REMEDIES AND THE *BAUMGARTNER* JOINT ENDEAVOUR PRINCIPLE: ASPECTS OF THE MINIMUM EQUITY RULE

MAXEN WILLIAMS*

The doctrine in Baumgartner v Baumgartner – the joint endeavour principle – is now a firmly entrenched feature of Australian equity jurisprudence. However, substantial uncertainties remain as to its remedial operation. It is unclear when the principle can override other doctrines, such as resulting trusts and equitable estoppel, in providing a remedy. It is also unclear if the quantum and form of such a remedy can be determined in accordance with legal principle, including where interested third parties are present. These obscurities have led to significant academic criticism of the doctrine. This article argues that these uncertainties can be resolved by attention to the minimum equity rule: the notion that equity will only grant the minimum remedy necessary to relieve the conscience of the defendant. In so arguing, the joint endeavour principle is upheld, contrary to the academic commentary, as an example, par excellence, of the principled development of the law.

I INTRODUCTION

The remedy for a failed joint endeavour must only be the minimum necessary to relieve the conscience of the defendant. That proposition and its corollaries, it will be argued, are sufficient to resolve the present uncertainties concerning the remedial operation of the doctrine in *Muschinski v Dodds* ('*Muschinski*')[1] and *Baumgartner v Baumgartner* ('*Baumgartner*'),[2] henceforth the 'joint endeavour principle' ('JEP'). In so arguing, the legitimacy of the JEP as an example of the development of the law in accordance with traditional equitable reasoning is upheld.

The JEP, although now a firmly entrenched feature of Australian equity jurisprudence, remains a difficult and poorly understood doctrine; tellingly, Gummow J has said of *Baumgartner*, '[i]f you can find the ratio, you are fairly astute'.[3] Inevitably, therefore, the JEP has been the subject of significant academic

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1 (1985) 160 CLR 583 ('*Muschinski*').

2 (1987) 164 CLR 137 ('*Baumgartner*').

3 Transcript of Proceedings, *Bathurst City Council v PWC Properties Pty Ltd* (High Court of Australia, S141/1997, Gummow J, 21 April 1998).

criticism. For example, the authors of *Jacobs' Law of Trusts in Australia* ('*Jacobs*') have contended that the JEP

> may give no more predictability or consistency in result than that which follows from the English decisions espousing the 'new model' constructive trust. It remains unclear as to when and why the interposition of equity to prevent unconscientious reliance on legal rights … will give rise in equity to a proprietary rather than a personal right, and a proprietary right which is a constructive trust 'fashioned' by the court.[4]

Despite this criticism, the JEP has been of great utility to plaintiffs in the years following *Baumgartner*: for instance, the doctrine was pleaded at least 26 times in 2019 alone.[5] This is notwithstanding the expansive conferral of jurisdiction upon courts to adjust the proprietary rights of parties to domestic relationships by both Commonwealth and state legislatures.[6] The JEP remains relevant because, although it is most frequently applicable in the context of domestic relationships, not all such relationships attract family law jurisdiction, and the JEP may confer advantages not always available under family law legislation, such as gaining priority over other creditors in a bankruptcy scenario.[7] The JEP can also apply in purely commercial contexts.[8]

In light of the significance of the JEP in the contemporary practice of equity, a response to the academic criticism of the doctrine, and a clarification of the uncertainties that plague it, would be desirable. Both critique and uncertainty, as intimated by the passage from *Jacobs* quoted above, relate primarily to remedies.[9] It is difficult to explain what kind of relief should be granted when the JEP is applied; although both *Muschinski* and *Baumgartner* resulted in the award of a constructive trust, the specific orders in either case were very different,[10] and lower court applications of the JEP have resulted in remedies including unsecured

4 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 275–6 [13-53] ('*Jacobs*'). See also James Edelman, 'Judicial Discretion in Australia' (2000) 19(3) *Australian Bar Review* 285, 296; Barbara McDonald, 'Constructive Trusts' in Patrick Parkinson (ed), *The Principles of Equity* (Lawbook, 2nd ed, 2003) 721, 776.

5 Ying Khai Liew, 'The "Joint Endeavour Constructive Trust" Doctrine in Australia: Deconstructing Unconscionability' (2021) 42(1) *Adelaide Law Review* 73, 75 ('The Joint Endeavour Constructive Trust').

6 See generally *Family Law Act 1975* (Cth); *Domestic Relationships Act 1994* (ACT); *Property (Relationships) Act 1984* (NSW); *De Facto Relationships Act 1991* (NT); *Property Law Act 1974* (Qld); *Domestic Partners Property Act 1996* (SA); *Relationships Act 2003* (Tas); *Relationships Act 2008* (Vic); *Family Court Act 1997* (WA) pt 5A.

7 See, eg, *Re Sabri; Ex parte Brien v Australia & New Zealand Banking Group Ltd* (1996) 137 FLR 165, 181–2, 185 (Chisholm J) ('*Sabri*'). But see also *Family Law Act 1975* (Cth) ss 79(1)(b), 90SM(1)(b); *Bankruptcy Act 1966* (Cth) ss 59A, 116(2)(q); Grant T Riethmuller, 'Family Law and Bankruptcy: An Alternative Conceptualisation' (2014) 28(3) *Australian Journal of Family Law* 290.

8 *Galati v Deans* [2021] NSWSC 1094, [912] (Ward CJ in Eq), citing *Liquor National Wholesale Pty Ltd v Redrock Co Pty Ltd* [2007] NSWSC 392, [42] (Brereton J).

9 Heydon and Leeming, *Jacobs* (n 4) 275–6 [13-53].

10 *Muschinski* (n 1) 623–4 (Deane J, Gibbs CJ agreeing at 598, Mason J agreeing at 599). Cf *Baumgartner* (n 2) 157. See also Elise Bant and Michael Bryan, 'Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials' (2011) 5(3) *Journal of Equity* 171, 190–1.

equitable compensation,[11] an equitable lien (or charge)[12] and a constructive trust.[13] As well, there is confusion as to how relief is determined where the JEP and a different legal doctrine may both operate so as to justify a remedy.[14] There is a dearth of academic literature which addresses these issues.[15] The present article seeks to cure this dearth.

It also seeks to contribute to the jurisprudence on the 'minimum equity rule'. That term will be used to describe the proposition that equity will only grant the minimum remedy necessary to relieve the conscience of the defendant.[16] The concept of the minimum equity is generally accepted as guiding the formulation of equitable relief, but it is often times given only glib reference, sometimes entirely brushed off, and seldom has a thorough investigation been made into its full implications.[17] This article, therefore, considers four issues which affect the determination of remedies based on the JEP and, correspondingly, four aspects of the minimum equity rule. In doing so, the importance of the rule is reasserted, and the JEP is defended as entirely consonant with traditional equitable reasoning.

