DOING THE SAME WORK?
ESTOPPEL BY CONVENTION AND FAILURE OF BASIS

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There are obvious similarities between claims asserting an estoppel by convention and unjust enrichment claims where a failure of basis is alleged. Despite this, the relationship between the two is largely unexplored. This article seeks to fill that gap. It explicates the elements of, and issues arising in relation to estoppel by convention and failure of basis, then elucidates the areas of overlap between the two, the areas where there is none, and the consequences of each.

CONTENTS

I INTRODUCTION

There are obvious similarities between claims asserting an estoppel by convention and claims in the category of unjust enrichment where a failure of basis is alleged. The first prevents a party from departing from an assumption which formed the conventional basis of the party's relations with another party. The second restores to a party a benefit transferred by that party to another on a basis which has failed. Despite these similarities, the relationship between estoppel by convention and failure of basis is largely unexplored. While some work has been done to consider the relationship between unjust enrichment and estoppel generally, that between failure of basis and estoppel by convention in particular is, with one exception, entirely unexplored.[1] This article seeks to fill that gap. It will elucidate the areas of overlap between estoppel by convention and failure of basis, the areas where there is no overlap, and the consequences of each.

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[1] In relation to estoppel and unjust enrichment generally, see: Ben McFarlane, 'Case Note: *Blue Haven Enterprises Ltd v Tully & Another*' (2006) 1 *J Eq* 156. In relation to (inter alia) estoppel by convention and failure of basis, see: Elise Bant and Michael Bryan 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35 *OJLS* 427, 447-8; Elise Bant, 'Unravelling Fraud in the Wake of *Hayward v Zurich Insurance*' [2018] *LMCLQ* 91.

The article is in three parts. Part I considers estoppel by convention by reference to its location in the law and its elements. The part then addresses various issues in relation to those elements, as well as the scope and function of the estoppel. Part II considers failure of basis, likewise, by reference to its location in the law and its elements. It also addresses various issues arising in relation to this unjust factor. Part III then compares the two. The part first considers the significant areas of overlap between estoppel by convention and failure of basis. It then considers how the two are different, reflecting on whether the differences are real or apparent. The part then considers the consequences of these similarities and differences for the coherence of the law generally.

The article concludes that estoppel by convention and failure of basis do the same work where there has been the transfer of a benefit by the plaintiff to the defendant and the relief sought by the plaintiff is restitution of that benefit. In this – significant – area of overlap, both *reverse unjust enrichment*. Accordingly, for the coherence of the law, where estoppel by convention and failure of basis overlap, they should be understood and applied in the same way. The article concludes that estoppel by convention does work which failure of basis cannot do, where there has been no transfer of a benefit by the plaintiff to the defendant, so the defendant is not enriched. However, given the significant overlap between estoppel by convention and failure of basis, it is helpful to understand the estoppel in these cases as *preventing unjust enrichment*. For the coherence of the law, then, even in these cases outside the area of overlap, estoppel by convention should be understood and applied in the same way as failure of basis.

II PART I: ESTOPPEL BY CONVENTION

Estoppel by convention is a separate species of estoppel.[2] Its origins are in the common law, not equity.[3] In England, however, it is increasingly understood as having left those origins behind, given the recent influence of equity, and to be another species of equitable estoppel, in which the unconscionability criterion

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[2] *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (2015) 329 ALR 1, [768]; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [35], [41]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [117]; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 587, 591.
[3] *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 105-6; *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39, [71]; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 320-1; *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [30]; *Rae & Partners Pty v Shaw* [2020] TASFC 14, [156]-[159]; Elizabeth Cooke, *The Modern Law of Estoppel* (2000) 29; T Brettel Dawson, 'Estoppel and Obligation: the Modern Role of Estoppel by Convention' (1989) 9 *Legal Stud* 16; Rory Derham, 'Estoppel by Convention – Part I' (1997) 71 *Aust LJ* 860, 860; Rory Derham, 'Estoppel by Convention – Part II' (1997) *Australian Law Journal* 976, 981; PLG Brereton, 'Equitable Estoppel in Australia: the Court of Conscience in the Antipodes' (2007) 81 *ALJ* 638, 644; Kristina Bunting, 'Estoppel by Convention and Pre-Contractual Understandings: the Position and Practical Consequences' (2011) 42 *Vic Uni Wellington L Rev* 511 (**Bunting**) 518.

applies.[4] In Australia, in the High Court decision in *Legione v Hateley*, Justices Mason and Deane sought to classify the various species of estoppel.[5] By that classification, there are three families of estoppel: estoppel by deed, estoppel by record and estoppel in pais.[6] The third consists of an equitable genus and a common law genus. The former comprises promissory and proprietary estoppel and the latter estoppel by convention.[7] Some courts and commentators suggest that estoppel by convention evolved from, or by analogy with estoppel by deed,[8] such that estoppel by deed is properly understood as a sub-species of estoppel by convention.[9] The same courts and commentators also treat estoppel by convention as a species of 'estoppel by representation'.[10] There is, of course, raging debate about the proper classification of estoppels, in Australia and beyond. For now, at least as a matter of authority in Australia, there is no overarching doctrine of estoppel.[11] The *Legione* classification still applies. Accordingly, estoppel by convention continues to exist as a common law species of estoppel.[12]

Estoppel by convention is traditionally described as follows: 'When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each

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[4] *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351-2; *John v George* [1996] 1 EGLR 7, 13; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 27,605, [335]; *Tinkler v Commissioners for HM Revenue and Customs* [2021] UKSC 39, [28]. See also: *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* (2014) 253 CLR 560, [152]; Cooke (n 3) 31; Matthew Harvey, 'Estoppel by Convention – an Old Doctrine with New Potential' (1995) 23 *ABLR* 45, 46; Ray Mulholland, 'Estoppel by Convention' [2002] *NZLJ* 395, 396; Jonathan Seitler, 'Estoppel by Convention' (2017) *The Estates Gazette* 74, 74-5; Jessica Hudson, 'The Price of Coherence in Estoppels' (2017) 39 *Sydney LRev* 1.

[5] *Legione v Hateley* (1982) 152 CLR 406, 430-1. See also: *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [30]; *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [114]-[153]. Cf Derham – Part I (n 3) 863.

[6] Estoppel in pais - 'in the country' – means without writing or legal proceedings, so by conduct: *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [144].

[7] Alec Leopold, 'The Elements of Estoppel' (1991) 7 *Building and Construction Law* 248, 265-7; Hudson (n 4) 4-9.

[8] KR Handley, *Estoppel by Conduct and Election* (2nd edn 2016) [8-002]; K Lindgren, 'Estoppel Against Enforcing a Contract According to its Correct Construction' (2012) 6 *J Eq* 144.

[9] *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [114]-[153]; Alexander Turner, *Spencer Bower and Turner: The Law Relating to Estoppel by Representation* (3rd edn, 1977) (**Spencer Bower**)) [161], [171]-[174]; Brettel Dawson (n 3) 32; Derham – Part I (n 3) 30-1.

[10] *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [114]-[153]; Spencer Bower (n 9) [161], [171]-[174]; Handley (n 8) [8-001]; Cooke (n 3) 31-2.

[11] *Giumelli v Giumelli* (1999) 196 CLR 101, [7]; *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [114]-[153]; *Sidhu v Van Dyke* (2014) 251 CLR 505, [1]; *Miller Heiman Pty Ltd v Sales Principles Pty Ltd* (2017) 94 NSWLR 500, [42]; *Rae & Partners Pty v Shaw* [2020] TASFC 14, [152]-[159]; Derham – Part II (n 3) 983; Brereton (n 3) 643; Bant & Bryan (n 1) 428. Cf *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394. The position appears to be the same in the UK: Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation and Estoppel* (2012).

[12] Leopold (n 8) 265-6; Derham – Part II (n 3) 981-4; Lindgren (n 8); Bant & Bryan (n 1) 428. Cf Bunting (n 3) 519 (unclear, given, e.g., *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 27,605, [322]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, [34], [577], in which the question was left open).

will be estopped against the other from questioning the truth of the statement of facts so assumed'.[13]

The first reference to 'convention' as determinative of the parties' rights and obligations appears to have occurred in the English case of *M'Cance v London & Northwestern Railway Co*, decided in 1864.[14] In Australia, in *Dabbs v Seaman*, decided in 1925, there are references to 'a conventional state of facts' and 'the very basis of the transaction'.[15] Since these early references, the elements of estoppel by convention have evolved but not entirely bedded down. There are some differences across jurisdictions. In England, a modern statement of estoppel by convention and its elements is found in *HM Revenue v Benchdollar.*[16] This statement includes the unconscionability criterion, which is important in the context of equitable species of estoppel. Leading statements of the elements of estoppel by convention by courts in New Zealand,[17] and Canada,[18] are different again.

The primary focus of this article is the law in Australia. The elements of estoppel by convention, as part of estoppel in pais generally, were first definitively

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[13] Spencer Bower (n 9) [157]. This oft-cited statement has been described as an illustration of the estoppel rather than a definition: *Hamel-Smith v Pycroft & Jetsave Ltd* (unreported, 5 February 1987, Peter Gibson J) 21; *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351-2; Bunting (n 3) 513.

[14] *M'Cance v London and Northwestern Railway Co* (1864) 7 H&N 477. See also: *Horton v Westminster Improvement Commissioners* (1852) 7 Ex 780; Cooke (n 3) 29-30; Joel Nitikman, 'Estoppel by Convention: Does the Truth Matter?' (2021) 79 *The Advocate* 179, 183.

[15] *Dabbs v Seaman* (1925) 36 CLR 538, 548-50. See also, in Australia: *Thompson v Palmer* (1933) 49 CLR 507, 547 and *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641, 674-6, per Dixon J, discussing estoppel in pais generally, who described the object of the estoppel as being to prevent the unjust departure of a person from an assumption 'adopted by convention as the basis of some act or omission'. In England, see also: *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, in which the rebirth of estoppel by convention in that jurisdiction began.

[16] Justice Briggs enumerated five elements: (i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it. (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. (iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties. (v) Some detriment must thereby have been suffered by the person alleging the estoppel or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position: *Revenue and Customs Commissioner v Benchdollar* [2010] 1 All ER 174, [52]. This statement has been applied on numerous occasions since. See for example: *ABN Amro Bank NV v Royal and Sun Alliance Insurance plc* [2021] EWCA Civ 1789. Cf *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49]. In *Blindley Heath Investments Ltd v Bass* [2017] Ch 389, [91], it was decided that the first element should be amended to include that 'crossing of the line between the parties may consist either of words or conduct from which the necessary sharing can properly be inferred'. With that amendment, this statement of the elements of the estoppel was recently approved by the UK Supreme Court in *Tinkler v Commissioners for HM Revenue and Customs* [2021] UKSC 39, [53], [84], [92].

[17] *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548, 550. See: Mulholland (n 4) 396; Bunting (n 3) 515.

[18] *Ryan v Moore* (2005) SCC 38, [59]; Nitikman (n 14) 179-80.

stated by Dixon J in *Thompson v Palmer* and *Grundt v Great Boulder Proprietary Gold Mines Ltd.*[19] His Honour referred to the need for a common assumption regarding an agreed state of affairs, which is adopted by the parties as the conventional basis of their dealings. He alluded to the defendant as having some responsibility for the assumption. And he required that the plaintiff relied on the assumption, such that the plaintiff would suffer detriment if the defendant departed from the assumption. His Honour concluded that, where these elements were present, departure from the assumption would be unjust.

A modern statement of the elements of estoppel by convention in Australian law is found in *Waterman v Gerling.*[20] Justice Brereton's list is more pared back than its English counterpart. His Honour identified just three (or four) elements which it is necessary for the plaintiff to establish:[21]

> (i) that it has adopted an assumption as to the terms of its legal relationship with the defendant;
> (ii) that the defendant has adopted the same assumption; and
> (iii) that both parties have conducted their relationship on the basis of that mutual assumption. It is inherent in the idea of a mutually agreed or assumed convention that each party knew or intended that the other act on that basis.

Brereton J added: 'And it seems that a conventional estoppel will not arise unless departure from the assumption will occasion detriment to the plaintiff'.[22] This statement has been adopted and applied repeatedly by intermediate courts in Australia.[23] However, there is a competing line of authority. Some Australian cases adopt the approach taken in New Zealand, where a more prescriptive list of six or seven elements is used.[24] This approach, like that in England, introduces the

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[19] *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641, 674-6.
[20] *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300.
[21] *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 322.
[22] *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 322.
[23] See for example: *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39, [72]; *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [32]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, [573]-[574]; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 27,605, [330]; *Sze Tu v Lowe* (2014) 89 NSWLR 317, [431]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (2015) 329 ALR 1, [760]; *AAP Engineering Pty Ltd v Fernlog Pty Ltd* [2017] NSWDC 141, [50]; *Klein v Lyster* [2017] WASC 368, [69]; *Webster v Strang* [2018] NSWSC 495, [253]; *Re Jobema Pty Ltd* [2018] NSWSC 856, [25]; *Gupta v Fordham Laboratories Pty Ltd* [2018] NSWSC 551, [200]-[201]; *Anthony v Morton* [2018] NSWSC 1884, [494]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [100].
[24] For example, in *Outback Energy Hunter Pty Ltd v New Standard Energy PEL 570 Pty Ltd* [2018] SASC 8, [269] Blue J stated the elements of estoppel by convention as follows: (i) The parties proceed on the basis of an assumption of fact and/or law capable of forming the foundation of the remaining elements. (ii) Each party, from the perspective of the other, accepts the assumption as true for the purpose of the transaction in question. (iii) Such acceptance is intended to govern the legal position between the parties. (iv) The proponent takes or omits to take action and is entitled to so act in reliance upon the assumption.

unconscionability criterion. But for now, the dominant line of authority appears to be that which follows *Waterman*.

Despite the differences between these lines of authority, and approaches in other jurisdictions, there is a good deal of overlap between the various statements of the elements of estoppel by convention. The essence of the estoppel is, therefore, relatively well-settled. However, there are many difficult issues surrounding the estoppel. Many of these bear upon the relationship of estoppel by convention with failure of basis. We turn to these issues now.

