJ* 8, 29-30, 32; Stone, note 3 *supra*, 75.

51 *Muschinski* v. *Dodds*, note 5 *supra*, 615.

52 *Ibid.*

the constructive trust arises at the time of the unconscientious conduct giving rise to the claim.[53] Rather than the court exercising a discretion as to the time at which the trust arises, an alternative approach would be for the court in appropriate circumstances to require that the beneficiary under a constructive trust make allowances for the rights of third parties. Such a condition might properly be imposed in the exercise of the court's discretion in granting an equitable remedy.

In *Baumgartner*, the High Court indicated the approach to be adopted in determining the terms of a constructive trust arising upon the failure of a joint endeavour. The majority noted that the parties' purposes in acquiring the property and the means of financing from a pool of joint earnings supported equality of beneficial ownership of the property "at least as a starting point", subject to "adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind" (at 34). The majority observed that in general:

> [t]he Court should, where possible, strive to give effect to the notion of practical equality, rather than pursue complicated factual inquiries which will result in relatively insignificant differences in contributions and consequential beneficial interest (at 34-35).

The majority held, however, that an adjustment was warranted on the facts to take account of the greater financial contribution of the appellant. Toohey J. similarly took the view that, whether the imposition of a constructive trust was justified by a principle of unconscionability or by a principle of unjust enrichment, neither principle "necessarily calls for the precise accounting of the contributions of the parties." His Honour indicated, however, that the court should take account of disproportionate contributions, "especially where one of the parties makes available the proceeds of the sale of a property which he or she had acquired before the relationship began" (at 36).

VIII. THE CONSTRUCTIVE TRUST AND UNJUST ENRICHMENT

The principle of unjust enrichment has frequently been suggested by commentators as providing an explanation of cases in which a constructive trust has been allowed. Goff and Jones describe "unjust enrichment" as referring to a "principle of justice which the law recognises and gives effect to" in a range of areas, specifically where the defendant has unjustly gained a benefit at the plaintiff's expense.[54] Availability of a remedy based on unjust

53 Note 21 *supra*, 265.

54 R. Goff & G. Jones, *The Law of Restitution* (1986) (3rd ed) 13, 16. Lord Diplock's observation in *Orakpa* v. *Manson Investments Ltd* [1978] AC 95, 104 that "there is no general doctrine of unjust enrichment recognised in English law" is of course well-known. His Lordship took the view that remedies in English law originated in separate doctrines applying to particular circumstances where the civil law might allow a remedy in unjust enrichment. See also J. Beatson, "Unjust Enrichment in the High Court of Australia" (1988) 104 *LQR* 13, 15.

enrichment has typically been said to require that the defendant has been enriched by receiving a benefit; that the enrichment is at the plaintiff's expense; and that it would be unjust to allow the defendant to retain the benefit in the particular circumstances.[55] In Canada, the principle of unjust es to determine entitlements to property upon the failure of a de facto relationship.[56] In *Muschinski* v. *Dodds*, Deane J. had left open the possibility that a principle of unjust enrichment would ultimately be recognised in Australian law as the basis of the imposition of a constructive trust. His Honour observed that "no such general principle is as yet established, as a basis of decision as distinct from an informative generic label for purposes of classification", which label refers to:

> [t]he notion underlying a variety of distinct categories of case in which the law has recognised an obligation on the part of the defendant to account for a benefit derived at the expense of the plaintiff.[57]

In a different context, in *Pavey & Matthews Pty Ltd.* v. *Paul*,[58] the majority in the High Court (Mason and Wilson JJ. in a joint judgment and Deane J. in a separate judgment) accepted that unjust enrichment provided the justification in principle for the remedy in quantum meruit.[59] Deane J. emphasised the value of the concept of unjust enrichment:

> [i]n the determination, by the ordinary process of legal reasoning, of the question whether the law should, in justice, recognise such an obligation [to make restitution] in a new or developing category of case.[60]

The arguments for recognising a principle of unjust enrichment underlying the quasi-contractual remedy of quantum meruit are not necessarily applicable as a justification for imposing a constructive trust in equity, given the particular history of the quasi-contractual doctrines.

As noted above, Toohey J. in *Baumgartner* accepted the majority's conclusion that a constructive trust arose based upon the appellant's unconscionable conduct in asserting an exclusive beneficial interest in the property. His Honour's alternative reasoning emphasised the value of the principle of unjust enrichment as a basis for imposing a constructive trust (at 36). His Honour referred to the Canadian cases applying the principle of unjust enrichment in matrimonial cases, and cited Dickson J.'s identification of the three elements of unjust enrichment in *Pettkus* v. *Becker*[61] as being the existence of an enrichment, a corresponding deprivation and the absence of a juristic reason for the enrichment. Toohey J. argued that the principle of unjust enrichment as formulated by the Canadian courts had application

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55 Jones, note 50 *supra*, 472; to similar effect *B.P. Exploration Co.* v. *Hunt (No 2)* [1979] 1 WLR 783 *per* Goff J., 789.