Part III of this article addresses the first substantive issue: the interaction of the JEP with other legal doctrines. Part III first illustrates how the minimum equity rule requires that the JEP only operate so as to provide a remedy if there is no other available doctrine sufficient to undo any unconscionable conduct of the defendant. It then proceeds to identify situations in which the JEP may operate concurrently with another doctrine, if required by the dictates of conscience. Following this, Part IV explains how the minimum equity rule determines the quantum of relief to which a plaintiff is entitled on the basis of the JEP, and builds on Part III in discussing how other doctrines guide this quantification. Next, Part V addresses how the form of relief based on the JEP is determined and explains the circumstances in which effecting the minimum equity requires relief in the nature of unsecured equitable compensation, an equitable lien, or a constructive trust. Part VI is the final substantive part, discussing how the need to protect third party interests may affect the formulation of relief. Before these issues can be addressed, however, it is necessary to explain the nature and history of the JEP and the minimum equity rule, which is what Part II does.

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11 *Krajovska v Krajovska* [2011] NSWSC 903, [54]–[56], [66] (Black J) ('*Krajovska*').

12 *Henderson v Miles [No 2]* (2005) 12 BPR 23,579, 23,590 [109]–[110] (Young CJ in Eq) ('*Henderson*').

13 *West v Mead* (2003) 13 BPR 24,431, 24,457–8 [114]–[116] (Campbell J) ('*West*').

14 See *Saitannis v Katsolos* [2022] NSWSC 1468, [106]–[109] (Robb J) ('*Saitannis*').

15 But see Liew, 'The Joint Endeavour Constructive Trust' (n 5); Ying Khai Liew, 'Constructive Trusts and Discretion in Australia: Taking Stock' (2021) 44(3) *Melbourne University Law Review* 963, 978–80 ('Constructive Trusts and Discretion').

16 *Hogan v Baseden* (1997) 8 BPR 15,723, 15,726 (Beazley JA) ('*Hogan*').

17 See Peter W Young, Clyde Croft and Megan Louise Smith, *On Equity* (Lawbook, 2009) 950–1 [14.180]–[14.190]. Cf Liew, 'The Joint Endeavour Constructive Trust' (n 5) 90–2; Susan Barkehall Thomas, 'Families Behaving Badly: What Happens When Grandma Gets Kicked Out of the Granny Flat?' (2008) 15(2) *Australian Property Law Journal* 154, 164 ('Families Behaving Badly').

II OVERVIEW OF CONCEPTS

A The Joint Endeavour Principle

The JEP is the 'general principle of equity' first identified by Deane J in *Muschinski* as a novel basis for the imposition of a constructive trust.[18] The principle, in the words of Deane J, as approved by the majority (Mason CJ, Wilson and Deane JJ) in *Baumgartner*,[19]

> operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do …[20]

This article follows Owen J in *Stowe v Stowe [No 3]* and Miller J in *Lloyd v Tedesco* in terming the principle identified by Deane J in *Muschinski* the JEP – the 'joint endeavour principle' – as that phrase is helpfully descriptive of the circumstances in which the principle may operate.[21]

The JEP, as intimated by Deane J,[22] is best classified as a 'general equity' based on unconscionability, akin to proprietary and promissory estoppel.[23] That is to say, when the elements of the principle are satisfied, then this gives rise to an equity in favour of the plaintiff which is 'general' in the sense that it may entitle the plaintiff to a range of equitable relief, both personal and proprietary, determined by the extent of the unconscionable conduct of the defendant viewed in light of the circumstances as a whole.[24]

It is often said that operation of the JEP gives rise to a constructive trust,[25] and the JEP is generally discussed in textbooks under the heading of constructive trust.[26] That proposition can be accepted as correct, but only in a limited sense. The

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18 *Muschinski* (n 1) 619.

19 *Baumgartner* (n 2) 148.

20 *Muschinski* (n 1) 620.

21 *Stowe v Stowe [No 3]* (Supreme Court of Western Australia, Owen J, 5 August 1997) 6; *Lloyd v Tedesco* [2001] WASC 99, [3]. Cf the other terms which have been used to describe the principle: 'Windfall Equity' (*Henderson* (n 12) 23,581 [19] (Young CJ in Eq)); '"failed joint endeavour" equity' (*Dean v Aylward* [2017] NSWSC 972, [51] (Parker J) ('*Dean*')); '*Baumgartner* equity' or '*Baumgartner* principle' (*Clancy v Salienta Pty Ltd* (2000) 11 BPR 20,425, 20,426 [1], 20,437 [70] (Beazley JA)).

22 *Muschinski* (n 1) 619.

23 *Henderson* (n 12) 23,581 [19] (Young CJ in Eq).

24 See *Commonwealth v Verwayen* (1990) 170 CLR 394, 434–5 (Deane J) ('*Verwayen*').

25 The phrase 'joint endeavour constructive trust' is frequently used: see, eg, *Lordianto v Commissioner of Australian Federal Police* (2019) 266 CLR 273, 323 [141] (Edelman J); *Sweeney v He* [2023] NSWCA 68, [2] (Ward P), [169] (Brereton JA); *Merker v Merker* [2022] QCA 277, [49] (McMurdo JA); *Gunn v Meiners* [2022] WASCA 95, [208] (Mitchell, Beech and Vaughan JJA); *Zekry v Zekry* [2020] VSCA 336, [74] (Tate, Kyrou and Niall JJA) ('*Zekry*').

26 See, eg, Heydon and Leeming, *Jacobs* (n 4) 275–6 [13-51]–[13-53]; Young, Croft and Smith (n 17) 445–51 [6.750]–[6.800]; GE Dal Pont, *Equity and Trusts in Australia* (Lawbook, 7th ed, 2019) 1149–55 [38.175]–[38.210]; Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 5th ed, 2021) 924–35 [36.31]–[36.77].

term 'constructive trust' is used in a variety of different contexts; in some cases the declaration of a constructive trust involves the recognition of a proprietary interest held by the plaintiff, whereas in other cases it merely involves the imposition of personal liability upon the defendant in a manner akin to the liability which a defaulting express trustee may attract.[27] It is in the latter sense of the phrase that a constructive trust arises in every case where the JEP is found to operate. More particularly, it could be said that in every case where the JEP is operative, the doctrinal basis for relief involves the recognition of a constructive trust whereby the defendant is prevented from asserting that they have, or had at some point, a beneficial interest in the relevant property to the extent of their legal rights without having atoned for any unconscionable conduct.[28] To speak of a constructive trust in this way, however, is not particularly helpful.[29] The basis for the grant of equitable relief is the JEP itself, rather than the preliminary conclusion that the manner in which the defendant is liable in accordance with that principle is similar to the manner in which a defaulting express trustee may be liable.[30] In this article, therefore, use of the term 'constructive trust' in this minimalist sense will be avoided.

A constructive trust in the minimalist sense must be distinguished from a constructive trust of a properly proprietary kind.[31] The latter – henceforth the referent for 'constructive trust' in this article – can only exist where the circumstances are such as would justify, *inter partes*, the court making an order that the plaintiff has a certain beneficial interest in property held by the defendant.[32] As soon as such circumstances exist, a constructive trust is recognised as coming into existence independently of any order of the court.[33] In such circumstances, the court will ordinarily fully enforce the constructive trust by in fact making orders granting the plaintiff a beneficial interest in the relevant property effective from the time of the entitling circumstances.[34] However, third party interests may mean that a constructive trust which is *recognised* as pre-existing and properly proprietary, can only be *enforced* as effective from a later date[35] or by means of a remedy less than the grant of a beneficial interest in property.[36] Full enforcement of a constructive

27 *Giumelli v Giumelli* (1999) 196 CLR 101, 112 [4] (Gleeson CJ, McHugh, Gummow and Callinan JJ) ('*Giumelli*').