A Questions In Relation to Estoppel By Convention

What follows considers various questions which arise in relation to estoppel by convention. It will be seen that, for many, corresponding questions arise in relation to failure of basis.

1 What is the nature of the parties' common assumption? How is it adopted as the conventional basis of their relations?

It is well settled that the assumption, adopted by the parties as to the terms of their relationship, must be common to the parties, in the sense of mutual and bilateral.[25] It is this common assumption which is the distinguishing characteristic of estoppel by convention.[26] Effectively, there must be consensus,[27] or agreement between the parties evidencing a coincidence of states of mind – a 'meeting of the minds'.[28] However, no representation, by the defendant to the plaintiff, and no promise, is

(v) The other party knows that the proponent is so acting. (vi) The proponent would suffer detriment if the other party were permitted to depart from the assumption. (vii) It would be unconscionable for the other party to depart from the assumption. See: *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548, 550; *Helmich and Taylor v Thorp and Strathdee* [1997] 3 NZLR 86, 92. See also: *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 106; *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594, [27]; *PG Kazis Nominees Pty Ltd v Bakers II Pty Ltd* [2018] SADC 48, [70]; *Manassen Holdings Pty Ltd v Commercial & General Corporation Pty Ltd* [2019] SASC 171, [259].

[25] Handley (n 8) [8-001]; Cooke (n 3) 31; Brettel Dawson (n 3) 38; Mulholland (n 4) 395; Brereton (n 3) 645; Trevor Thomas, 'Contract: what Contract?' (2010) 26 *BCL* 304, 309, 311; Bunting (n 3) 516; Lindgren (n 8); Bant & Bryan (n 1) 447.

[26] See e.g.: *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641, 674-6; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 584, 587, 591; *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158, 164-8; *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985) 160 CLR 226, 244-5; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 321; *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [31]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [194]; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 27,605, [331]; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, [68]; *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [106]; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49].

[27] Derham – Part I (n 3) 863.

[28] *Troop v Gibson* [1986] 1 EGLR 1, 5; *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351-2; Brettel Dawson (n 3) 38; Derham – Part II (n 3) 976-7.

required.[29] The assumption need not be express. It can be implied from words or conduct – even silence – such as a course of dealing, or other surrounding circumstances.[30] The assumption need not have contractual force or effect.[31] It may be an informal understanding.[32] The assumption must also be clear and unambiguous.[33] Both the fact of a common assumption and its scope must be clear.[34] Without clarity of scope, it is impossible to determine whether the defendant has departed from the assumption.[35] One case has suggested that it will seldom suffice for the assumption to be less than unequivocal.[36] But other cases accept that an assumption which is less than unequivocal may suffice.[37] The assumption must also be reasonably formed.[38] Otherwise, the plaintiff may be a risk-taker.[39]

The assumption must form the conventional basis of the parties' relations.[40] This means that the assumption must be integrated into their relations – incorporated into their transaction.[41] It must be an operative factor in those relations and be acted upon by one or both parties. There must be some 'reliance in the mind' on the assumption.[42] And that reliance must be reasonable.[43] An 'a factor' test should be applied, so that if the assumption is 'an operative factor' in the minds of the parties, that is enough.[44] The assumption must be adopted, at least, 'clearly enough[45]' – some cases suggest 'unequivocally'.[46] And the adoption must be proved as a matter of fact.[47] The means by which the assumption is adopted is irrelevant. It may be done expressly, or by inference. Where a document evidences the assumption, whether it has been adopted by the parties as the conventional basis

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[29] *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985) 160 CLR 226, 244-5; Brettel Dawson (n 3) 31.
[30] *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 326; *Prime Sight Ltd v Lavarello* [2013] 4 All ER 659, [29]; *Anthony v Morton* [2018] NSWSC 1884, [509]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [111]; Brettel Dawson (n 3) 39; Brereton (n 3) 646.
[31] Harvey (n 4) 46.
[32] *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194, [30].
[33] *Dabbs v Seaman* (1925) 36 CLR 538, 548-50; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 326-7; Brettel Dawson (n 3) 32; Brereton (n 3) 646.
[34] Brereton (n 3) 646.
[35] *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 326-7.
[36] *Troop v Gibson* [1986] 1 EGLR 1, 6.
[37] See Brereton (n 3) 646.
[38] Brettel Dawson (n 3) 40 ('credible, current, and made on reasonable grounds'); Leopold (n 8) 265.
[39] Leopold (n 8) 259.
[40] *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985) 160 CLR 226, 244-5; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 321.
[41] *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)* [1985] 2 Lloyd's Rep 28, 34-5; Brettel Dawson (n 3) 34; Thomas (n 25) 311-2.
[42] Elise Bant, 'Causation and Scope of Liability in Unjust Enrichment' [2009] *Restitution LRev* 60, 62.
[43] Leopold (n 8) 259; Bant & Bryan (n 1) 440-8; Hudson (n 4) 17.
[44] Bant (n 42) 63; Brettel Dawson (n 3) 41.
[45] Spencer Bower (n 9) [163]; Derham – Part II (n 3) 981.
[46] *Queensland Independent Wholesalers v Coutts Townsville Pty Ltd* [1989] Qd R 40, 46; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [101], [111]; Derham – Part II (n 3) 981.
[47] *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [128]; Spencer Bower (n 9) [163]; Hudson (n 4) 20.

of their relations is a question of construction of that document.[48]

How the conventional basis of the parties' relations is determined is a matter for the Court, and it is a question of interpretation of all relevant facts and circumstances. The interpretation exercise is not unlike contractual interpretation.[49]

2 Must the assumption be expressly shared?

The assumption must be common to the parties. There must be no cross-purposes.[50] But it is not enough that one party makes the assumption and then, separately and independently, the other makes the same assumption.[51] It is said that there must be something which 'crosses the line' between the parties.[52] However, this is not a requirement of inducement by the defendant of the plaintiff. Instead, it is a requirement that the assumption be shared.[53] This means that the assumption is communicated between the parties.[54] The communication may be express but it can also be inferred – from conduct, including silence.[55] There need be no words.[56] The key is that the assumption is not just privately assumed by the plaintiff or the defendant, unilaterally.[57] In *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd ('The August Leonhardt')*, Kerr LJ explained that the requirement that

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[48] Spencer Bower (n 9) [163].
[49] *Dabbs v Seaman* (1925) 36 CLR 538, 548-50; *Troop v Gibson* [1986] 1 EGLR 1, 3; Derham – Part II (n 3) 977.
[50] *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)* [1985] 2 Lloyd's Rep 28, 34-5; Brettel Dawson (n 3) 40; Derham – Part II (n 3) 976-7.
[51] *Republic of India v Indian Steamship Co Ltd (No. 2) (The Indian Endurance)* [1998] AC 878, 913; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [45]; *Outback Energy Hunter Pty Ltd v New Standard Energy PEL 570 Pty Ltd* [2018] SASC 8, [270]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [100]; *Manassen Holdings Pty Ltd v Commercial & General Corporation Pty Ltd* [2019] SASC 171, [259]; Wilken (n 11) [10.09]; Lindgren (n 8); Bant & Bryan (n 1) 447.
[52] *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)* [1985] 2 Lloyd's Rep 28, 34-5; *Republic of India v Indian Steamship Co Ltd (No. 2) (The Indian Endurance)* [1998] AC 878, 913; Wilken (n 11) [10.09]; Brettel Dawson (n 3) 41; Derham – Part II (n 3) 977.
[53] *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158, 176; *Queensland Independent Wholesalers v Coutts Townsville Pty Ltd* [1989] Qd R 40, 46; *John v George* [1996] 1 EGLR 7, 11, 13; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49]; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [44]-[45], [96]; *Anthony v Morton* [2018] NSWSC 1884, [495]-[500]; Wilken (n 11) [10.09]; Handley (n 8) [8-012]; Brettel Dawson (n 3) 38. Cf *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 584.
[54] *John v George* [1996] 1 EGLR 7, 13; *Republic of India v Indian Steamship Co Ltd (No. 2) (The Indian Endurance)* [1998] AC 878, 913; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49]; Bant & Bryan (n 1) 447.
[55] *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158, 167; *Queensland Independent Wholesalers v Coutts Townsville Pty Ltd* [1989] Qd R 40, 46; *Republic of India v Indian Steamship Co Ltd (No. 2) (The Indian Endurance)* [1998] AC 878, 913; *Rae & Partners Pty v Shaw* [2020] TASFC 14, [140]-[143]; Cooke (n 3) 31; Derham – Part II (n 3) 979; Seitler (n 4) 74-5. Cf Wilken (n 11) [10.09].
[56] Handley (n 8) [8-011]; Derham – Part II (n 3) 979; Seitler (n 4) 74-5.
[57] *Queensland Independent Wholesalers v Coutts Townsville Pty Ltd* [1989] Qd R 40, 46; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [45]; Derham – Part II (n 3) 977.

something 'cross the line' between the parties is not particularly onerous.[58] Some mutually manifest conduct, evident to both parties, will suffice.[59] And in *Republic of India v India Steamship Co Ltd (No. 2) ('The Indian Endurance')*, Lord Steyn said that it is sufficient that the assumption is made by one and acquiesced in by the other.[60]

3 Do courts adopt an objective or subjective approach?

Will a plaintiff asserting an estoppel by convention need to give evidence of their actual state of mind, or will it suffice to lead evidence of objective matters demonstrating what the parties' states of mind must have been? The better view appears to be that these are objective questions.[61] For example, in *Rae & Partners Pty Ltd v Shaw*, it was said that there is no requirement that the parties gave any real thought or due consideration to the alleged assumption or its adoption. The relevant states of mind need not have been subjectively held.[62] However, this is not beyond doubt. In *Hiscox v Outhwaite*, it was said that there can be no estoppel if the assumption, or its adoption, did not 'cross [the parties'] minds', or if they never 'took any view' or 'formed any apprehension'.[63] A handful of other cases, likewise, have required that the common assumption be subjectively held.[64]

4 Is there any requirement that the plaintiff is not a risk-taker?

Arguably, it is an implicit requirement of an estoppel by convention that the plaintiff is not a risk-taker.[65] But care is needed in the analysis of risk-taking in this context, just as it is in relation to failure of basis. Bant argues that the expression and content of any such requirement should be mediated through the objective

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[58] *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)* [1985] 2 Lloyd's Rep 28, 34-5. See also *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158, 167.

[59] *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)* [1985] 2 Lloyd's Rep 28, 34-5. See also: *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158, 167; *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 349-50; *Bank of Scotland v Wright* [1991] BCLC 244, 261-3; *Rae & Partners Pty v Shaw* [2020] TASFC 14, [140]-[143]; Wilken (n 11) [10.09]; Handley (n 8) [8-011]; Brettel Dawson (n 3) 45; Derham – Part II (n 3) 977. Cf *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641, 674-6; *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [32]; *Anthony v Morton* [2018] NSWSC 1884, [497].

[60] *Republic of India v Indian Steamship Co Ltd (No. 2) (The Indian Endurance)* [1998] AC 878, 913. See also: *Queensland Independent Wholesalers v Coutts Townsville Pty Ltd* [1989] Qd R 40, 46; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [100]; *Manassen Holdings Pty Ltd v Commercial & General Corporation Pty Ltd* [2019] SASC 171, [273]; *Rae & Partners Pty v Shaw* [2020] TASFC 14, [140]-[143]; Seitler (n 4) 74-5.

[61] *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [34]-[36]; Bant & Bryan (n 1) 448.

[62] *Rae & Partners Pty v Shaw* [2020] TASFC 14, [122], [125].

[63] *Hiscox v Outhwaite* [1991] 3 All ER 124, 142.

[64] *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [45]. See also Mulholland (n 4) 395 ('the states of mind of both parties are highly relevant').

[65] Bant & Bryan (n 1) 447-8.

standard of reasonable reliance. Otherwise, to say that the plaintiff 'is a risk-taker' is merely to assert a conclusion.[66]

5 *Must the assumption be as to facts not law, and presently existing matters, not the future?*

There is High Court authority that an assumption adopted as the conventional basis of the parties' relations must be of fact, not law.[67] However, this is doubtful, as earlier High Court cases insisted on no such requirement.[68] And in cases since, Australian intermediate courts have almost universally accepted that the assumption may be as to fact or law.[69] Likewise, in England, *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* did not exclude assumptions of law,[70] and later cases recognise both assumptions as to law and fact as sufficient to give rise to an estoppel by convention.[71] However, not every assumption as to law will suffice. The assumption cannot be as to the general law.[72] It must be as to the parties' private legal rights, the existence or meaning of any contract between them, or its legal effect.[73] The justification for this limitation is

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[66] Bant & Bryan (n 1) 433.

[67] *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1985) 160 CLR 226, 244-5. See also Spencer Bower (n 9) [166]; Brettel Dawson (n 3) 33; Thomas (n 25) 310-11.

[68] *Thompson v Palmer* (1933) 49 CLR 507; *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641, 674-6; *Legione v Hateley* (1982) 152 CLR 406, 430-1.

[69] See e.g.: *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175, 188; *Government Employees Superannuation Board v Martin* (1997) 19 WAR 224, 243-4; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 105-7; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 321; *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39, [73]; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194, [112]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [194]; *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [31]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (2015) 329 ALR 1, [759]; *AAP Engineering Pty Ltd v Fernlog Pty Ltd* [2017] NSWDC 141, [46]-[50]; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [69]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [100]; *Manassen Holdings Pty Ltd v Commercial & General Corporation Pty Ltd* [2019] SASC 171, [268]; *Rae & Partners Pty v Shaw* [2020] TASFC 14, [53]-[85]. Also: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; Handley (n 8) [8-013]; Derham – Part I (n 3) 865; Brereton (n 3) 645; Thomas (n 25) 310-11; Bunting (n 3) 516-7; Lindgren (n 8).