56 *Pettkus* v. *Becker* (1980) 117 DLR (3d) 257; see also G.D. Klippert, "Restitutionary Claims for the Appropriation of Property" (1981) 26 *McGill LJ* 506.

57 *Muschinski* v. *Dodds* note 5 *supra*, 617.

58 (1987) 162 CLR 221.

59 *Id.*, *per* Mason & Wilson JJ., 227; *per* Deane J. esp 256-257.

60 *Id.*, 257.

61 *Pettkus* v. *Becker* note 56 *supra*, 273-274.

where the contributions of one party assisted the other to acquire a particular asset, and that such a principle "is as much at ease with the authorities and is as capable of ready and certain application as is the notion of unconscionable conduct" (at 36).

With respect, the reasoning of Toohey J. offers no strong positive basis for adopting the principle of unjust enrichment in explanation of the constructive trust. Although it may be that the principle of unjust enrichment is no less certain than an approach based on the concept of unconscionability, the concept of unconscionability has a basis in equitable principle absent from that of unjust enrichment. Accepting the value of the principle of unjust enrichment in relation to quasi-contractual remedies, and accepting that the authorities do not exclude unjust enrichment as an explanatory principle as to the imposition of a constructive trust, one still requires some reason to adopt that principle instead of or in addition to the concept of unconscionability. It may be that the principle of unjust enrichment appropriately directs the court's attention to "the facts and circumstances surrounding the obtaining or retention of the property in question."[62] It is not self-evident, however, that the principle of unjust enrichment establishes criteria for the analysis of such circumstances which are preferable to the criteria derived from an approach based in unconscionability. If the two principles would lead to the same result on any particular set of facts, adopting reasoning based in unjust enrichment adds additional complexity for no obvious purpose. If the principle of unjust enrichment would lead to a different result from the concept of unconscionability in its application to particular facts, the reasoning of Toohey J. indicates no reason to prefer the result of applying the principle of unjust enrichment.

IX. CONCLUSION

The application of the principles expressed in *Baumgartner* to de facto relationships will be displaced in some circumstances by statute, including the De Facto Relationships Act 1984 (N.S.W.) and the Property Law Amendment Act 1987 (Vic.). Such legislation typically allows the court a broad discretion to 'adjust' property rights, the court being directed to make an order as is 'just and equitable' having regard to considerations including financial and non-financial contributions by the parties, contributions as homemaker or parent, and the financial resources of each of the parties.[63] Certain relationships will fall outside the terms of the applicable statutes and in such cases general equitable principles will continue to apply.

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62 Note 21 *supra*, 279.

63 The NSW legislation is reviewed in R. Chisholm, "De Facto Relationships Legislation in New South Wales" (1987) 1 *Aust J of Fam Law* 87.

Baumgartner develops indications in earlier decision of the High Court of a characteristic approach to equitable principles. The reasoning of the majority defines the circumstances in which a constructive trust will arise in a manner which had been foreshadowed by Deane J. in *Muschinski* v. *Dodds*. At the same time, the approach of the majority reflects patterns of reasoning apparent in the High Court's decision in *Taylor* v. *Johnson* in respect of unilateral mistake, in *CBA* v. *Amadio* in respect of the doctrine of equitable unconscionability, and in *Waltons Stores (Interstate) Ltd.* v. *Maher* in respect of estoppel. The reasoning of Toohey J. supports an approach to constructive trusts based on unjust enrichment. It is, however, by no means clear that reasoning based on unjust enrichment would lead to different results in any particular fact situation than would reasoning based in unconscionability, nor is it clear that an analysis based in unjust enrichment offers a better definition of the relevant criteria for imposing a trust than analysis founded in unconscionability.

Baumgartner is not without interest as an example of the balancing of competing considerations of policy and principle in defining the scope of equitable proprietary remedies impacting upon property rights. The imposition of constructive trusts has required the courts to balance the respect for legal property rights, the interest of certainty in the law, and equity's concern to provide a remedy against unconscionable conduct and specifically against the unconscionable assertion of a legal right. The imposition of a constructive trust may have significant implications for third parties other than a bona fide purchaser of the legal title for value without notice of the circumstances giving rise to a trust. The High Court's recognition of a discretion as to the point of time at which a constructive trust arises is directed to limiting the prejudice to third parties resulting from the recognition of a trust.

The ability of parties to plan their affairs and of legal advisers to identify the possible consequences of particular actions depends upon the development of the law according to principles which have a general application and are capable of being expressed with a degree of certainty.[64] In the writer's view, the principles derived from *Baumgartner* are sufficiently certain for these purposes. It is suggested that the concept of unconscionability — despite some uncertainty as to its outer margins — and the limits to the circumstances giving rise to an equitable interest upon the failure of a joint endeavour will restrict the circumstances giving rise to a constructive trust, provided that first instance and intermediate appellate courts apply the reasoning of *Baumgartner* with regard to the limits of reasoning by analogy. To that extent, the High Court's constructive trust is distinguishable from Lord Denning's earlier vision of a "constructive trust of a new model".

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64 Oakley, note 3 *supra*, 7-8, 28.