28 See generally *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1, 46 [150] (Keane J).

29 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296, 356 [242] (Finn, Stone and Perram JJ) ('*Grimaldi*'); *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366, 404 [141]–[142] (Lord Millett).

30 See generally *Grimaldi* (n 29) 402–5 [503]–[512] (Finn, Stone and Perram JJ).

31 A failure to attend to such a distinction can result in confusion: cf Dane Bryce Weber, '*Muschinski v Dodds* and the Joint Endeavour Principle: The Ephemeral Distinction between Institutional and Remedial' (2019) 27(3) *Australian Property Law Journal* 227, 245–6.

32 See, eg, the orders in *Baumgartner* (n 2) 157.

33 *Muschinski* (n 1) 614 (Deane J).

34 *Secretary, Department of Social Security v Agnew* (2000) 96 FCR 357, 365 [18] (Drummond, Sundberg and Marshall JJ) ('*Agnew*').

35 *Muschinski* (n 1) 615, 623 (Deane J).

36 See, eg, *Australian Building & Technical Solutions Pty Ltd v Boumelhem* (2009) 2 ASTLR 336, 370 [171] (Ward J) ('*Boumelhem*'); *Giumelli* (n 27) 112 [5], 125 [49]–[50] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

trust might also be prevented by conduct *inter partes* which occurred after the entitling circumstances because of, for example, unclean hands or laches.[37] Whether certain circumstances where the JEP is operative can constitute a properly proprietary constructive trust, and how that constructive trust should be enforced, is determined by the minimum equity rule.

B The Minimum Equity Rule

The minimum equity rule is the rule that equity will only grant the minimum remedy necessary to relieve the conscience of the defendant.[38] The origins of this rule likely go back to the medieval origins of the Court of Chancery, when the objective of the Chancellor was to provide a remedy 'as conscience requireth' in order to save the soul of the defendant; there would have been no justification for the Chancellor to grant more extensive relief than necessary to achieve that purpose.[39] The minimum equity rule applies generally to all manner of equitable doctrine, but the majority of jurisprudence on the rule has arisen in the context of equitable estoppel.[40]

Thus, the most influential modern formulation of the rule was by the Court of Appeal in *Crabb v Arun District Council*, a case dealing with equitable estoppel.[41] In that case, Scarman LJ considered that, in determining the extent of a particular equity and the relief needed to satisfy it, the court should effect 'the minimum equity to do justice to the plaintiff'.[42] Scarman LJ's judgment makes clear that any injustice which equity recognises can be identified with unconscionability, and so the minimum equity necessary to do justice to the plaintiff is the same as the minimum equity necessary to counteract the unconscionable conduct of the defendant.[43] Scarman LJ's statement of principle was later approved in Australia by Mason CJ, Wilson J and Brennan J in *Waltons Stores (Interstate) Ltd v Maher* ('*Waltons*').[44] Brennan J, in that case, stated that 'in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct'.[45]

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37 See JC Campbell, 'When and Why a Bribe is Held on a Constructive Trust: The Method of Reasoning Towards an Equitable Remedy' (2015) 39(3) *Australian Bar Review* 320, 338–41 ('Bribes Held on Constructive Trust').

38 *Hogan* (n 16) 15,726 (Beazley JA).

39 Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate, 2010) 17 <https://doi.org/10.4324/9781315573465>.

40 Young, Croft and Smith (n 17) 950–1 [14.180]–[14.190]. See, eg, *Tillett v Varnell Holdings Pty Ltd* [2009] NSWSC 1040, [92]–[101] (Brereton J) (undue influence and unconscionable conduct); *Re Sirrah Pty Ltd (in prov liq)* (2021) 152 ACSR 212, 262 [157] (Black J) (breach of fiduciary duty, knowing receipt and knowing assistance); *Austin v Hornby* (2011) 16 BPR 30,623, 30,655–6 [186] (Ward J) ('*Austin*') (common intention constructive trust).

41 [1976] Ch 179 ('*Crabb*'). See also *Henderson* (n 12) 23,585 [62] (Young CJ in Eq).

42 *Crabb* (n 41) 198.

43 Ibid 195; JC Campbell, '*Waltons v Maher*: History, Unconscientiousness and Remedy: The "Minimum Equity"' (2013) 7(3) *Journal of Equity* 171, 188 ('*Waltons* and the Minimum Equity').

44 (1988) 164 CLR 387, 404 (Mason CJ and Wilson J), 417 (Brennan J) ('*Waltons*').

45 Ibid 419.

The High Court's decision in *Giumelli v Giumelli* ('*Giumelli*') has caused some confusion concerning the minimum equity.[46] *Giumelli* is often understood as having overruled *Waltons* in holding that the enforcement of the minimum equity is no longer the guiding principle in determining equitable relief for an estoppel.[47] Rather, it is said, the effect of *Giumelli* is that an equitable estoppel will prima facie be remedied by requiring the defendant to make good the assumption they induced in the plaintiff.[48] In truth, any 'prima facie entitlement' established by *Giumelli* can in no way be inconsistent with the minimum equity rule.[49] The Court made clear in *Giumelli* that any relief must not 'exceed what could be justified by the requirements of conscientious conduct' and must not 'be unjust to the estopped party'.[50] It was also observed that the Court needed to 'avoid relief which went beyond what was required for conscientious conduct by Mr and Mrs Giumelli'.[51] To say that a plaintiff is prima facie entitled to relief requiring the defendant to make good the assumption induced by them must therefore just mean that, in most estoppel cases, such relief will usually be necessary to relieve the conscience of the defendant and do justice to the parties; it is an empirical generalisation, rather than a statement of principle.[52] Thus, in *Sidhu v Van Dyke* the High Court disregarded the cases decided prior to *Giumelli* to the extent that those cases supported an approach to the minimum equity rule limiting relief for an estoppel to the reversal of detriment, but clearly endorsed the minimum equity rule itself: the requirement that the Court go 'no further than is necessary to prevent unconscionable conduct'.[53]

This understanding is consistent with the recent decision of the Supreme Court of the United Kingdom in *Guest v Guest*.[54] In that case, the majority, for whom Lord Briggs JSC delivered judgment, held that the prima facie appropriate remedy for an equitable estoppel, at least where 'the reliant detriment has … had lifelong consequences', is to fulfil the plaintiff's expectation.[55] However, Lord Briggs JSC made clear that this prima facie position accords with the minimum equity rule properly conceived.[56] '[N]either expectation fulfilment nor detriment compensation is the aim of the remedy' for an equitable estoppel; rather, the aim

46 *Giumelli* (n 27).