[70] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577; Brettel Dawson (n 3) 38-9; Derham – Part I (n 3) 866.

[71] See e.g.: *Keen v Holland* [1984] 1 All ER 75, 81-2; *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351-2; *Bank of Scotland v Wright* [1991] BCLC 244, 263; *Kenneth Allison Ltd v AE Limehouse & Co* [1991] 4 All ER 500, 514; *Republic of India v Indian Steamship Co Ltd (No. 2) (The Indian Endurance)* [1998] AC 878, 913; *PW & Co v Milton Gate Investments Ltd* [2003] 3 EGLR 103, [173]; *Prime Sight Ltd v Lavarello* [2013] 4 All ER 659, [29]; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49]; Wilken (n 11) [10.02]; Handley (n 8) [8-006]; Cooke (n 3) 31.

[72] Handley (n 8) [8-010].

[73] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 584; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [69]; Handley (n 8) [8-010]; Lindgren (n 8); Bant & Bryan (n 1) 448.

that estoppel by convention can only do what contract can do.[74]

As to whether the assumption may relate to the future, as well as presently existing fact or law, on authority, the answer is no.[75] Estoppel by convention does not apply to promises as to the future.[76] This is the domain of promissory estoppel. An assumption about a future matter, something which depends on probability, possibility, or hope – in other words, an assumption involving an element of risk – will not give rise to a conventional estoppel. This is one feature of estoppel by convention which distinguishes it from failure of basis. However, leaving aside authority, there are real questions around whether this limitation is justifiable.[77]

6 Can pre-contractual negotiations give rise to an estoppel by convention?

In Australia, the parties' pre-contractual negotiations can give rise to a conventional estoppel – probably. There are competing lines of authority.[78]

On the one hand, *Whittet v State Bank of NSW*, and cases following it, hold that a court may have regard to evidence of pre-contractual negotiations to find an estoppel by convention, if that evidence is 'clear and convincing'.[79] This is the same test as is used in relation to the rectification of a contract. These cases reason that, essentially, such evidence is not inadmissible by virtue of the parol evidence rule because that rule only excludes evidence which is adduced to subtract from, add to, vary, or contradict the express terms of a contract. But an estoppel by convention does not do any of these things.[80] It has also been said that, insofar as conventional estoppel is a species of equitable estoppel, it is unaffected by the common law parol evidence rule.[81] Accordingly, evidence of pre-contractual negotiations, the contract

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[74] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 584; *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175, 188-9; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (2015) 329 ALR 1, [759].

[75] *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175, 188; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194, [117]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (2015) 329 ALR 1, [762]-[763]; *Rolleston Coal Holdings Pty Ltd v ICRA Rolleston Pty Ltd* [2020] QSC 352, [102].

[76] *Greer v Kettle* [1938] AC 156; *Scottish & Newcastle plc v Lancashire Mortgage Corporation Ltd* [2007] EWCA Civ 684, [61]-[62]; Spencer Bower (n 9) [166]; Wilken (n 11) [10.02]; Brettel Dawson (n 3) 33; Derham – Part II (n 3) 982.

[77] Bant & Bryan (n 1) 447-8.

[78] Harvey (n 4) 48-50; Derham – Part I (n 3) 867-71; Bunting (n 3) 527-32; Lindgren (n 8); David McLauchlan, 'The Continuing Confusion and Uncertainty Over the Relevance of Actual Mutual Intention in Contract Interpretation' (2021) 37 *Journal of Contract Law* 25, 28-9.

[79] *Queensland Independent Wholesalers v Coutts Townsville Pty Ltd* [1989] Qd R 40, 46; *Whittet v State Bank of NSW* (1991) 24 NSWLR 146, 151-4; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194, [113]-[116]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [214], [227] (question left open but assumed without decision); *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, [577]; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 27,605, [333]-[336]; Harvey (n 4) 48-50.

[80] Bunting (n 3) 529.

[81] *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, [34]; Lindgren (n 8).

itself, and conduct subsequent to the contract, is all admissible in the search for an estoppel by convention.

On the other hand, *Johnson Matthey Ltd v AC Rochester Overseas Corp*, and the cases following it, hold, based on the parol evidence rule, that pre-contractual negotiations are inadmissible to prove a conventional estoppel – at least where those negotiations result in a written contract.[82]

The *Whittet* line of authority appears now to be in the ascendancy. It reflects the position in other jurisdictions, including England and New Zealand, where estoppel by convention is regarded as being outside the exclusionary parol evidence rule.[83]

It should be added that the parties need not be in a contractual relationship for a conventional estoppel to arise. The convention need not be contractual.[84] It can arise from a course of dealing or even ad hoc.[85]

7 Must the defendant have induced the plaintiff to adopt the assumption?

The earliest Australian cases apparently required that the defendant played some role in the plaintiff's adoption of the parties' common assumption. For example, in *Thompson v Palmer*, Dixon J referred to 'the part taken by [the defendant] in occasioning the adoption' of the assumption.[86] Likewise, but more recently, in *Coghlan v Lock,* McHugh JA required that the defendant 'contributed to or occasioned' the plaintiff's adoption of the assumption, 'induced' that assumption, or 'actively contributed' to it.[87]

However, in *Thompson,* Dixon J was considering estoppel in pais generally and, having said that whether departure from a common assumption is unjust depends on the part taken by the defendant in occasioning its adoption, went on to say, specifically in relation to estoppel by convention, that the defendant 'may be required to abide by the assumption because it formed the conventional basis upon

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[82] *Johnson Matthey Ltd v AC Rochester Overseas Corp* (1990) 23 NSWLR 190, 195; *Skywest Aviation Pty Ltd v Commonwealth of Australia* (1995) 126 FLR 61, 104-5; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 322. See also: Wilken (n 11) [10.09]; Harvey (n 4) 48-50; Bunting (n 3) 529-31.

[83] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 4 All ER 677, [42], [47]; *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, [73]; Bunting (n 3) 527-32; Handley (n 8) [8-013].

[84] *Troop v Gibson* [1986] 1 EGLR 1, 3; *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351-2; *Prime Sight Ltd v Lavarello* [2013] 4 All ER 659, [30]; *Tinkler v Commissioners for HM Revenue and Customs* [2021] UKSC 39, [78]; Spencer Bower (n 9) [158]; Handley (n 8) [8-001]; Mulholland (n 4) 396.

[85] *Keen v Holland* [1984] 1 All ER 75, 81-2; *Queensland Independent Wholesalers v Coutts Townsville Pty Ltd* [1989] Qd R 40, 46; *PW & Co v Milton Gate Investments Ltd* [2003] 3 EGLR 103, [165]; *Revenue and Customs Commissioner v Benchdollar* [2010] 1 All ER 174, [50]; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49].

[86] *Thompson v Palmer* (1933) 49 CLR 507, 547

[87] *Coghlan v SH Lock (Australia) Ltd* (1985) 4 NSWLR 158, 176; Leopold (n 8) 266.

which the parties entered into contractual or other mutual relations'.[88] Further, modern cases expressly negative any requirement that the defendant induced or encouraged the plaintiff's adoption of the assumption.[89] According to these cases, the defendant need not be the source of the assumption.[90]

They do suggest, however, that the defendant must have been 'an influence', 'a reason' or 'a consideration' in the adoption of the assumption by the plaintiff.[91] These suggestions may best be viewed as going to the requirement that something 'cross the line' between the parties, in the assumption's adoption, or that – so far as different – the assumption be shared. It is in the context of discussion of the requirement that something cross the line between the parties that English cases consider what role in the plaintiff's adoption of the assumption the defendant must play.[92] It has been said that the defendant must 'contribute in some active way'.[93] But more recent authority, by reference to *Texas Bank*, holds that this requirement is really a requirement that the assumption be shared.[94]

8 What detriment must the plaintiff suffer?

The cases make clear that detriment is an indispensable element of estoppel by convention.[95] However, it does not provide the normative foundation for this species of estoppel, as it may do for equitable estoppels.[96]

The detriment element has two aspects. The first is that, in reliance on the parties' assumption, the plaintiff must change its position.[97] The second is that the plaintiff would suffer detriment if the defendant departed from the assumption.[98]

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[88] *Thompson v Palmer* (1933) 49 CLR 507, 547; Derham – Part II (n 3) 978, 984.
[89] *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [37]; *Anthony v Morton* [2018] NSWSC 1884, [501]-[509]. See also: Wilken (n 11) [10.01 fn 6]; Handley (n 8) [8-014]; Brereton (n 3) 647. Cf Cooke (n 3) 80 ('encouraged').
[90] Derham – Part II (n 3) 984.
[91] Bant (n 42) 63; Handley (n 8) [8-014]; Derham – Part II (n 3) 984.
[92] See e.g.: *K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The August Leonhardt)* [1985] 2 Lloyd's Rep 28, 34-5; *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 349-50; *Bank of Scotland v Wright* [1991] BCLC 244, 261-3; *Kenneth Allison Ltd v AE Limehouse & Co* [1991] 4 All ER 500, 514.
[93] *Bank of Scotland v Wright* [1991] BCLC 244, 261.
[94] *John v George* [1996] 1 EGLR 7, 11 (cf 14-5).
[95] See e.g.: *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641, 674-6; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 104, 105-7; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 328; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [202]-[203]; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [70]-[72], [96]-[97]; Lindgren (n 8).
[96] Cf Hudson (n 4).
[97] Derham – Part II (n 3) 985; Seitler (n 4) 74-5.
[98] *Thompson v Palmer* (1933) 49 CLR 507, 547; *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641, 674-6; *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 104, 105-7; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 327-8; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [202]-[203]; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [70]-[71], [96]-[97]; Wilken (n 11) [10.12]; Handley (n 8) [8-008].

The first aspect describes the action or inaction by the plaintiff in reliance on the assumption.[99] For example, the plaintiff may change their position by entering into the transaction which attracts the convention, or by action or inaction in reliance on an ad hoc convention.[100] The second aspect describes detriment which is suffered by the plaintiff as a result of that action or inaction. It results from departure from the assumption, and only becomes detrimental when the defendant does so depart.[101]

Essentially, this is a requirement of detrimental reliance.[102] That reliance must be reasonable.[103] Implicit in the requirement is the need for a causal link between, first, the assumption and the plaintiff's action or inaction – their change of position – and second, that action or inaction and the resulting detriment.[104] The plaintiff must act in a way which they would not otherwise have done. But this does not mean that the assumption must be the sole inducement for the plaintiff's behaviour. Some cases apply a 'but for' test of causation.[105] But others require only that the plaintiff was 'materially induced' by the assumption,[106] or that the assumption was a 'significant factor'.[107] It may be that the applicable test of causation is an 'a factor' test.

The cases make clear that the requirement of detriment will be satisfied if, in reliance on the parties' assumption, the plaintiff enters a transaction and, as a result, would suffer detriment if the defendant departed from the assumption.[108] There is, however, no requirement that the defendant have knowledge of the detriment.

9 Is unconscionability an element of estoppel by convention?

In Australia today, it is settled that unconscionability is not an element of this

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[99] *John v George* [1996] 1 EGLR 7, 12-3; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [70].
[100] Handley (n 8) [8-008]; Lindgren (n 8).
[101] *Thompson v Palmer* (1933) 49 CLR 507, 547; *John v George* [1996] 1 EGLR 7, 12-3; *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351-2; *LCY Pty Ltd v Dong Yan Ma* [2017] VSCA 383, [70], [96]-[97]; Wilken (n 11) [10.12]; Thomas (n 25) 312; Seitler (n 4) 74-5.
[102] *John v George* [1996] 1 EGLR 7, 12-3; *Revenue and Customs Commissioner v Benchdollar* [2010] 1 All ER 174, [52]; *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [128]-[130]; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [101].
[103] Bant & Bryan (n 1) 440.
[104] *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (2015) 329 ALR 1, [770]-[779]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [101]; *Rolleston Coal Holdings Pty Ltd v ICRA Rolleston Pty Ltd* [2020] QSC 352, [102]; *Rae & Partners Pty v Shaw* [2020] TASFC 14, [144-]-149].
[105] *Miller Heiman Pty Ltd v Sales Principles Pty Ltd* (2017) 94 NSWLR 500, [45].
[106] *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49].
[107] *Sidhu v Van Dyke* (2014) 251 CLR 505, [73].
[108] *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641, 674-6.

species of estoppel.[109] It has been described, instead, as a 'vituperative epithet' that 'adds nothing'.[110] Likewise, it is not a separate element of estoppel by convention that the defendant's departure from the parties' assumption is unjust. It is inherently unconscionable, or unjust, for the defendant to resile from a common assumption where it has been detrimentally relied upon by the plaintiff.[111] The essential element is detrimental reliance.[112] Where that is satisfied, it will follow that departure from the assumption will be unjust, or unconscionable. But this need not be separately proved. It is a conclusion which is reached after satisfaction of the other elements of the estoppel. Older Australian cases do use the language of unconscionability and injustice.[113] But it is suggested that they do so in this conclusionary way.

The Australian position may be contrasted with that in other jurisdictions. In New Zealand, unconscionability is treated as a separate element of conventional estoppel.[114] And in England, especially, the unconscionability criterion is receiving increasing emphasis in estoppel by convention cases.[115] This is said to be a function of the infiltration of equity into this historically common law species of estoppel.[116]

10 Is estoppel by convention a shield, not a sword?

Conventional estoppel is a shield, not a sword.[117] It is a procedural, rather than substantive rule. It is a rule of evidence, by which the defendant is precluded from denying the parties' assumption.[118] The defendant may not plead the contrary, or lead evidence to do so. Estoppel by convention is not, therefore, a direct source of

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[109] *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (2015) 329 ALR 1, [764]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [101], [107]; Brettel Dawson (n 3) 37-45.
[110] Handley (n 8) [8-024].
[111] Bunting (n 3) 517; Handley (n 8) [8-024].
[112] See Wilken (n 11) [10.12]; Derham – Part II (n 3) 985.
[113] See e.g.: *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641, 674-6; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300, 321; Derham – Part II (n 3) 984.
[114] *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548, 550. See also: *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 104, 106 (suggesting that this NZ case reflects Australian law); Mulholland (n 4) 396-7.
[115] See e.g.: *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 584 ('unfair or unjust'); *Keen v Holland* [1984] 1 All ER 75, 81-2; *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351-2; *Bank of Scotland v Wright* [1991] BCLC 244, 261; *Hiscox v Outhwaite* [1991] 3 All ER 124, 135; *Kenneth Allison Ltd v AE Limehouse & Co* [1991] 4 All ER 500, 514; *John v George* [1996] 1 EGLR 7, 13; *PW & Co v Milton Gate Investments Ltd* [2003] 3 EGLR 103, [159]; *Revenue and Customs Commissioner v Benchdollar* [2010] 1 All ER 174, [52]; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49]; Seitler (n 4) 74-5.
[116] Mulholland (n 4) 396.
[117] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 591; *Government Employees Superannuation Board v Martin* (1997) 19 WAR 224, 244; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49]; Derham – Part II (n 3) 988; Seitler (n 4) 74-5.
[118] Wilken (n 11) [10.13]; Leopold (n 8) 252-3; Derham – Part II (n 3) 988; Mulholland (n 4) 397; Bant & Bryan (n 1) 448; Seitler (n 4) 74-5; Hudson (n 4) 7.

rights and obligations.[119] It does not create substantive rights in the parties. And it is not a cause of action. Nor can it found a cause of action, or form the basis for a positive claim, *itself.* Rather, conventional estoppel has an indirect effect upon the parties' rights and obligations. It may change them indirectly, by changing the material *facts*.[120] The estoppel establishes the facts – the state of affairs – by reference to which legal relations between the parties are ascertained.[121] So, it is concerned with the terms on which the parties' rights and obligations are ascertained.[122] It makes available to the plaintiff a cause of action which would be available if the parties' assumption were true, and the relief which would be available if that cause of action were made out.[123]

11 Does estoppel by convention have temporary or permanent effect? What is its extent?

There is some English authority that the effect of an estoppel by convention lasts only as long as necessary to protect the plaintiff from the consequences of their change of position. Accordingly, the effect may be temporary – limited and suspensory – rather than permanent.[124] Other English cases hold that estoppel by convention may not operate prospectively. Instead, it ceases to operate once the parties' assumption is revealed to be erroneous.[125] This is not the position in Australia. It is established in this jurisdiction that conventional estoppel has permanent effect. In other words, the elements of the estoppel having been made out, the defendant is prevented, permanently, from departing from the parties' assumption.[126]

As to extent, estoppel by convention operates as between the parties and binds them both.[127] But it operates only in relation to the transaction in issue – not future dealings, even between the same parties.[128]

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[119] Wilken (n 11) [10.13]; Leopold (n 8) 252-3; Seitler (n 4) 74-5; J Hudson (n 4) 5.
[120] Hudson (n 4) 4-8.
[121] Hudson (n 4) 4-8.
[122] Hudson (n 4) 4-8.
[123] Leopold (n 8) 252-3; Seitler (n 4) 74-5.
[124] *Grundt v The Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641, 674-6; *Troop v Gibson* [1986] 1 EGLR 1, 4; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [232]-[233]; Spencer Bower (n 9) [167] (at least where mistake of *law*). See also: Bant & Bryan (n 1) 448.
[125] *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343, 351-2; *Hiscox v Outhwaite* [1991] 3 All ER 124, 135; *Mears Ltd v Shoreline Housing Partnership Ltd* (2015) 160 ConLR 157, [49].
[126] *Mineralogy Pty Ltd v Sino Iron Pty Ltd* (2015) 329 ALR 1, [765]-[769]; *Bannon v Nauru Phosphate Royalties Trust* [2018] VSC 532, [113]-[120].
[127] *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [48]; *Federal Commissioner of Taxation v Thomas* [2018] HCA 31, [76].
[128] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 587-8; *Troop v Gibson* [1986] 1 EGLR 1, 5-6; Spencer Bower (n 9) [167]; K Handley (n 8) [8-015]; Brettel Dawson (n 3) 41-5.

12 What is the justification for estoppel by convention?

What are the underlying philosophical justifications, or normative foundations, for this species of estoppel? In England and New Zealand, the probable answer to this question is: the prevention of detriment or, more broadly, the prevention of unconscionable conduct.[129] This justification matches that often given for equitable species of estoppel.[130] This may not be the position in Australia. In this jurisdiction, estoppel by convention is still best viewed as a species of common law estoppel. So, its raison d'être may not be the prevention of detriment,[131] or unconscionable conduct. Rather, it may be the preservation of party autonomy.[132] The primary focus of estoppel by convention is the consensual basis of the parties' relations.[133] The parties are free to choose the basis on which they conduct those relations and, where such a choice has been made, they should be bound by that choice.[134] To allow the defendant to depart from that basis would be to infringe on the decision-making autonomy of the plaintiff.[135] So, it may be this which provides the normative foundation for the estoppel, and its philosophical justification. Detriment, on the other hand, is just an element, and the prevention of detriment a beneficial incident, of estoppel by convention.[136]

13 What are the available remedies when an estoppel by convention is established?

Given that an estoppel by convention is not a cause of action, it is inapt to speak of available *remedies.* The estoppel has an evidential effect: it prevents the defendant from denying the parties' assumption and thereby destroying the very basis of the transaction.[137] But as it does not create substantive primary rights or obligations, nor can it create substantive secondary – remedial – rights or obligations. At least, not directly. What estoppel by convention does is recognise and sustain the parties' assumption. It adjusts the parties' relations as if the assumption were true.[138] The relief therefore available to the plaintiff is that available for any cause of action which the plaintiff can plead, and prove, on that basis.[139] Suppose that the parties

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[129] Mulholland (n 4) 396-7. See also *Guest v Guest* [2022] UKSC 27.
[130] Hudson (n 4) 17.
[131] Cf Derham – Part II (n 3) 985.
[132] Hudson (n 4) 11.
[133] *Moratic Pty Ltd v Lawrence James Gordon* [2007] NSWSC 5, [30]-[33]; *Rae & Partners Pty v Shaw* [2020] TASFC 14, [25]; Derham – Part II (n 3) 976; Brereton (n 3) 645.
[134] Hudson (n 4) 10-17.
[135] Hudson (n 4) 10-17.
[136] Hudson (n 4) 10-17.
[137] *Dabbs v Seaman* (1925) 36 CLR 538, 548-50; *Labracon Pty Ltd v Cuturich* (2013) 17 BPR 32,497, [133]; Derham – Part I (n 3) 861; Leopold (n 8) 253.
[138] *Anthony v Morton* [2018] NSWSC 1884, [520].
[139] Leopold (n 8) 253; Derham – Part II (n 3) 988.

assume that the repayment of loans made to the defendant's subsidiary by the plaintiff's subsidiary, as well as loans made by the plaintiff itself, would be guaranteed by the defendant. In the event that the guarantee only referred to loans made by the plaintiff itself, the plaintiff would have a claim under the guarantee and all available remedies for that cause of action.[140]

Further, if, as discussed, the normative foundation for estoppel by convention in Australia is not the prevention of detriment, then it follows that the available relief is not calibrated around the level of detriment suffered by the plaintiff.[141] This contrasts with the position in England. As conventional estoppel is increasingly treated as a species of equitable estoppel in that jurisdiction, it is also treated as discretionary, and the available relief limited to the minimum necessary to do justice. As for equitable estoppels generally, the relief must be proportionate to, and crafted to ameliorate, the detriment suffered by the plaintiff.[142]

14 Is estoppel by convention discretionary?

In Australia, there is no room for judicial discretion as conventional estoppel is best viewed as a species of common law not equitable estoppel. In England (and other jurisdictions, including New Zealand) it is treated as equitable. Accordingly, the Court has discretion, on the elements of the estoppel being made out, as to the relief, if any, which is awarded.

III PART II: FAILURE OF BASIS

With the discussion of these questions in relation to estoppel by convention in mind, we turn to failure of basis. Failure of basis is a ground, or reason, for restitution. It arises where the plaintiff's intention to transfer a benefit to the defendant is unimpaired at the time of the transfer, but objectively *qualified* by reference to some basis – purpose or condition. The plaintiff's intention to transfer becomes impaired when that basis fails either to eventuate, or to sustain itself.[143]

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[140] Cf *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577.
[141] Hudson (n 4) 18-22.
[142] *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1981] 3 All ER 577, 584; Derham – Part II (n 3) 985; Seitler (n 4) 74-5.
[143] See e.g.: Andrew Burrows, *The Law of Restitution* (2011 OUP) 319; Andrew Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012, OUP) 15(1); Andrew Burrows, 'Conditional Intention as an Unjust Factor' in Elise Bant et al (eds), *Research Handbook on Unjust Enrichment and Restitution* (2020, Elgar), 347; Kit Barker and Ross Grantham, *Unjust Enrichment* (2008, LexisNexis Butterworths) [9.1]; Charles Mitchell et al (eds) *Goff & Jones: the Law of Unjust Enrichment* (9th edn, 2016, Sweet & Maxwell) [12-01]; James Edelman and Elise Bant, *Unjust Enrichment* (2nd edn, 2016) 252; Graham Virgo, *The Principles of the Law of Restitution* (2nd edn, 2006, OUP) 304; Ross Grantham, 'Restitutionary Recovery *Ex Aequo et Bono*' [2002] Sing JLeg Stud 388, 390; Frederick Wilmot-Smith, 'Reconsidering "Total" Failure' (2013) 72 *CLJ* 414, 415; Timothy Pilkington, 'Failure of Condition or Implied Term?' (2021) 84 MLR 371, 379-80.

A claim alleging a failure of basis is a claim within the category of unjust enrichment. Arguably, failure of basis ranks second only to mistake in terms of practical and theoretical significance.[144] There is, of course, debate about the status of unjust enrichment in Australian law. The emerging view is that unjust enrichment comprises a category of claims, the common features of which are that, subject to defences, the defendant is enriched, that enrichment is at the plaintiff's expense, and the enrichment is unjust – in the sense that there is a recognised reason for restitution, or 'unjust factor'.[145] In any event, for present purposes, the analysis of failure of basis can be mostly quarantined from this larger debate.[146]

As a claim in the category of unjust enrichment, failure of basis is subject to an overriding requirement of all such claims that there is no 'juristic reason' for the defendant to *retain* the enrichment.[147] Principally, in this context, it is a valid contract between the parties which might provide such a reason. As discussed further below, a justification for this overriding requirement is to prevent the subversion of contract law to the law of unjust enrichment. Accordingly, often – but not always[148] – there can be no restitution unless a valid contract between the parties has been disposed of, whether because it was inherently ineffective, or became ineffective.[149]

Claims in the category of unjust enrichment generally, and failure of basis in particular, are claims at common law *and* in equity.[150] Traditionally, a claim for money had and received was a common law claim.[151] But arguably, since the *Judicature Acts 1873-5* (UK) there is only one law of restitution, and no need to explain failure of basis in legal or equitable terms. In *Roxborough v Rothmans of Pall Mall Ltd*, however, some members of the High Court suggested that claims in unjust enrichment are 'equitable'.[152] In particular, Gleeson CJ, Gaudron and Hayne

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[144] Burrows – 2020 (n 143) 345.
[145] Edelman & Bant (n 143) Ch 2; Kit Barker, 'Unjust Enrichment in Australia: What Is(n't) It? Implications for Legal Reasoning and Practice' (2020) 43 Melbourne University Law Review 903, 915-22 and generally; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No. 3)* [2014] WASC 162, [54]-[55]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, [162].
[146] Karan Raghavan, 'Failure of Consideration as a Basis for Quantum Meruit Following a Repudiatory Breach of Contract' (2016) 42 Monash LRev 179, 203.
[147] Edelman & Bant (n 143) Ch 7; Graham Virgo, 'Demolishing the Pyramid – the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment' in Andrew Robertson and Tang Hang Wu, *The Goals of Private Law* (2009, Hart) 488ff.
[148] The contract may not govern the risk in question.
[149] K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (3rd edn, 2016, LexisNexis Butterworths) [909].
[150] Edelman & Bant (n 143) 258-9; Grantham (n 143) 396; *Burgess v Rawnsley* [1975] Ch 429; *Muschinski v Dodds* (1985) 160 CLR 583, 620.
[151] JW Carter and GJ Tolhurst, 'Roxborough v Rothmans of Pall Mall' (2003) 19 JCL 287, 296.
[152] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516. See: Peter Birks, 'Failure of Consideration and its Place on the Map' (2002) 2(1) OUC7LJ 1, 7-8; Ralph Cunnington, 'Failure of Basis' [2004] LMCLQ 234, 237-8.

JJ regarded such claims as common law claims subject to equitable influence.[153] Callinan J took the view that they were common law claims, not equitable, and Kirby J agreed.[154] But Gummow J developed, at length, the argument that claims in unjust enrichment are equitable, given their equitable origins and that the ultimate question in such claims is whether the defendant's retention of the benefit transferred is *unconscionable*.[155]

Whether claims in the category of unjust enrichment, including failure of basis claims, are legal or equitable (or both) is part of the larger debate about the conceptual basis of unjust enrichment in Australian law. Interestingly, none of the members of the Court in *Roxborough,* apart from Gummow J, expressly considered whether failure of basis formed part of the law of unjust enrichment. Gummow J opined that it was not a species of unjust enrichment.[156] So, his Honour's application of the law in relation to failures of basis was untouched by his analysis of unjust enrichment claims in terms of unconscionable retention. There is, therefore, some doubt surrounding the question: are failure of basis claims legal or equitable?

Historically, given its common law origins, in claims for money had and received, failure of basis was confined to money claims. It was not available in claims where the benefit in relation to which restitution was sought was goods or services.[157] But given developments since, including the *Judicature Acts*, there is a strong argument that symmetry demands that failure of basis claims should be available whether or not the benefit transferred was money.[158]

The elements of failure of basis claims can be easily stated. There must be the transfer of a benefit – by which the defendant is enriched, at the expense of the plaintiff – on a particular *basis*. And that basis must *fail*. However, once again, there are many difficult issues surrounding failure of basis. Many of these bear upon the relationship of failure of basis with estoppel by convention. We turn to these issues now.