47 See, eg, *Donis v Donis* (2007) 19 VR 577, 588 [32] (Nettle JA) ('*Donis*'); *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483, 493 [59] (Handley AJA); *Jones v AAI Ltd* [2016] FCA 1244, [69] (Allsop CJ); Julie Ward, 'Constructive Trusts and Equitable Property Relief: Insights from Estoppel' in Elise Bant and Michael Bryan (eds), *Principles of Proprietary Remedies* (Lawbook, 2013) 165, 175; Susan Barkehall Thomas, 'Proprietary Estoppel: Enforcing Expectations (Most of the Time)' (2014) 31(3) *Journal of Contract Law* 234, 237; Lee Aitken, 'The Future of the "Minimum Equity", and the Appropriate "Fault Line" in Promissory and Proprietary Estoppel' (2010) 33(3) *Australian Bar Review* 212, 215.

48 *Donis* (n 47) 588 [19] (Nettle JA); Ward (n 47) 175–6.

49 *Giumelli* (n 27) 123 [42], 125 [50] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

50 Ibid 123–4 [42], quoting *Verwayen* (n 24) 442 (Deane J).

51 *Giumelli* (n 27) 125 [50] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

52 Campbell, '*Waltons* and the Minimum Equity' (n 43) 200.

53 (2014) 251 CLR 505, 530 [85] (French CJ, Kiefel, Bell and Keane JJ) ('*Sidhu*'), quoting *Waltons* (n 44) 419 (Brennan J).

54 [2022] 3 WLR 911.

55 Ibid 934–5 [53], 940 [72], [75], 947 [100].

56 Ibid 942 [80].

is 'the prevention or undoing of unconscionable conduct'.[57] In other words, the true aim of the remedy is to effect the 'minimum equity to do justice', which means that 'if the promisor was to confer that proposed remedy upon the promisee, he would [not] be acting unconscionably'.[58] Thus, in the many cases where it is appropriate to fulfil the plaintiff's expectation, giving effect to this prima facie basis for relief, the remedy is justified only because such relief is necessary to undo the unconscionable conduct of the defendant in compliance with the minimum equity rule.

Outside the context of estoppel, the High Court of Australia has mainly stressed minimum equity considerations in relation to constructive trusts. In *Bathurst City Council v PWC Properties Pty Ltd* ('*Bathurst*'), the Court, in an influential passage, stated that 'before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy'.[59] Similarly, in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* ('*John Alexander's*'), the Court observed that '[a] constructive trust ought not to be imposed if there are other orders capable of doing full justice' and that 'care must be taken to avoid granting equitable relief which goes beyond the necessities of the case'.[60] The latter statement is important authority that the minimum equity rule, although particularly pertinent when deciding whether to impose (ie, recognise and enforce) a constructive trust, is really of general application to the determination of equitable remedies. *Bathurst* and *John Alexander's* also indicated that the need to avoid relief which is unduly prejudicial to third parties is a significant aspect of the minimum equity rule; such relief would go beyond what would be necessary to relieve the conscience of the defendant.[61]

Decisions of lower courts have confirmed specifically that the minimum equity rule is determinative of the appropriate relief to be granted on the basis of the JEP. In *Henderson v Miles [No 2]* ('*Henderson*'), Young CJ in Eq held that, in deciding a remedy based on the JEP, it is necessary that it effect '"the minimum equity" to assuage the defendant's conscience'.[62] Similarly, in *Tasevska v Tasevski* ('*Tasevska*') Einstein J stated, in relation to the JEP, that '[w]hatever will be the minimum relief necessary to satisfy the equity should be the form of remedy imposed'.[63] In *Austin v Hornby*, Ward J made clear that the statement in *Bathurst* that a constructive trust should only be imposed if there is no appropriate equitable remedy which falls short

57 Ibid 946 [94].

58 Ibid 942 [80].

59 (1998) 195 CLR 566, 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Bathurst*'), cited in *Giumelli* (n 27) 113 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ), in turn cited in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [200] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

60 (2010) 241 CLR 1, 45–6 [128]–[129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) ('*John Alexander's*').

61 Ibid; *Bathurst* (n 59) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See below nn 231–33 and accompanying text.

62 *Henderson* (n 12) 23,581 [20].

63 [2011] NSWSC 174, [82] ('*Tasevska*'), citing *Giumelli* (n 27) 113 [10] (Gleeson CJ, McHugh, Gummow and Callinan JJ). See also *Byrnes v Byrnes* [2012] NSWSC 1600, [124] (Lindsay J).

of a trust applies to the JEP.[64] Gummow J also intimated this in the *Friend v Brooker* special leave application, saying that '*Bathurst* … at least would suggest some caution in jumping into the pool with the words "*Baumgartner*" in front of it'.[65]

III INTERACTION WITH OTHER DOCTRINES

A Sufficiency of Other Doctrines

Now that the nature of the JEP and minimum equity rule have been clarified, the first significant aspect of the latter concept can be addressed. The minimum equity rule requires that no remedy be granted on the basis of the JEP at all if the operation of another legal or equitable doctrine would be sufficient to undo any unconscionable conduct of the defendant. This proposition can be derived from the previously quoted dictum of the High Court in *Bathurst* that the court should first decide whether 'there are other means available to quell the controversy' before seeking to impose a constructive trust.[66] It is clear that 'other means' includes other doctrines, so the Court seems to be implying here that, if a doctrine can be applied which would only justify the imposition of a remedy less than a constructive trust, and that remedy would be sufficient, then another doctrine which might justify the imposition of a constructive trust – such as the JEP – cannot be applied at all.[67] Alternatively, the subsidiarity of the JEP can be derived from the nature of the principle itself.[68] As noted by Brereton J in *Dinsdale v Arthur*, since the JEP can only apply if there is an unconscionable assertion of rights, it cannot apply where 'the doctrines of resulting trust, accounting and contribution provide an adequate remedy' because then 'there is no unconscionability in insisting upon the position that they produce'.[69] In other words, where another doctrine is sufficient to resolve the case, the JEP has no room for application at all because the requisite element of unconscionability is not present.[70] The minimum equity rule, or considerations closely allied to that rule, therefore requires that the JEP be a principle of last resort.

This point was in issue in *Muschinski*. As noted in *Bathurst*, whether there was an appropriate remedy falling short of a constructive trust

64 *Austin* (n 40) 30,655 [186].

65 Transcript of Proceedings, *Friend v Brooker* [2008] HCATrans 344.

66 *Bathurst* (n 59) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

67 Ibid. The context of [42], particularly the reference to Gibbs CJ's judgment in *Muschinski* (n 1), shows this to be a likely implication of the dictum: see below n 72 and accompanying text. See also Young, Croft and Smith (n 17) 454 [6.860]; David Wright, 'Third Parties and the Australian Remedial Constructive Trust' (2014) 37(2) *University of Western Australia Law Review* 31, 53; Keith Mason, 'Deconstructing Constructive Trusts in Australia' (2010) 4(2) *Journal of Equity* 98, 109–10.

68 The doctrine of subrogation appears to be subsidiary in the same (distinctly equitable) sense: *Cochrane v Cochrane* (1985) 3 NSWLR 403, 405 (Kearney J). As to other forms of subsidiarity in private law, see Lionel Smith, 'Property, Subsidiarity and Unjust Enrichment' in David Johnston and Reinhard Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002) 588 <https://doi.org/10.1017/CBO9780511495519.022>.

69 (2006) 12 BPR 23,509, 23,512 [14].