A Questions In Relation To Failure of Basis

What follows considers various questions which arise in relation to failure of basis. It will be seen that many of these correspond to the questions considered earlier, in relation to estoppel by convention.

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[153] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [16], [23].
[154] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [202]-[204].
[155] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [83]-[87], [96]-[100], [103].
[156] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [104]-[109].
[157] Burrows (n 144) 318; Burrows – 2020 (n 143) 350; *Goff & Jones* (n 143) [12-03].
[158] *Barnes v The Eastenders Group* [2015] AC 1; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560.

1 *What is the nature of the basis for the transfer?*

Traditionally, claims for failure of basis were known as claims for a total failure of *consideration*. However, this long-established terminology was both inapt and confusing.[159] 'Consideration', in this context, was not used to mean the exchange – or quid pro quo, whether promise for promise, or performance for promise – required in the formation of a contract.[160] Where there is, or has been, a contract between the parties, it has been said that the basis for a transfer by the plaintiff to the defendant will – 'generally speaking' – be the performance of the contractual promise.[161] But the basis is not so limited.[162] As will be seen, there need be no contract between the parties.[163] So, the basis may be a promised counter-performance or some non-promissory state of affairs.[164] It has been suggested that the former is the primary meaning – namely, the performance of an obligation or otherwise the benefit bargained for.[165] Likewise, it has been suggested that the 'controlling concept' is that of the 'agreed return'.[166]

However, the High Court has now accepted on several occasions that 'basis' means the reason, purpose or condition for the transfer that causes the

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[159] Burrows – 2012 (n 143) 15(1).

[160] James Goodwin, 'Failure of Basis in the Contractual Context' [2013] RLR 24, 25; Cunnington (n 152) 234; Peter Birks, *Unjust Enrichment* (2nd edn, 2005, OUP) 118; A Burrows – 2012 (n 143) 15(1); Peter Jaffey, 'Failure of Consideration: *Roxborough v Rothmans*' (2003) 66 *MLR* 284, 285-6; Edelman & Bant (n 143) 262-4; Barker & Grantham (n 143) [9.2]; Virgo (n 143) 306-7; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [16]; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, [238]; *Anderson v McPherson (No. 2)* [2012] WASC 19, [232]-[233]; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No. 3)* [2014] WASC 162, [98]; *Barnes v The Eastenders Group* [2015] AC 1, [104]. Cf *Mason & Carter's* (n 149) [923].

[161] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48; *Baltic Shipping Company v Dillon* (1993) 176 CLR 344, 389; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [103], [196]; *Barnes v The Eastenders Group* [2015] AC 1, [104]; *Mason & Carter's* (n 149) [923]; Virgo (n 143) 306-7; Jaffey (n 160) 285-6; Wilmot-Smith (n 143) 415; Frederick Wilmot-Smith, 'Replacing Risk-Taking Reasoning' (2011) 127 *LQR* 610, 618; Felicity Maher, 'A New Conception of Failure of Basis' (2004) 12 RLR 96, 97; David Winterton and Frederick Wilmot-Smith, 'Steering a Course on Contract Damages and Failure of Consideration' (2012) 128 *LQR* 23, 23.

[162] Wilmot-Smith (n 161) 618-9; Maher (n 161) 97-100; Winterton & Wilmot-Smith (n 161) 23; *Goff & Jones* (n 143) [12-12]; Grantham (n 143) 391; Carter & Tolhurst (n 151) 292; Burrows – 2012 (n 143) 15(2); HG Beale (ed), *Chitty on Contracts: General Principles* (32nd edn, 2015, Sweet & Maxwell) [29-057]; Virgo (n 143) 307; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [16]; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, [238]; *Barnes v The Eastenders Group* [2015] AC 1, [106]. Cf *Mason & Carter's* (n 149) [923].

[163] *Goff & Jones* (n 143) Ch 13. Cf *Mason & Carter's* (n 149) [923].

[164] *Goff & Jones* (n 143) Ch 13; Burrows (n 144) 320-322; Burrows – 2020 (n 143) 357ff; Burrows – 2012 (n 143) 15(2); Goodwin (n 160) 25; Grantham (n 143) 391; Cunnington (n 152) 240; Maher (n 161) 98-99; Wilmot-Smith (n 161) 619; Carmel McLure, 'Failure of Consideration and the Boundaries of Restitution and Contract' in Simone Degeling and James Edelman (eds) *Unjust Enrichment in Commercial Law* (2008 Thomson Reuters) 212-3; Barker & Grantham (n 143) [9.2]; Edelman & Bant (n 143) 262-4; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [16]; *Barnes v The Eastenders Group* [2015] AC 1, [106]-[107]; *Patel v Mirza* [2017] AC 467, [13].

[165] Burrows (n 144) 319; Burrows – 2020 (n 143) 357ff.

[166] Cf *Mason & Carter's* (n 149) [923].

defendant's enrichment.[167] The concept reflects the Roman law *condictio causa data causa non secuta* (something given on a basis, that basis not following)[168] or even the *condictio sine causa* (something given for no cause).[169] Birks has described the basis for a transfer as a 'matter considered in forming the decision to act', the 'reason for an act' and 'the state of affairs contemplated as the basis' for the transfer.[170] The true controlling concept is that of the qualification of the plaintiff's intention to benefit the defendant – in other words, the conditionality of the transfer. So, the basis for the transfer of a benefit is the condition for the defendant's retention of the benefit, or the state of affairs on which the transfer is conditioned. In *Roxborough,* Gleeson CJ, Gaudron and Hayne JJ adopted this analysis, stating that, in this context, 'consideration' means a purpose which has failed, a condition which has not been fulfilled, or a state of affairs which has disappeared.[171] Gummow J agreed that it does not mean contractual consideration. Rather (channelling Birks) it refers to the 'state of affairs contemplated as the basis for payment'.[172] Likewise, in *Equuscorp*, the High Court referred to failure of 'basis', so clearly accepted that 'basis' is a more apt term than 'consideration'.[173]

In theory, there are no limits on the number or range of conditions which might qualify as the basis for a transfer.[174] The basis could be connected to money, or entirely unconnected.[175] Basis plainly does not coincide with motive.[176] All this means that the identification of the basis for a transfer assumes great importance.[177]

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[167] *Muschinski v Dodds* (1985) 160 CLR 583, 620; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 382; *Baltic Shipping Company v Dillon* (1993) 176 CLR 344, 389; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [17], [23], [60], [104]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, [31]; *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, [168]. See also: *Anderson v McPherson (No. 2)* [2012] WASC 19, [233]; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No. 3)* [2014] WASC 162, [98]; *Barnes v The Eastenders Group* [2015] AC 1, [107]; *Patel v Mirza* [2017] AC 467, [13]; *Commissioners for HM Revenue and Customs v The Investment Trust Companies* [2017] UKSC 29, [43]; Also: Robert Stevens *The Laws of Restitution* (2023 OUP) 109; Edelman & Bant (n 143) 262-4; Paul Mitchell, 'Artificiality in Failure of Consideration' (2010) 29 *UQLJ* 191, 191; Maher (n 161) 97; Winterton & Wilmot-Smith (n 161) 23; Pilkington (n 143) 379; James Edelman, 'Liability in Unjust Enrichment where a Contract Fails to Materialize' in Andrew Burrows and Edwin Peel, *Contract Formation and Parties* (2010 OUP) 163-4; Wilmot-Smith (n 143) 415-6; Wilmot-Smith (n 161) 618, 619; Goodwin (n 160) 25; Julie Taylor, '"Total" Failure of Consideration and Roxborough v Rothmans' (2004) 120 *LQR* 30, 31; Jaffey (n 160) 285-6; Virgo (n 143) 307; McLure (n 164) 212; *Goff & Jones* (n 143) [12-15]; *Chitty on Contracts* (n 162) [29-057]; Birks (n 152) 3-4. Cf *Mason & Carter's* (n 149) [923].

[168] Grantham (n 143) 392; Mitchell (n 167) 198-9; Edelman (n 167) 164.

[169] Edelman & Bant (n 143) 262-4; Mitchell (n 167) 198-9.

[170] Birks (n 160) 117; Maher (n 161) 99-100.

[171] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [16].

[172] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [104].

[173] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, [31]. See also *Gray v Lavan (a firm)* [2022] WASC 417, [29]-[30].

[174] Wilmot-Smith (n 161) 619.

[175] Burrows – 2012 (n 143) 15(1); Virgo (n 143) 306; Burrows (n 144) 318-322; *Mason & Carter's* (n 149) [170].

[176] *Goff & Jones* (n 143) [13-10]-[13-11].

[177] Edelman & Bant (n 143) 262-4; Maher (n 161) 99.

2 How is the basis for a transfer determined?

The identification of the basis for a transfer requires close analysis of the transfer ,[178] and careful scrutiny of any broader transaction of which it forms part.[179] It is an exercise of characterization of the circumstances of the transfer.[180] As will be seen, it is an objective exercise, to ascertain the objective, common intention of the parties. It is, accordingly, akin to an exercise in contractual construction.[181] The general approach to, and the various rules of, contractual construction provide fertile ground for explicating the process of identifying the basis for a transfer.[182] The rules should, to a large extent, apply, and can be built upon for this purpose.[183] In respect of both construing a contract, and identifying the basis for a transfer, the key question is the perspective of the reasonable person in the position of the parties. Specifically, in the identification of the basis for a transfer, the question is: what would a reasonable person in the position of the parties have understood the basis to be?[184] Relevant considerations will include what the parties said and did, the terms of any contractual or related documents, the history of dealings between the parties, and, generally, the surrounding circumstances.[185]

There are, however, some differences between construing a contract and identifying the basis for a transfer. The basis need not be express but can be implied. So, it is not just ascertained by reference to the express words or conduct of the parties.[186] Further, for example, in relation to the sale of goods, the transfer of title is such a fundamental feature that it can be implied that this was a basis of the transfer.[187]

The identification of the basis for a transfer is also context specific.[188] In the contractual context – where there is, or has been, a contract between the parties – it may be true to say that, generally speaking, the basis for a transfer will be contractual counter-performance. However, the process of identification of the basis for a transfer also requires legal analysis of the relevant generic situation – such as a contract – and the law applicable to that situation.[189]

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[178] Edelman & Bant (n 143) 262-4; Maher (n 161) 99.
[179] *Goff & Jones* (n 143) [13-01].
[180] Edelman & Bant (n 143) 262-4; Burrows – 2020 (n 143) 348; Felicity Maher, 'Failure of Basis' (DPhil thesis, University of Oxford, 2008) 17; Wilmot-Smith (n 161) 619; Raghavan (n 146) 186.
[181] Raghavan (n 146) 194; McLure (n 164) 218. See also: Stevens (n 167) 118.
[182] Wilmot-Smith (n 161) 620-2; Raghavan (n 146) 194.
[183] Burrows – 2020 (n 143) 348.
[184] Edelman & Bant (n 143) 262-4; Wilmot-Smith (n 161) 620.
[185] Edelman & Bant (n 143) 252-4; McLure (n 164) 235.
[186] *Goff & Jones* (n 143) [13-06].
[187] *Goff & Jones* (n 143) [13-06]; *Rowland v Divall* [1923] 2 KB 500.
[188] Maher (n 180) 17; Wilmot-Smith (n 161) 619-23.
[189] Mitchell (n 167) 210; *Goff & Jones* (n 143) [13-06].

Further, some rules for contractual construction do not apply to the identification of the basis for a transfer.[190] Certain policy considerations applicable to the former are inappropriate and inapplicable to the latter. A key example is the rule against the admissibility of prior contractual negotiations in most circumstances in the construction of contracts. There are sound policy reasons to exclude such evidence where those negotiations have been reduced to a written contract. But in the process of the identification of the basis for a transfer, those same policy reasons do not apply. On the contrary, prior negotiations may provide crucial evidence in determining the basis and must be admissible to do so.

3 Must the basis be expressly shared? Is an objective or a subjective approach applied? Is there any requirement that the plaintiff is not a risk-taker?

These questions can be taken together. They probe further the nature of the basis for a transfer. The basis for a transfer is objectively determined, not subjectively[191] – although some have suggested a subjective, plaintiff-sided, factual test.[192] The subjective motives or intentions of the plaintiff are irrelevant. It is insufficient that the basis is only in the plaintiff's mind. Just as in the interpretation of contracts, so here, an objective approach applies.[193]

The rationale for this approach is the principle that, where the plaintiff transfers a benefit to the defendant on a subjective basis which is not apparent to the defendant, the plaintiff knowingly runs the risk of disappointment.[194] And a risk-taker who runs the risk of the basis for a transfer failing is a mere volunteer, undeserving of the law's assistance. In any event, in practice, a factual inquiry into the plaintiff's subjective intentions would be difficult, costly, and uncertain, so ultimately impractical.[195]

Further, the basis must be common to the parties, or shared.[196] It must be

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[190] Wilmot-Smith (n 161) 622.

[191] Bant & Bryan (n 1) 435; Edelman & Bant (n 143) 252-4; Burrows – 2020 (n 143) 347; Edelman (n 167) 166; Thomas Camp, 'Restitution on a Partial Failure of Basis' (2016) 28 Bond LRev 21, 28; Raghavan (n 146) 194; Wilmot-Smith (n 161) 622; Goodwin (n 160) 26; Virgo (n 143) 306; *Goff & Jones* (n 143) [13-02]; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, [225]-[255]; *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558, [27]-[28]; *Giedo Van Ger Garde BV v Force India Formula 1 Team Limited* [2010] EWHC 2373, [285]-[286]; *Anderson v McPherson (No. 2)* [2012] WASC 19, [236].

[192] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 382; Maher (n 180) 17.

[193] Virgo (n 143) 306; *Goff & Jones* (n 143) [13-03]; Burrows – 2012 (n 143) 15(3); Goodwin (n 160) 26; Stevens (n 167) 110-1.

[194] Edelman & Bant (n 143) 252-4; Burrows – 2020 (n 143) 142; Carter & Tolhurst (n 151) 297; Goodwin (n 160) 26; *Goff & Jones* (n 143) [13-02]-[13-04]; Virgo (n 147) 504ff.

[195] Virgo (n 147) 480; Goodwin (n 160) 26; *Goff & Jones* (n 143) [13-03].

[196] Edelman (n 167) 165; Edelman & Bant (n 143) 252-4; Burrows – 2020 (n 143) 347; *Goff & Jones* (n 143) [13-02]; Pilkington (n 143) 379; Birks (n 152) 4; Burrows – 2012 (n 143) 15(3); McLure (n 164) 235; Jaffey (n 160) 285-6.

bilateral – of both parties – not unilateral – of the plaintiff alone.[197] The basis must be joint; jointly understood.[198] Both parties must, objectively, be aware of the basis.[199] It must be – again, objectively – within the contemplation of the parties.[200] However, it need not be formally agreed or reduced to a binding contract.[201]

Between the parties, there must be a common basis.[202] The parties cannot be at cross-purposes, one party taking the basis to be *x,* and the other *y.* There must be an understanding between the parties.

These requirements will be satisfied if the basis is *communicated* by the plaintiff to the defendant, or otherwise made clear to, and accepted by, the defendant.[203] The requirement for a 'shared' basis is, however, itself an objective concept.[204] So, the basis must be objectively shared. It will be sufficient that the defendant, if not actually aware of the basis, ought reasonably to be aware of it.[205] In other words, the basis must be manifest.[206] If the plaintiff could reasonably expect the defendant to know the basis, or there is the objective appearance of agreement, that will suffice.[207] There is no need to communicate the basis to a recipient to whom it reasonably appears to be manifest, or which is manifested, for example, in a contractual arrangement.[208] It will also suffice if the plaintiff voices an understanding and the defendant apparently assents.[209]

It follows that there is no *requirement* that the basis be communicated.[210] The key is that the plaintiff does not take the risk of the basis failing.[211] That the basis is communicated to, and accepted by, the defendant is one way of proving this.[212] It will throw the risk of the basis failing on the defendant.[213] But in every case there must ultimately be an evaluative exercise: who has assumed the risk of the basis failing?[214]

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[197] Burrows – 2020 (n 143) 347.
[198] *Goff & Jones* (n 143) [13-02].
[199] Birks (n 152) 6.
[200] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [17].
[201] Jaffey (n 160) 286-7.
[202] *Burgess v Rawnsley* [1975] Ch 429, 442; Maher (n 161) 100-1; Goodwin (n 160) 26; Camp (n 191) 26, 28.
[203] Maher (n 161) 100-1; Goodwin (n 160) 26; Virgo (n 143) 306.
[204] Goodwin (n 160) 30.
[205] Edelman & Bant (n 143) 252-4; Burrows – 2020 (n 143) 347.
[206] *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, [235]; *Anderson v McPherson (No. 2)* [2012] WASC 19, [236]; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No. 3)* [2014] WASC 162, [115]; Birks (n 160) 142.
[207] Burrows – 2020 (n 143) 347; Pilkington (n 143) 379.
[208] Birks (n 160) 142.
[209] Virgo (n 143) 306.
[210] Maher (n 161) 101.
[211] Maher (n 161) 101; Edelman & Bant (n 143) 252-4.
[212] Maher (n 161) 101.
[213] Burrows – 2012 (n 143) 15(3).
[214] Edelman & Bant (n 143) 253.

The risk-taking analysis has been criticised.[215] The criticisms have especially been directed to those cases in which an anticipated contract never materialised. Such cases have been analysed as cases in which restitution was refused because the plaintiff took the risk of the contract failing to materialise. In particular, the risk-taking analysis has been criticised as being circular, ambiguous, inconclusive, incapable of explaining decided cases and unnecessary – being question-begging and providing only a legal conclusion.[216] However, the risk-taking analysis has also been defended, on the basis that the plaintiff being a risk-taker should be seen as a bar to claims in unjust enrichment generally.[217] The better view may be that failure of basis is the best explanation of anticipated contracts cases. And the requirement that the plaintiff not have taken the risk of the basis failing is an *element* of claims for failure of basis. It is built into, and underlies, the requirement that the basis be shared.[218]

4 Must the basis be of fact not law, and presently existing matters, not the future?

It is now relatively well established that the basis for a transfer may be factual or legal.[219] For example, in the contractual context, the basis for a transfer by the plaintiff to the defendant may be factual – the defendant providing counter-performance of the contract – or legal – the defendant being subject to a legal obligation to perform the contract.[220] So, a transfer pursuant to a contractual obligation generally has (at least) two bases, one factual and the other legal. The factual basis is counter-performance, and the legal basis is that, if there is no counter-performance, the plaintiff can have recourse to rights under the contract to compel counter-performance, or damages in the alternative. This analysis has been described as 'immediate (and obvious)'.[221]

The notion that the basis for a transfer may be legal has been gaining traction for some time. It relies on an analysis in terms of rights.[222] Its premise is that a party conferring a benefit pursuant to a legal obligation has an expectation that certain legal rights will be conferred on – created or transferred to – the plaintiff as a result of the transfer.[223] In other words, a particular legal result, or state of legal

[215] Edelman (n 167) 160-2; Wilmot-Smith (n 161) 612-16.
[216] Wilmot-Smith (n 161) 612-16; Edelman (n 167) 160-2.
[217] Virgo (n 147) 504-6; Goodwin (n 160) 28-33.
[218] Maher (n 161) 101.
[219] Maher (n 161) 108-9; Maher (n 180) Ch 2; J Goodwin (n 160) 40-41; Burrows – 2020 (n 143) 347; Edelman & Bant (n 143) 253; Bant & Bryan (n 1) 435.
[220] Mitchell (n 167) 208-10.
[221] McLure (n 164) 213.
[222] Mitchell (n 167) 208-10; Wilmot-Smith (n 161) 619.
[223] *Goff & Jones* (n 143) [13-19ff]; Mitchell (n 167) 208-10; Wilmot-Smith (n 161) 619; Wilmot-Smith (n 143) 416.

affairs, will be achieved.[224] The basis may be, for instance, that the plaintiff, on making the transfer, will have certain rights, or that the defendant will have certain obligations, and in either case, those rights and obligations being legally enforceable.[225] Or it may be that the plaintiff was liable to make the transfer or, on making it, is discharged from an obligation to do so.[226] Accordingly, in the absence of the expected legal rights, or the achievement of the intended legal result, the basis for the transfer fails. And that failure of basis gives rise to restitution – even where, importantly, any co-existing factual basis for the transfer does not fail (for example, a contract is performed).[227]

Various commentators have accepted this analysis. And it has been applied by courts, including the High Court in *Roxborough.*[228] In that case, the basis for the payment of the tax component of the price of cigarettes concerned a legal matter, namely, the obligation on the wholesaler to pay the tax to the government. The failure of that basis gave rise to a right to restitution. Likewise, in *Equuscorp*, it was argued that the basis for the loan payments by the plaintiff was a legal matter: that the loans were enforceable.[229] Accordingly, in determining the basis for a transfer, we cannot place sole emphasis on the factual basis.[230] The legal basis may be as, and potentially more, important.

It follows that there may be more than one shared basis for the transfer of a benefit by the plaintiff to the defendant – one legal and the other factual.[231] The factual basis will be the achievement of certain factual, or practical matters, while the legal basis will be the achievement of certain legal results. The failure of *either* – even where the other does not fail – will be sufficient to generate a right to restitution.[232] The even broader point is that a transfer may be conditional on a range of matters. If any of these, meeting the criteria to be a basis for the transfer, fails, restitution should follow.

Further, it is well understood that the basis for a transfer may be a condition as to the present – or past – or the future.[233] 'Consideration' includes a promised

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[224] *Goff & Jones* (n 143) [13-19ff]; Mitchell (n 167) 208-10; Mischa Balen and Christopher Knowles, 'Failure to Estop: Rationalising Proprietary Estoppel Using Failure of Basis' [2011] 75 Conv 176, 184.
[225] Winterton & Wilmot-Smith (n 161) 23; *Goff & Jones* (n 143) [13-19ff].
[226] *Rowland v Divall* [1923] 2 KB 500; *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London Borough Council* [1999] QB 215, 230; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [17]; *Barnes v The Eastenders Group* [2015] AC 1, [115]; Edelman (n 167) 167-8; Maher (n 180).
[227] *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London Borough Council* [1999] QB 215, 230.
[228] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [17].
[229] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, [28].
[230] Mitchell (n 167) 208-10.
[231] Mitchell (n 167) 208-10; Wilmot-Smith (n 143) 433-4.
[232] *Goff & Jones* (n 143) [13-14]; Mitchell (n 167) 208-10; Wilmot-Smith (n 143) 433-4. Cf T Camp (n 191) 28-9.
[233] Edelman & Bant (n 143) 253; Burrows – 2012 (n 143) 15(2); Bant & Bryan (n 1) 435.

counter-performance, which will be as to the future, as well as a non-promissory state of affairs, which may be as to the past, present, or future.[234]

5 Must the basis be contractual?

The basis for a transfer is not the same as the consideration necessary for the formation of a binding contract, so it need not be contractual counter-performance (although it often is). Indeed, there need be no contract at all, in a failure of basis claim. A failure of basis may be established entirely outside the contractual context.[235]

A claim for failure of basis may also be available where a contract between the parties is void, has become voidable or has been terminated. Or where a transfer is expressly made 'subject to', or is made in contemplation of, a contract which never materialises. Or where other contractual conditions are not fulfilled.[236]

6 When does the basis for a transfer fail? Must the basis fail subsequent to transfer, or can it fail at the outset?

When the basis for a transfer fails is a question of characterization of the circumstances.[237] It may be a question of fact – for example, where the basis is some factual matter. Or it may be a question of law – for example, where the basis is some legal matter.[238] It could also be a question of mixed fact and law. In the contractual context, whether the basis has failed may turn on the terms of the contract.[239] More generally, it will be affected by the nature of the transaction. Just as in relation to the determination of the basis for a transfer, the question whether that basis has failed is an objective question,[240] although some have argued that it should be assessed from the perspective of the plaintiff.[241] As a general proposition, it is not lightly accepted that there has been a failure of basis.

As noted earlier, the basis may be as to a past or present fact, or a future matter. Correspondingly, the latter will fail at some time subsequent to transfer

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[234] Burrows – 2020 (n 143) 350.
[235] Maher (n 161) 97-100; Edelman & Bant (n 143) 252; *Chitty on Contracts* (n 162) [29-057]; Burrows (n 144) 319; Wilmot-Smith (n 143) 415; Wilmot-Smith (n 161) 617; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [16], [103]; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, [238]; *Anderson v McPherson (No. 2)* [2012] WASC 19, [232]; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No. 3)* [2014] WASC 162, [98]. Cf Jaffey (n 160) 286-7.
[236] Edelman & Bant (n 143) 262-4.
[237] Burrows – 2012 (n 143) 15.
[238] Wilmot-Smith (n 143) 432-4.
[239] Virgo (n 143) 315; McLure (n 164) 235.
[240] Burrows – 2012 (n 143) 15(3).
[241] Maher (n 161) 100; Maher (n 180) 20; *Rover International Ltd v Cannon Film Ltd* [1989] 1 WLR 912, 923; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 382; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, [239].

when that future matter fails to eventuate. But the former may also fail at, or even before, the time of transfer. In most cases, the basis for the transfer will be some promissory or non-promissory condition as to the future, which will fail subsequent to the transfer.[242] But in some cases, the basis will pertain to the existence of a state of affairs at or before the time of transfer. This may fail at the outset and constitute an original failure. So, in principle, the failure of the basis for a transfer may be original or subsequent.[243] In the first case, the basis fails to materialise. In the second, if it did exist, it fails to sustain itself.[244] Further, where the basis fails at the outset, the plaintiff may have a choice: to make a claim in the category of unjust enrichment alleging a failure of basis or alleging a mistake (or both).[245] This is a matter of election for the plaintiff. The overlap between original failures of basis, and mistakes, is an example of unobjectionable alternative analysis.[246]

7 Must the failure of basis be total?

Historically, it was a requirement of claims for money had and received on the ground of failure of consideration that the failure be total.[247] It was said that no part of what had been bargained for could be received by the plaintiff.[248] In other words, no part of the condition on which the transfer was made could be fulfilled.[249] Otherwise, the basis for the transfer would not have failed 'totally' or 'completely'. Of course, the question whether the basis for a transfer has failed, totally or merely partially, is a question of construction.[250]

The requirement has been heavily criticised, over many years, by commentators and, occasionally, courts.[251] The main grounds of criticism have been that the total failure requirement is not justified by any of its suggested rationales, that it is a blunt instrument, and that, in all failure of basis claims, the inquiry is the same, whether there is a 'total' or 'partial' failure.