70 See also *West* (n 13) 24,444–5 [62]–[64] (Campbell J).

> appears to have been the cause of division between Gibbs CJ on the one hand and Mason J and Deane J on the other hand … The Chief Justice saw as an adequate equitable remedy an entitlement of the appellant to a contribution from the respondent to the extent to which she had paid more than one-half of the purchase moneys, coupled with an equitable charge for that amount upon the half interest of the respondent in the land.[71]

However, Gibbs CJ was prevented from deciding the case on the basis of contribution because contribution was not argued by the parties.[72] This illustrates a limitation to the minimum equity rule: the court must grant only the minimum appropriate remedy, but that minimum is determined by what the parties actually argued.[73] Thus in *Khalif v Khalif*, Watts J decided that, because neither party addressed a remedy falling short of a constructive trust, there was no basis to consider whether a lesser remedy should be imposed.[74] However, if a judge finds that initial argument would confine relief to a constructive trust or nothing at all, and the judge foresees that the circumstances would not justify a constructive trust, procedural fairness would require the parties to be informed of this and to have the opportunity to make submissions regarding lesser relief.[75]

Draper v Official Trustee in Bankruptcy is a useful supplement to the example of *Muschinski* concerning the potential sufficiency of doctrines other than the JEP.[76] In particular, the remarks of Besanko J helpfully illustrate a scenario where an equitable accounting between co-owners may sufficiently remedy any unconscionability so as to leave the JEP superfluous.[77] In that case, Mr Draper's trustee in bankruptcy became registered as the owner of a half interest in a property previously owned equally by Mr and Mrs Draper.[78] The Drapers argued that the trustee held the half interest (and, in turn, since the property had been sold, half of the proceeds of sale) on express or constructive trust for Mrs Draper.[79] Alternatively, they claimed that Mrs Draper was entitled to monetary relief on the basis of an equitable accounting since she had paid all the mortgage instalments, recurrent outgoings and improvement costs.[80]

In the circumstances, putting aside the express trust issue, Besanko J found that the case could be effectively decided on the basis of equitable accounting.[81] Any disproportion between the legal rights of the trustee and the extent of Mrs Draper's contributions to the upkeep and improvement of the property, including the increase in the equity of redemption attributable to her mortgage repayments,

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71 *Bathurst* (n 59) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (citations omitted).
72 *Muschinski* (n 1) 598.
73 See also *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279, 286–7 (Mason CJ and Gaudron J).
74 [2020] FamCA 39, [238].
75 See *Friend v Brooker* (2009) 239 CLR 129, 172–3 [115]–[118] (Heydon J).
76 (2006) 156 FCR 53 ('*Draper*').
77 Note, however, that any remarks are strictly obiter because the Full Federal Court ordered that the case be remitted to the Federal Magistrates Court for rehearing: see ibid 71 [73] (Mansfield J, Rares J agreeing at 72 [76]), 93 [174] (Besanko J).
78 Ibid 56 [3] (Mansfield J).
79 Ibid 56–7 [4]–[5].
80 Ibid 56–7 [5].
81 Ibid 84–5 [135] (Besanko J).

were readily quantifiable and amenable to the established accounting rules.[82] Thus, applying the minimum equity rule, there could be no unconscionable assertion of a legal right on the part of the trustee so as to attract application of the JEP after an equitable accounting between the parties would prevent any inequitable division of the proceeds of sale of the property.[83]

The converse scenario, where there is no sufficient doctrine other than the JEP, is illustrated by *Huen v Official Receiver* ('*Huen*').[84] In that case a husband and wife acquired a matrimonial property as joint tenants.[85] Due to marital difficulties, and pursuant to a novated joint relationship, the husband soon moved out of the property, leaving the wife and their children to live there, with the wife paying all rates and outgoings, effecting improvements to the property and making substantial mortgage repayments.[86] Some time later, the husband became bankrupt and his half interest in the property vested in the trustee of his estate.[87] For present purposes, the issue was whether the trustee held his half interest on constructive trust for the wife.[88] The trustee argued that an equitable accounting would provide an adequate remedy such that a constructive trust could not be granted under the minimum equity rule.[89]

Ultimately, the Full Federal Court disagreed with the trustee's argument because an equitable accounting could not quell the controversy once and for all.[90] The reason was that 'a present monetary value could not be assigned to the [wife's] assumption of future liabilities, including the payment of instalments under the mortgage and the continuing provision of the … property as a home for the children'.[91] The issue is that an equitable accounting would focus only on the financial contributions of the wife whereas a remedy based on the JEP would be capable of taking into account other matters which were fundamental to the joint relationship, namely the responsibility for the maintenance of the property and the care of the children.[92] The wife's responsibility for child-care, in particular, was 'a matter of considerable importance in doing equity between the parties' which 'is not readily brought to account in any process of equitable accounting'.[93] Consequently, the Court determined that it was necessary to impose a constructive trust over the half-share in the property in favour of the wife on the basis of the JEP.[94]

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82 Ibid. Those rules were summarised at 90–1 [163].
83 Ibid 84–5 [135]. Cf at 77 [98] (Rares J).
84 (2008) 248 ALR 1 ('*Huen*').
85 Ibid 3 [3]–[4] (Ryan, Moore and Tamberlin JJ).
86 Ibid 4 [5], [8], [13], 20 [70].
87 Ibid 4 [9].
88 Ibid 8–9 [29]–[32].
89 Ibid 22 [78].
90 Ibid.
91 Ibid.
92 Ibid 22–3 [79]–[80]. See also below nn 165–70 and accompanying text.
93 Ibid 23 [80].
94 Ibid 23 [81]. Oddly, the Court granted a remedy based on the JEP despite holding that the joint endeavour had not collapsed (at 20 [70]); however, the case may be explained on the orthodox basis that the husband's bankruptcy brought the joint endeavour to an end: *Boumelhem* (n 36) 355 [94] (Ward J).

The key point, therefore, is this: if there is a joint relationship or endeavour which imposes obligations and confers benefits that are not readily comprehended by other doctrines, such as equitable accounting, then the JEP may necessarily operate to remove any outstanding unconscionability; otherwise, those other doctrines will be sufficient and so the JEP can provide no remedy.

B Co-operation with Other Doctrines

1 Resulting Trusts

The previous section explained how the minimum equity rule requires that the sufficiency of another doctrine exclude the remedial operation of the JEP. But what if there is another doctrine which is only *partially* sufficient to undo the unconscionable conduct of the defendant? In such a situation, should a remedy be granted partially on the basis of the JEP and partially on the basis of a different doctrine, even in addressing the same subject matter? Considering the range of doctrines which are potentially applicable in scenarios where the JEP is relevant – especially domestic property disputes – it is important to answer these questions in clarifying the precise remedial operation of the JEP.[95] Potentially overlapping doctrines include, most relevantly, resulting trusts, estoppel, common intention constructive trusts and equitable accounting. Each of these will be considered in turn, beginning with resulting trusts.

There is no reason in principle why a remedy cannot be granted partially on the basis of a resulting trust and partially on the basis of the JEP, as each doctrine has distinct chronological application and serves different purposes. *Australian Building & Technical Solutions Pty Ltd v Boumelhem* ('*Boumelhem*') is an example of such a co-operation.[96] In that case, Ward J would have imposed an equitable lien over a property to the extent of the plaintiffs' contributions to its purchase price and to subsequent construction costs on the basis of the JEP (or proprietary estoppel).[97] Owing to third party interests, it would not have been appropriate to grant the plaintiffs a beneficial interest in the property on JEP grounds.[98] However, Ward J also found that the plaintiffs were entitled to a beneficial interest in the property pursuant to a presumed resulting trust on the basis of their contributions to the purchase price.[99] In these circumstances, the appropriate remedy was to declare the resulting trust with respect to the contributions to the purchase price and impose the lien on the basis of the JEP with respect to the subsequent construction costs alone.[100]

However, there are some circumstances where a resulting trust cannot co-operate with the JEP. In *Anson v Anson*, Campbell J held that:

> [I]f the factual circumstances are such as to give rise to both a presumption of a resulting trust, and the imposition of a constructive trust on *Baumgartner* principles,

95 See generally *Black Uhlans Inc v New South Wales Crime Commission* (2002) 12 BPR 22,421, 22,425 [143] (Campbell J).

96 *Boumelhem* (n 36).

97 Ibid 371 [174].

98 Ibid 370 [171]. See below nn 261–8 and accompanying text.

99 Ibid 365 [142].

100 Ibid 370–1 [172].

> and the application of these two different sets of principles leads to different results, then it is the result arising from the *Baumgartner* principles which prevails.[101]

In other words, if application of the JEP would justify the imposition of a constructive trust – thereby modifying the parties' beneficial interests in property – as opposed to a monetary award, then that constructive trust will prevail over any resulting trust which is presumed, and so the only operative doctrine will be the JEP.[102] The reason for this is that the most latter determination of beneficial interests must logically prevail, which is invariably pursuant to the JEP, since resulting trust principles operate at the time of the acquisition of property, whereas the JEP can only operate from the time when the joint endeavour has collapsed.[103] As well, a constructive trust founded on the JEP is imposed 'regardless of actual or presumed agreement or intention' and so must, if necessary to counteract all identified unconscionability in accordance with the minimum equity rule, override a presumed intention giving rise to a resulting trust.[104] Although, to reiterate, the JEP can only operate to modify the parties' beneficial interests in property – and, in doing so, override a resulting trust – if this is necessary to satisfy the minimum equity; if, in a given case, the JEP would only justify monetary relief, and not a constructive trust, then application of the principle cannot come into conflict with a resulting trust.[105]

2 Estoppel

As was recently noted by Parker J in *Makaritis v Makaritis [No 2]*, there is a significant 'potential for overlap between proprietary estoppel and failed joint endeavour doctrines'.[106] Thus, there are a number of cases in which judges have found that equivalent relief could be based either on equitable estoppel or the JEP; for example, Robb J in *Saitannis v Katsolos* considered that either doctrine would justify the same remedy since the case could be analysed 'partly in terms of mutual representations as to future conduct, and partly as a joint endeavour that has partially failed'.[107] However, this overlap does not require, as Parker J and Robb J have suggested in the two previously cited cases, that 'the doctrinal basis for the grant of relief should not affect the outcome'.[108] The instantiation of unconscionability which is addressed by the JEP on the one hand and by equitable estoppel on the other is distinct: the JEP is concerned with the unconscionable

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101 (2004) 12 BPR 22,303, 22,309 [37] ('*Anson*').

102 See also *Sivritas v Sivritas* (2008) 23 VR 349, 373 [127] (Kyrou J) ('*Sivritas*'); *Mo v Yang* [2022] NZCA 573, [64] (Ellis J for the Court); *Bristol and West Building Society v May May & Merrimans* [1996] 2 All ER 801, 818 (Chadwick J).

103 *Anson* (n 101) 22,309 [37] (Campbell J).

104 *Baumgartner* (n 2) 148 (Mason CJ, Wilson and Deane JJ). Cf *Tracy v Bifield* (1998) 23 Fam LR 260, 263 (Templeman J).

105 *Boumelhem* (n 36) 370–1 [172] (Ward J).

106 [2022] NSWSC 1690, [179] ('*Makaritis*').

107 *Saitannis* (n 14) [109]. See also *Spink v Flourentzou* [2019] NSWSC 256, [317]–[320] (Robb J) ('*Spink*'); *E Co v Q* [2018] NSWSC 442, [46], [858] (Ward CJ in Eq).

108 *Makaritis* (n 106) [179] (Parker J), citing *Saitannis* (n 14) [109] (Robb J).

retention of an unintended benefit[109] whereas equitable estoppel is concerned with the unconscionable resiling from a promise which is detrimentally relied upon.[110] Since the minimum equity rule requires that relief be tailored with specificity to the particular instance of unconscionability upon which a given doctrine operates, as well as the purpose for such operation, it must be incorrect that there could be any a priori identification of relief based on the JEP and on equitable estoppel; any such identification must be purely coincidental.[111] Thus, Parker J, in another case, found that the relief to which the plaintiff would be entitled pursuant to a proprietary estoppel would be less favourable than that to which he would be entitled based on the JEP; the more favourable remedy based on the JEP was granted, since, consistently with the minimum equity rule, only that remedy could entirely account for the defendant's unconscionability.[112]

In some scenarios the concurrent application of equitable estoppel and the JEP, even with respect to the same subject matter, may be necessary to undo all identified unconscionability. For example, the JEP may justify a remedy equal to the value of a plaintiff's contributions to a joint endeavour whereas equitable estoppel may justify a remedy quantifying the detriment suffered by the plaintiff in giving up an economic opportunity relying on an inducement to enter into that joint endeavour. The latter instance of unconscionability could not be entirely subsumed within a remedy based on the JEP (and vice versa), so both remedies would be necessary.[113] There is some precedent for such a co-operation of doctrine. In *Kriezis v Kriezis* ('*Kriezis*'), Burchett AJ imposed a constructive trust over a property and quantified the plaintiff's beneficial interest in the property as to 10% on the basis of an equitable estoppel and as to 57% on the basis of the JEP.[114] The estoppel related to improvements erected in reliance on promises made by the defendant, and the joint endeavour involved contributions to the acquisition of a property for the purposes of a joint living arrangement.[115] Admittedly, the estoppel remedy here could probably have been subsumed into the JEP remedy, but the case still shows that a co-operation of this kind is possible if required.