Given these criticisms, the courts have developed various 'exceptions' to the total failure requirement.[252] First, the requirement is said not to apply where the benefit received by the plaintiff is 'ancillary', 'incidental' or 'collateral'.[253] But this is not

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[242] Barker & Grantham (n 143) [9.1].
[243] Burrows (n 144) 321; Maher (n 161) 101-4; Edelman (n 167) 164; Birks (n 160) 130.
[244] Peter Birks, *An Introduction to the Law of Restitution* (1989 Clarendon Press) 223.
[245] *Goff & Jones* (n 143) [12-07].
[246] Maher (n 161) 103; *Goff & Jones* (n 143) [12-07]; Burrows – 2020 (n 143) 350.
[247] Cunnington (n 152) 241.
[248] *Goff & Jones* (n 143) [12-16]; Virgo (n 143) 310.
[249] Cunnington (n 152) 241.
[250] Burrows (n 144) 322.
[251] Birks (n 244) 244-5; Cunnington (n 152) 243; *Chitty on Contracts* (n 162) [29-067].
[252] Maher (n 161) 106; Barker & Grantham (n 143) [9.13]; Burrows (n 144) 324-326, 330-334; Virgo (n 143) 318-323; *Goff & Jones* (n 143) [12-26ff].
[253] Edelman & Bant (n 143) 271-4; *Goff & Jones* (n 143) [12-24]; Goodwin (n 160) 28; *Mason & Carter's* (n 149) [918].

a true exception. Properly viewed, such benefits would not constitute a basis for the plaintiff's transfer. Second, the courts have held that where the basis for a transfer is severable, it may be apportioned to the benefit transferred by the plaintiff to the defendant, such that if a severable portion of the basis has totally failed, that is enough to ground restitution.[254] However, this is not a true exception to the total failure requirement, either. It does not permit restitution for partial failures of basis, but only for the total failure of a severable portion of the basis. It has also been criticised, as 'artificial', 'manipulative', 'emasculating', and 'a device to circumvent the requirement'.[255]

Some commentators argue that there is (or should be) no total failure requirement at all, and that restitution should be available on a partial failure of basis, provided the plaintiff makes *counter-restitution*.[256] In other words, provided the plaintiff makes restitution of any benefit received by the plaintiff from the defendant, then the plaintiff's receipt of that benefit is not a bar to restitution. More recently, it has also been suggested that the total failure requirement is properly understood as a 'substantial failure' requirement.[257]

However, once we understand the true meaning of 'consideration' as 'basis' – namely, the condition for the plaintiff's transfer of a benefit to the defendant – there is no difficulty with a total failure requirement.[258] A condition will either fail or it will not. So, it will fail totally or not at all. It is binary.[259] The key, then, becomes the precise identification of that condition. On this view, there is no logical space for 'partial' – or 'substantial' – failures of basis. Indeed, to accept that there is might undermine, even rewrite, a contractual allocation of risk.

8 Is unconscionability an element of failure of basis?

Claims in the category of unjust enrichment are strict liability claims. They include no fault, so unconscionability – whether the defendant's behaviour was against conscience – is irrelevant.[260] However, in Australia, this is not entirely beyond doubt. In *Roxborough,* Gummow J considered that the governing concept in unjust

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[254] Edelman & Bant (n 143) 269-71; *Mason & Carter's* (n 149) [918]; Goodwin (n 160) 28; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 382; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [14]-[24]; *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83, [4], [226], [235]; *Barnes v The Eastenders Group* [2015] AC 1, [114].
[255] Maher (n 161) 106; Barker & Grantham (n 143) [9.13]; Burrows (n 144) 324.
[256] Birks (n 244) 248; Cunnington (n 152) 247; *Chitty on Contracts* (n 162) [29-067]; Burrows (n 144) 331; Burrows – 2012 (n 143) 15(3); Camp (n 191) 49; Maher (n 161) 107; Taylor (n 167) 31; Virgo (n 143) 323-326.
[257] Wilmot-Smith (n 143) 431; *Mason & Carter's* (n 149) [927].
[258] Edelman & Bant (n 143) 267; Barker & Grantham (n 143) [9.13]; Goodwin (n 160) 28; Camp (n 191); Burrows – 2020 (n 143) 348; Birks (n 160) 121; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No. 3)* [2014] WASC 162, [112].
[259] Camp (n 191) 30-31; Barker & Grantham (n 143) [9.13]; Stevens (n 167) 115.
[260] *Mason & Carter's* (n 149) [917]; Edelman & Bant (n 143) 259-60.

enrichment claims was unconscionable retention.[261] But his Honour did not then apply this reasoning in his application of the law to the facts of that case. Treating the case as a failure of basis claim, outside the law of unjust enrichment, Gummow J did not require any unconscionability.[262]

9 Can a failure of basis give rise to restitution within a valid contract?

It is often said that there can be no restitution, on the ground of failure of basis, if this would be inconsistent with a contractual provision or, more generally, within a valid contract between the parties. This restriction is not specific to failure of basis. It applies to all claims in the category of unjust enrichment.[263]

However, this restriction may best be viewed as part of a wider principle – perhaps an element of, or a bar to, all claims in this category – that there is no *juristic reason* for the defendant to retain the enrichment. A valid contract between the parties may provide such a juristic reason. This principle commonly operates in claims in the category of unjust enrichment alleging failure of basis because such claims often arise in a contractual context. Although there need be no contract between the parties, there often is, such that the (or a) basis for the plaintiff's transfer is the defendant's counter-performance of the contract.

This view is more nuanced than the suggestion that there can be no restitution within a valid contract.[264] The rationale for excluding restitution where such a contract provides a juristic reason for the defendant to retain the enrichment is to prevent the subversion of contract to unjust enrichment. The exclusion of restitutionary claims thereby avoids the application of two conflicting sets of obligations. There can be no award of restitution if to do so would be inconsistent with a contractually agreed allocation of risk. The law of unjust enrichment must not be permitted to undermine such a risk-allocation.[265] But if this rationale will not be served, in a particular case, restitution may be available. So where, for example, the parties' contract does not allocate the risk in question – there is a 'gap' in the contract – such that there will be no undermining, or subversion, or conflict, there is room for restitution, including on the ground of failure of basis.[266] This is a more limited principle than the bald statement that there can be no restitution within a valid contract.

Importantly, this principle serves a suggested rationale of the total failure

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[261] *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516, [104].
[262] Birks (n 152) 13; Cunnington (n 152) 238.
[263] *Goff & Jones* (n 143) [12-22]; *Mason & Carter's* (n 149) [909]; Camp (n 191) 44.
[264] *Mason & Carter's* (n 149) [909]; Burrows (n 144) 327-330.
[265] Carter & Tolhurst (n 151) 298; Taylor (n 167) 34; Cunnington (n 152) 249-51; Burrows (n 144) 328; *Goff & Jones* (n 143) [12-21].
[266] *Goff & Jones* (n 143) [12-20]; Burrows (n 144) 328-330.

requirement. But it is better suited to do so than that requirement.[267]

10 Is the defence of change of position available in failure of basis claims?

Change of position is a general defence to claims in the category of unjust enrichment; indeed, it is the primary defence. But it has been suggested that, in most failure of basis claims, the defence will not apply.[268] This is because such claims involve conditional transfers. The defendant receives the benefit transferred by the plaintiff conditionally. And the condition is objectively known to the defendant. The defendant is taken to know it. It follows that the defendant is taken to know that, if the condition is not fulfilled, they will be required to make restitution of the benefit received. In other words, the defendant's receipt is defeasible, and the defendant is fixed with knowledge of this. Accordingly, if the defendant changes their position in reliance on the receipt, they may do so in bad faith. They would not be acting reasonably. In those circumstances, it is argued, the defence of change of position is unavailable. This reasoning is exceptional among claims in the category of unjust enrichment. It has yet to be tested in the courts.

11 What is the justification for restitution on the failure of the basis for a transfer?

What are the underlying philosophical justifications, or normative foundations, for failure of basis claims? Much has been written about the philosophical foundations of unjust enrichment generally.[269] It is beyond the scope of this article to engage with those debates in any detail. In brief, failure of basis provides a reason for restitution where the plaintiff's *intention* to transfer a benefit to the defendant is *qualified*. Where that condition is not fulfilled, the plaintiff's intention becomes impaired – deficient, or vitiated. So, the underlying concern of these claims is the plaintiff's autonomy, arguably, as part of a broader concern for party autonomy generally.[270]

12 What relief is available when a failure of basis is made out?

The remedial response to any claim in the category of unjust enrichment alleging failure of basis – the sole, exclusive form of relief – is restitution: restitution of the value of the benefit transferred by the plaintiff to the defendant.[271] Further,

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[267] Cunnington (n 152) 250-1; Taylor (n 167) 31-3.
[268] Edelman & Bant (n 143) 353; Elise Bant, *The Change of Position Defence* (2009 Hart Publishing) 197-8 (acknowledging that the defence may apply to some failure of basis scenarios).
[269] See eg R Chambers, C Mitchell and J Penner (eds), *The Philosophical Foundations of Unjust Enrichment* (2009 OUP).
[270] Cf Hudson (n 4) 11.
[271] Birks (n 244) 6.

generally, only personal not proprietary restitution will be triggered.[272] There are large questions around when proprietary restitution is available for claims in unjust enrichment, including failure of basis claims. Those questions are also beyond the scope of this article.

IV PART III: ESTOPPEL BY CONVENTION AND FAILURE OF BASIS COMPARED

The analysis so far underscores the close relationship between estoppel by convention and failure of basis. Clearly, there is considerable overlap between the two.[273] Is this a problem? Generally, where there are overlapping claims, based on different principles, the two should not undermine or controvert each other. This would damage the coherence of the law.[274] The fact of overlap gives rise to various questions.[275] Is it justifiable to have distinct principles operating in the same field? Where is the dividing line? Are the two concurrent? Or are they independent? Does, or should, one subsume the other – partially, or entirely? This part will explore these kinds of questions in relation to estoppel by convention and failure of basis. It will do so, first, by identifying the ways in which the two overlap – their similarities – and second, by distinguishing the ways in which they do not (apparently) overlap – their differences. The part will then draw some conclusions.

A Overlap Between Estoppel By Convention and Failure of Basis

There are numerous, important similarities between estoppel by convention and failure of basis. Perhaps most importantly, the fundamental concern of both is *conditional* relations or transfers.[276] Specifically, estoppel by convention concerns relations founded on an assumed state of affairs – so, relations governed by, or conditional on that state of affairs continuing to exist. And failure of basis is concerned with transfers made on a basis – so, conditional on that basis coming into existence, or continuing to exist. Accordingly, it can be argued, the philosophical justification, or normative foundation, for both estoppel by convention and failure of basis is the protection of the qualified intention of the plaintiff, known (at least objectively) to the defendant. And more broadly, it is the protection of the autonomy of the parties. Both estoppel by convention and failure of basis recognise

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[272] Burrows – 2020 (n 143) 350.
[273] Bant (n 1)102; Bant & Bryan (n 1) 447.
[274] Bant & Bryan (n 1); Sarah Worthington, 'Equitable Estoppel: Unpacking a Doctrine' (1999) 26 *JMCL* 227, 246; Hudson (n 4) 1-3.
[275] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in Elizabeth Cooke (ed) *Modern Studies in Property Law Volume II* (2003) 145, 146-7; McFarlane (n 1) 158-162. Cf Balen & Knowles (n 224) 176.
[276] Balen & Knowles (n 224) 185.

and uphold the freedom of the parties to determine the basis on which their relations, and transfers of value within them, are founded.[277]

Further, it has emerged strongly from the preceding analysis that the concepts of 'assumption' and 'basis' are functionally equivalent.[278] As just noted, in each case, they provide the conditional foundation for the parties' relations, and transfers of value within them. Both concepts are objective, rather than subjective.[279] And they are bilateral, rather than unilateral. They cannot just be in the plaintiff's mind. Moreover, there can be no cross-purposes. In neither case can the plaintiff have one assumption, or basis, in mind, and the defendant something different. In relation to failure of basis claims, and conventional estoppels, if the basis, or assumption, is not communicated or otherwise expressly agreed, it must at least be shared, in the sense of manifest. The defendant ought reasonably to know the assumption or basis, and the plaintiff can reasonably expect this. Otherwise, in both cases, the plaintiff will be a risk-taker, undeserving of the law's assistance.[280] In both cases, the assumption, or basis, can be of fact or law. And it must be as to what state of affairs does exist as a matter of certainty, not mere probability, possibility, or hope.[281] The manner of creation of the assumption, or basis, is not determinative. It may be created ad hoc. It may be express or implied. It may arise from a course of dealing between the parties, or through other acts or decisions.[282] It can be contractual. The assumption, for the purposes of estoppel by convention, and the basis for the purposes of failure of basis, are both identified from a close analysis of the facts, established by evidence. In both cases, this is a process analogous to contractual construction. It is assisted by the objective theory of contract and the various rules of contractual construction – albeit some applied in modified form. For example, evidence of conduct subsequent to the creation of the parties' relation, or the transfer in issue, is admissible to prove the assumption, or basis.

Further, the concept of *failure* of basis is functionally equivalent to that of the defendant 'resiling' or 'departing' from the assumption adopted by the parties as the conventional basis of their relations.[283] Importantly, both must give rise to relevant detriment on the part of the plaintiff. Moreover, the *same concept of detriment* applies to both conventional estoppels and claims for failure of basis. This is evident even though the language of detriment is not used in relation to failure of basis claims or claims in the category of unjust enrichment generally. For

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[277] Cf Hudson (n 4) 18-22.
[278] Bant & Bryan (n 1) 447-8.
[279] Bant & Bryan (n 1) 435, 447-8.
[280] Balen & Knowles (n 224) 184.
[281] Leopold (n 8) 251.
[282] Handley (n 8) [8-001].
[283] Bant & Bryan (n 1) 435, 447-8.

conventional estoppels, the plaintiff changes their position in reliance on the assumption and, as a result, will suffer detriment if the defendant resiles from the assumption. Likewise, for failure of basis claims, although there is no 'detriment' element in these terms, it is built into the elements common to all claims in the category of unjust enrichment that the defendant is *enriched* and the enrichment is *at the expense of* the plaintiff. Implicitly, these elements require a change of position by the plaintiff. The plaintiff must *transfer some value* to the defendant. In a failure of basis claim, that transfer is conditional – made on a particular basis. In other words, it is made in reliance on that basis. And if the basis fails, the plaintiff suffers a detriment corresponding to the value of the benefit transferred. In both cases, the detriment suffered by the plaintiff is that which results from a change in position made by the plaintiff in reliance on a conditional state of affairs, when that condition fails to be fulfilled. Accordingly, it can be said that, for both estoppel by convention and failure of basis, it is the failure of the condition for the plaintiff's behaviour that triggers a response.