3 Common Intention Constructive Trusts

There is some controversy as to whether the common intention constructive trust doctrine is sui generis or whether it is merely a sub-species of proprietary estoppel.[116] However, regardless of this debate, which is beyond the scope of this

109 *Muschinski* (n 1) 620 (Deane J).
110 *Sidhu* (n 53) 523 [58] (French CJ, Kiefel, Bell and Keane JJ).
111 See *Grimaldi* (n 29) 402–4 [503]–[509] (Finn, Stone and Perram JJ).
112 *Dean* (n 21) [51], [57]–[59].
113 Cf ibid [59]; *E Co v Q* (n 107) [46] (Ward CJ in Eq).
114 [2004] NSWSC 167, [29] ('*Kriezis*').
115 Ibid [24]–[27].
116 See, eg, *Bijkerk Investments Pty Ltd v Bikic* [2020] NSWSC 1336, [111]–[120] (Leeming JA); *Zekry* (n 25) [76] (Tate, Kyrou and Niall JJA); *Cheung Lai Mui v Cheung Wai Shing* (2021) 24 HKCFAR 116, 131–2 [40] (Ribeiro PJ and Gummow NPJ). See also Nicholas Hopkins, 'Unconscionability, Constructive Trusts and Proprietary Estoppel' in Michael Bryan (ed), *Private Law in Theory and Practice* (Routledge-Cavendish, 2007) 199; John Randall, 'Proprietary Estoppel and the Common Intention Constructive Trust: Strange

article, it must be accepted that, in Australia, the minimum equity rule applies to the determination of a remedy based on the common intention constructive trust doctrine such that there can be no automatic award of a proprietary constructive trust even if the doctrine is operative.[117] Therefore, even if the common intention constructive trust doctrine is distinct from proprietary estoppel, it must be that the process of reasoning towards a remedy is, in each case, very similar. This is reinforced by the fact that the common intention constructive trust doctrine and equitable estoppel serve essentially the same purpose: they are both targeted at the unconscionable resiling from an assumed state of affairs which is detrimentally relied upon.[118] Consequently, the manner in which the JEP interacts with the common intention constructive trust doctrine is materially the same as its interaction with estoppel, as canvassed above. It may therefore be possible for the JEP to co-operate with the common intention constructive trust doctrine in relation to the same subject matter.[119]

4 Equitable Accounting

The principles concerning equitable accounting between co-owners of property frequently overlap with the JEP. In most circumstances where the JEP is in issue, a party with a beneficial interest in property may seek an equitable account from any co-owner in relation to the erection of improvements since, following *Ryan v Dries* ('*Ryan*'), the jurisdiction to order such an accounting extends to any situation in which 'one party claims an interest in property by reason of a resulting trust or constructive trust, and the court is asked to quantify that interest'.[120] Moreover, following *Callow v Rupchev*, there is unlikely to be any issue as to the availability of an occupation fee (or, for that matter, an account for rents or profits) since that case held that an occupation fee may now be charged upon any relationship breakdown.[121] It is not immediately apparent, however, precisely how equitable accounting rules and the JEP interact. The authors of *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* tentatively state that '[t]he weight of authority … is to the effect that [rights arising from an accounting between co-owners] … take effect separately from the quantification of any equitable interest in the co-owners by way of resulting or constructive trust'.[122]

Bedfellows or a Match in the Making?' (2010) 4(3) *Journal of Equity* 171; Susan Barkehall Thomas, 'Proprietary Estoppel and Common Intention Constructive Trusts: Is It Time to Abandon the Distinction?' [2014] (1) *Singapore Journal of Legal Studies* 168.

117 *Austin* (n 40) 30,655 [186] (Ward J). Cf the position in England: *Stack v Dowden* [2007] 2 AC 432, 448–9 [37] (Lord Walker).

118 *Green v Green* (1989) 17 NSWLR 343, 354 (Gleeson CJ); *Sidhu* (n 53) 523 [58] (French CJ, Kiefel, Bell and Keane JJ).

119 See also Liew, 'The Joint Endeavour Constructive Trust' (n 5) 99.

120 (2002) 10 BPR 19,497, 19,511 [68] (Hodgson JA) ('*Ryan*').

121 (2009) 14 BPR 27,533, 27,538 [34]–[36], 27,540 [46] (Beazley, Basten JJA and Handley AJA). As to rents and profits, see ibid 19,510 [64]–[65].

122 JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (LexisNexis Butterworths, 5th ed, 2015) 922–3 [26-130].

That statement is essentially correct. Even if a party is granted a beneficial interest in property pursuant to a resulting or constructive trust, any equitable accounting between the parties can result only in a supplemental personal remedy and cannot alter the parties' beneficial interests in property. Such was the case in *Ryan*.[123] However, equitable accounting principles, particularly in relation to improvements, can supply guidance as to the quantification of contributions pursuant to the JEP, and so may, in an indirect sense, affect the beneficial interests of the parties.[124]

For instance, in circumstances where the JEP is operative, improvements made by a party to property will usually be for the purposes of the relevant joint endeavour.[125] In such a case, the value of the improvements is simply analysed as a contribution for the purposes of determining a remedy under the JEP.[126] Any equitable accounting would therefore not embrace such improvements; equitable accounting principles would, however, provide guidance as to the quantification of the value of the improvements for the purposes of the JEP.[127] Albeit, it is not every case in which improvements (or mortgage payments) can be assimilated to a joint endeavour. In these cases, there must be a distinct co-operation of the JEP and an equitable accounting (or a claim for contribution). For example, in *Payne v Rowe*, improvements which were made without consent, or which were outside of the scope of the joint endeavour, did not form part of the quantification of the constructive trust granted pursuant to the JEP, but were rather the subject of a separate equitable accounting remedy.[128] Likewise, improvements effected subsequent to the collapse of a joint endeavour, but prior to trial, must be the subject of an equitable accounting, rather than being taken into account under the JEP.[129] The value of the sole-occupation of, or rents derived from, a co-owned property, which is obtained separate from, or subsequent to, a joint endeavour which has failed may also be the subject of an equitable accounting.[130] An accounting with respect to matters postdating the collapse of a joint endeavour is determined according to any adjusted proportional beneficial ownership in the relevant property caused by operation of the JEP.[131]

The key point to derive from this Part is that the JEP can only operate to justify a remedy *after* it has been determined that no other doctrine would be sufficient to undo any unconscionable conduct of the defendant.[132] This aspect of the minimum

123 *Ryan* (n 120) 19,513 [76]–[79] (Hodgson JA). See also *Campbell v van der Velde* [2019] FCA 1871, [178] (Farrell J).

124 See below nn 160–4 and accompanying text.

125 See, eg, *Henderson* (n 12) 23,580 [11] (Young CJ in Eq).

126 Ibid 23,589 [96]–[99].

127 Ibid 23,589 [97].

128 (2012) 16 BPR 30,869, 30,896 [108] (Ball J).

129 See, eg, *Baumgartner* (n 2) 150–1 (Mason CJ, Wilson and Deane JJ); *NSW Trustee and Guardian v Togias* (2022) 110 NSWLR 86, 114 [113] (Mitchelmore JA) ('*Togias*').

130 See, eg, *Woods v McKinlay [No 2]* [2021] NSWSC 1510, [290] (Parker J); *McKay v McKay* [2008] NSWSC 177, [54] (Brereton J) ('*McKay*'); *Brennan v Duncan* [2006] NSWSC 674, [74] (White J) ('*Brennan*').

131 *Brennan* (n 130) [65], [74] (White J).