Further, as the immediately preceding discussion reveals, for both conventional estoppels and failure of basis claims, the requirement of detriment is a requirement of detrimental *reliance*. It is in reliance on the assumption or basis that the plaintiff changes their position, with the result that, on the defendant's departure from the assumption, or the failure of the basis, the plaintiff suffers detriment. In both cases, the detrimental reliance provides a causal link between the assumption or basis and the plaintiff's change of position. And in both cases, the reliance must be reasonable. Again, these are not expressly elements of claims in the category of unjust enrichment alleging a failure of basis. But they are built into the basis element which is objectively ascertained and must be shared for the plaintiff to avoid being characterised as a risk-taker who does not deserve the law's assistance. A plaintiff who transfers a benefit on a basis which is entirely in their own mind does not act reasonably.

Further, for an estoppel by convention, the defendant will be held to the parties' assumption to *prevent the detriment* to the plaintiff. For a failure of basis claim, the failure having occurred, the defendant is required to *reverse the detriment* to the plaintiff. And finally, at least in Australia, unconscionability may be irrelevant in both cases.

B No Overlap Between Estoppel By Convention and Failure of Basis

Notwithstanding the significant overlap between estoppel by convention and failure of basis, there are also differences between the two. A key difference is that estoppel by convention is not a cause of action but a procedural rule. A failure of basis, on the other hand, gives rise to substantive rights and obligations. Another key difference is that conventional estoppels can result in liability even where the

defendant has not been enriched. Enrichment, of course, is an element of failure of basis claims. Several other differences flow from, or are a function of, these primary differences between estoppel by convention and failure of basis. There are also other differences which are more apparent than real. And there are yet other differences which, when seen against the background of the significant similarities between estoppel by convention and failure of basis, arguably should not exist. What follows will consider each of these sets of differences in turn, then conclude with some observations about the relationship between estoppel by convention and failure of basis.

Conventional estoppels can result in the imposition of liability on a defendant who has not been enriched. The estoppel is not limited, nor governed by the extent of the defendant's enrichment.[284] So, the effect of the estoppel may not be to reverse unjust enrichment. On the other hand, the enrichment of the defendant is an essential element of claims in the category of unjust enrichment alleging failure of basis. This is a real difference. It is accordingly suggested by some, in relation to estoppels and unjust enrichment generally, that it should be harder to establish an estoppel than an unjust enrichment.[285] They argue that the absence of any transfer of value by the plaintiff to the defendant weakens the justification for the law's intervention in cases of this kind. And the strict liability which applies to unjust enrichment claims generally is only appropriate because there is a transfer of value by the plaintiff to the defendant. In estoppel cases, therefore, strict liability is inappropriate. There should be fault-based liability, with the unconscionability criterion supplying the fault element.[286] Although this argument may have force in relation to equitable species of estoppel – promissory and proprietary estoppel – where the equitable standard of unconscionability fits (whatever it may mean), the argument may lack force in relation to estoppel by convention as a common law species of estoppel.[287] The consequences of an estoppel by convention being established are that the defendant is held to the parties' assumption. The rights and liabilities of the parties are therefore treated as being those which flow from that assumption. That is all. So, there can be no objection to the defendant's liability – in this sense – being 'strict'. There need be no additional fault element to find the defendant so liable, whether unconscionability or something else. The philosophical justifications for, or normative foundations of, estoppel by convention and failure of basis are arguably the same. It ought to follow that the

[284] Balen & Knowles (n 224) 182; McFarlane (n 1) 158; Hopkins (n 276) 150.
[285] McFarlane (n 1) 160.
[286] McFarlane (n 1) 160; Hopkins (n 276) 148-9.
[287] Noting, however, that the language of unconscionability has been used in relation to some traditionally common law doctrines, including failure of basis and unjust enrichment more generally. See eg *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560, [214], [216].

standard of liability applicable to both – whether strict or fault-based – should also be the same.

Another real difference between estoppel by convention and failure of basis is that the former is not, and the latter is, a cause of action. The dominant (albeit not universal) view of conventional estoppel is that it is a rule of evidence rather than a direct source of substantive rights and obligations. It precludes the admission of evidence which contradicts the parties' assumption. On the other hand, failure of basis is a cause of action, even in Australia, where the status of unjust enrichment generally is in some doubt. It is a cause of action in the category of unjust enrichment. So, it is a direct source of substantive rights and obligations.

Further, the remedies available on establishing an estoppel by convention and a failure of basis are different. This is a further real difference between the two, and possibly the main point of distinction.[288] For failure of basis claims, the only possible remedy is restitution – of the value of the benefit by which the defendant was enriched at the plaintiff's expense.[289] But for conventional estoppels, the defendant is held to the parties' assumption and is not permitted to resile from it. The consequences of this will depend on the facts.[290] For example, if the parties' assumption is that their contract has a particular meaning, the parties will be required to perform that contract, or will be held to the consequences of its application, so understood. The available 'remedies' are accordingly unlimited. Certainly, they are not limited to restitution.

There could, therefore, be said to be 'remedial uncertainty' in relation to conventional estoppels, as has been said of other species of (equitable) estoppel.[291] But such uncertainty does not arise – as it does in relation to equitable estoppels – from the existence of *remedial discretion*. For equitable estoppels, a guiding remedial principle is that the remedy must be the minimum necessary to do justice. Within that broad limitation, the remedy may be personal or proprietary, compensatory or gain-based and, where compensatory, reliance or expectation based. The form and extent of the remedy is entirely within the discretion of the Court. In relation to conventional estoppels, on the other hand, there is no such discretion. Indeed, the very language of 'remedy' and 'remedial discretion' is inapt. It is inapt for the reason just described: estoppel by convention is not a cause of action but a procedural rule. Where the estoppel is made out, the defendant is held to the parties' assumption. The consequences of that – remedial and otherwise – depend on the facts and circumstances. It is those, rather than the exercise of any judicial discretion which dictates the rights and obligations of the parties. So,

[288] Bant & Bryan (n 1) 447-8; McFarlane (n 1) 159-60.
[289] Worthington (n 275) 243; McFarlane (n 1) 159-60.
[290] Hopkins (n 276) 152; Balen & Knowles (n 224) 179-80.
[291] Balen & Knowles (n 224) 179-80; Worthington (n 275) 246; Hopkins (n 276) 150-152.

although there may, in one sense, be remedial uncertainty surrounding conventional estoppels – in that the consequences of an estoppel being established are, in theory, at large – they will principally turn on the nature of the parties' assumption, and not on the unpredictable exercise of discretion by a court.

Relatedly, it might be said that each of estoppel and unjust enrichment generally – and by extension, estoppel by convention and failure of basis in particular – have a different focus, and a different target. The focus of estoppel generally is detriment, and its target, preventing that detriment. The focus of unjust enrichment generally is the defendant's gain, and its target, reversing that gain. But even if this difference exists in the same way in relation to conventional estoppels and failure of basis as it does in relation to estoppels and unjust enrichment generally, it is a function of conventional estoppels operating where there is no enrichment of the defendant, and it may not be a real difference at all. The plaintiff's detriment, and the defendant's gain will often coincide. And even where they do not, they are usually related. The defendant's enrichment must be subtracted from the plaintiff, even though the plaintiff need not have suffered any loss. Accordingly, a target of preventing the plaintiff's detriment may often be reconceptualised as, at the same time, preventing the defendant's gain.

It might also be suggested that each of estoppel by convention and failure of basis has a different relationship with the law of contract. A threshold issue in a claim for failure of basis – or any other claim in the category of unjust enrichment – is whether there is a subsisting valid contract between the parties which allocates the risk in question. If there is, that contract will provide a juristic reason for the defendant to retain the enrichment. In relation to conventional estoppels, there is no such threshold issue. And conventional estoppels frequently operate within the context of, and in relation to contracts – after they are entered into by the parties, as well as before. For example, the parties' assumption may be as to the meaning or application of a contract between them, such that an estoppel by convention permits, or prohibits a claim under the contract. This difference is a function of estoppel by convention being a shield, rather than a sword – a procedural rule rather than a cause of action.

The same is true of another difference between conventional estoppel and failure of basis, namely, the available defences. For claims in the category of unjust enrichment generally, the principal defence is change of position. For estoppel by convention, there is no such defence, in terms. There can be no 'defence' to something which is not a cause of action. However, as discussed, it may be doubtful whether the defence of change of position applies generally to claims for failure of basis. Similarly, claims in the category of unjust enrichment, including failure of basis, are subject to a counter-restitution requirement which is sometimes conceived of as a defence. Where the *defendant* transfers some value *to the plaintiff*,

the plaintiff must make restitution of that value to the defendant to get restitution from the defendant. For conventional estoppels, there is no such requirement, in terms. But again, insofar as the counter-restitution requirement is a defence, it is unavailable in answer to an estoppel by convention because the estoppel is not a cause of action. In any event, it seems that estoppel by convention is *mutual*: in principle, the parties' assumption binds both parties; the plaintiff as much as the defendant is estopped from resiling from the assumption where the other elements of the estoppel are made out.[292] There is some doubt about this feature.[293] But it seems right in principle. The defendant could, therefore, raise an estoppel by convention against the plaintiff and, in this way, the estoppel is to the same effect as a counter-restitution requirement.

On the other hand, it could be said that the mutuality feature of conventional estoppel distinguishes it from failure of basis. While an estoppel by convention, once made out, estops both parties from resiling from their assumption, on a failure of basis, only the plaintiff – the party who transfers a benefit to the other – is entitled to restitution. The counter-restitution requirement in unjust enrichment claims is one answer to this suggestion but there is also another. In failure of basis claims, which party is entitled to restitution depends on the direction of the transfer of value. It does *not* depend on how or why the basis for the transfer fails. For example, where the basis fails on a breach of contract, depending on the direction of the transfer of value, either party may be entitled to restitution, whether the 'innocent' party or the party in breach. It is settled that, even where a party *causes* the basis for a transfer to fail, they may be entitled to restitution.[294] So, although in a particular case, in respect of a particular transaction, only one party will be entitled to restitution – the plaintiff – generally, either party may be so entitled. This is not so different from saying that both parties may be estopped by an estoppel by convention.

Further, there has been debate about whether the parties' pre-contractual negotiations can evidence an assumption for the purposes of estoppel by convention. In relation to failure of basis, there appears to be no such debate. Pre-contractual negotiations, like any exchanges between the parties prior to their entry into a transaction pursuant to which the plaintiff transfers a benefit to the defendant, provide fertile ground for the identification of the basis for the transfer. However, the better view is that such negotiations *can* evidence an assumption as an element of a conventional estoppel. Indeed, this is one instance where the position so far as concerns estoppel by convention should be consistent with the position so far as

[292] Handley (n 8) [8-001]; Brettel Dawson (n 3) 31.
[293] Spencer Bower (n 9) [176].
[294] *Dies v British and International Mining and Finance Corp* [1939] 1 KB 724; *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912.

concerns failure of basis. For the coherence of the law, pre-contractual negotiations should be capable of evidencing either an assumption for an estoppel by convention, or a basis for a failure of basis.

Similarly, in relation to the total failure requirement in failure of basis claims, there has been no express recognition of an equivalent requirement for conventional estoppels. However, there should be a 'total departure' requirement, understood in the same way, for consistency between estoppel by convention and failure of basis, and the coherence of the law generally.

Likewise, for failure of basis claims, the basis may be a matter of existing fact or as to the future. But for conventional estoppels, the parties' assumption must be a matter of existing fact. There is no obvious justification for so limiting estoppels by convention. Again, for consistency, and the coherence of the law generally, an assumption, for the purposes of conventional estoppel, and a basis, for the purposes of failure of basis, should be capable of being either a matter of existing fact or as to the future.[295]

V CONCLUSIONS

All this reinforces the close relationship between estoppel by convention and failure of basis. The area of overlap between the two is significant. There is overlap whenever the plaintiff has transferred a benefit to the defendant and the relief sought by the plaintiff includes restitution of that benefit. In this area of overlap, estoppel by convention and failure of basis are *doing the same work.* Both are *reversing unjust enrichment*. In this area of overlap, therefore, for consistency and the coherence of the law, failure of basis and estoppel by convention should be understood and applied in the same way. To be clear, it is not argued that, in this area of overlap, failure of basis should *subsume*, or *supplant*, estoppel by convention. There is room for both. Each provides an alternative analysis. And this is unobjectionable so long as each produces the same result on the same facts. This will be so if each informs the other. So, failure of basis should suggest the resolution of controversies in relation to estoppel by convention, and vice versa. And estoppel by convention should be used as a cross-check on failure of basis, and vice versa.

For example, as for failure of basis, so too for estoppel by convention, the parties' assumption should be capable of being either a matter of existing fact or as to the future. Likewise, pre-contractual negotiations should be capable of evidencing either the basis for a transfer, for the purposes of failure of basis, or the parties' assumption, for the purposes of estoppel by convention. In the same way, the trend in England (and elsewhere) to include unconscionability as an element of estoppel by convention should be resisted on the ground that it has no place as part

[295] Bant & Bryan (n 1) 447-8.

of a failure of basis claim. And the recognition that, in a failure of basis claim, there may be more than one basis for a transfer, should be extended to estoppel by convention, in the identification of the parties' assumptions.

Of course, the overlap between estoppel by convention and failure of basis is not complete. There is *no* overlap where the defendant is not enriched – where there has been no transfer of value by the plaintiff to the defendant. In those cases, there can be no failure of basis, and no claim in unjust enrichment at all. Only estoppel by convention may operate. So, estoppel by convention includes, but is larger than, failure of basis. Failure of basis is a sub-set of estoppel by convention.

Even where there is no overlap, the close relationship between estoppel by convention and failure of basis is still important. In these cases, it is helpful to think of the estoppel as, not reversing, but *preventing unjust enrichment.* Accordingly, although the law's response in these cases is not restitution, still, estoppel by convention should be understood and applied consistently with failure of basis. This is just as important for the coherence of the law *within* estoppel by convention as it is *between* estoppel by convention and failure of basis.