132 *Draper* (n 76) 84–5 [135] (Besanko J).

equity rule significantly limits the scope of the JEP. The JEP does not automatically override other doctrines; it can only do so if absolutely necessary.[133] This helps to distinguish the JEP from other equitable doctrines which have been used to address failed joint relationships, such as the English 'new model' constructive trust.[134] The latter doctrine was problematic in that its application resulted in other, more well-established equitable doctrines, such as resulting trusts, being overridden merely because the result seemed 'fair'.[135] By contrast, once the minimum equity rule is attended to, the JEP can only operate predictably and in accordance with principle: it is only when the rights and obligations which constitute the joint endeavour in any given case are fundamentally incapable of being determined by application of another doctrine that the JEP can justify a remedy.[136] And, if the JEP justifies a remedy, it only overrides the operation of another doctrine if this is logically necessary; otherwise, there can be a remedial co-operation of doctrines.[137] In short, the JEP is a principle of last resort.[138]

IV QUANTUM OF RELIEF

The preceding Part has explained how the minimum equity rule requires that the remedial operation of the JEP be *limited* by other doctrines. This Part now explains how that rule requires that the remedial operation of the JEP be *guided* by other doctrines. In particular, it explains how, where the JEP does operate so as to justify a remedy, the quantum of that remedy must be determined with other doctrines in mind. This is because effecting the minimum equity requires that the quantum of a remedy based on the JEP be limited to 'the windfall that would be unconscionably retained by the [defendant] when the relationship failed if no order were made'.[139] The assessment of unconscionability must be guided by established legal principle, rather than any vague notion of fairness.[140] Owing to the relative novelty of the JEP, and the fact that the particular kind of unconscionability which it targets is closely analogous to the kind of unconscionability targeted by other doctrines, relevant legal principle must, in turn, be derived from those other doctrines.[141] Thus, the consequence of the minimum equity rule is that other legal doctrines, even if not able to be directly applied to account for all identified unconscionability, must, in so far as practicable, be applied indirectly, or transmuted, in the process of quantifying relief based on the JEP.[142]

133 Ibid.
134 See Heydon and Leeming, *Jacobs* (n 4) 272–4 [13-45]–[13-49].
135 Ibid 273 [13-46], discussing *Heseltine v Heseltine* [1971] 1 All ER 952.
136 *Huen* (n 84) 22–3 [79]–[80] (Ryan, Moore and Tamberlin JJ).
137 *Boumelhem* (n 36) 370–1 [172] (Ward J).
138 See above nn 66–70 and accompanying text.
139 *Henderson* (n 12) 23,581 [20], 23,589 [98] (Young CJ in Eq).
140 *Muschinski* (n 1) 615–16, 621 (Deane J).
141 Ibid 618–20.
142 See generally *West* (n 13) 24,443–4 [56], [60] (Campbell J).

The legal principle which provides the starting point in the assessment of unconscionability comes from the law of partnership and contractual joint ventures: namely, that on the premature dissolution of a partnership or joint venture, the parties are entitled to a return of capital contributions, unless there is an agreement to the contrary.[143] This principle constitutes the initial basis for the determination of unconscionability because it is predominantly from this principle that Deane J analogically, or inductively, 'distilled an application of the general principle of unconscionability' in *Muschinski*.[144] For this reason, Brereton J's statement in *McKay v McKay* that 'the return of contributions' is the 'guiding principle' in determining relief based on the JEP can be accepted as correct.[145] This principle is the reason why any expectation of the plaintiff is generally not relevant to assessing the value of a remedy to which they may be entitled pursuant to the JEP.[146]

It must be remembered, however, that the return of contributions is really just a proxy – albeit a generally very useful and appropriate proxy – for the 'true remedy', which is 'such order as will prevent the [defendant] from retaining the benefit of … property to the extent that it would be unconscionable for them to retain it'.[147] Thus, the principle of returning the contributions of the parties must yield to individual circumstances, and so, for instance, the express intention of the parties may mean that there is no unconscionability in retaining certain contributions.[148] For example, in *Tasevska*, the plaintiff and her husband contributed 35% of the purchase price of a property in consideration of a life interest for both of them; since the husband had died before the collapse of the joint relationship, there was no unconscionability in the defendants retaining one half of the contributions.[149] Moreover, where parties have pooled their resources and lived together for years, the maxim that equity favours equality means that it will only be appropriate to depart from an equality of beneficial ownership – so justifying a return of contributions – where there is a substantial disparity between the contributions of the parties.[150] Thus, it would be going too far to say that 'the prima facie remedy … is the return of contributions'.[151]

The way in which contributions are quantified for the purposes of determining a remedy based on the JEP differs based on the form of that remedy. If the remedy is a monetary award (unsecured or secured by an equitable lien), then the value of each party's contributions is assessed in absolute terms, which values will then condition the quantum of the remedy.[152] By contrast, if the remedy is a constructive

143 *Muschinski* (n 1) 619–20 (Deane J), 599 (Mason J). The JEP does not incorporate the other rules relating to the distribution of partnership assets: cf *Partnership Act 1892* (NSW) ss 39–44.

144 RP Meagher, 'Constructive Trusts: High Court Developments and Prospects' (1988) 4(1) *Australian Bar Review* 67, 70; *Muschinski* (n 1) 619–20 (Deane J).

145 *McKay* (n 130) [33].

146 *Henderson* (n 12) 23,589 [92]–[95] (Young CJ in Eq). Cf Susan Barkehall Thomas, 'Shared Homes, Broken Promises and Constructive Trusts: Why Older Generation Plaintiffs Are Frequently Worse Off' (2015) 9(3) *Journal of Equity* 239, 257.

147 *Bennett v Horgan* (Supreme Court of New South Wales, Bryson J, 3 June 1994) 9.

148 *West* (n 13) 24,444–5 [63] (Campbell J).

149 *Tasevska* (n 63) [89] (Einstein J).

150 *Baumgartner* (n 2) 149–50 (Mason CJ, Wilson and Deane JJ), 154 (Toohey J).

151 *McKay* (n 130) [33] (Brereton J).

152 See, eg, *Spink* (n 107) [323] (Robb J).

trust – adjusting the respective beneficial interests of the parties in certain property – then the contributions of the parties are quantified in proportionate rather than absolute terms.[153] To illustrate, if the plaintiff is awarded equitable compensation based on contributing $100,000 to the purchase price of a property, then the quantum of the compensation will be $100,000 (perhaps with interest)[154] irrespective of the contributions of the defendant. Conversely, if the plaintiff is awarded a constructive trust, then the plaintiff's beneficial interest in the property will equal $100,000 divided by the total of the plaintiff's and the defendant's contributions. In effect, this means that the JEP only modifies the plaintiff's entitlement to any surplus value of joint endeavour assets above the total value of the parties' contributions if the remedy is a constructive trust.[155] The importance of this difference means that the questions of quantum and form of relief cannot be entirely separated and equally depend on the circumstances of the case: whether the plaintiff should be entitled to relief quantified on a proportionate basis is a significant factor as to whether a constructive trust is an appropriate form of relief.[156]

The process of quantifying a constructive trust based on the JEP effectuates the principle from the law of resulting trusts that 'the beneficial title to an asset ought be proportionate to the contributions made to its purchase price'.[157] Albeit, in the context of the JEP the notion of the 'purchase price' is broader than in the context of resulting trusts and really reflects the present value of the relevant property.[158] Thus, non-financial contributions, the erection of improvements and the payment of mortgage instalments may all affect the parties' beneficial interests in property under the JEP, but none of these will constitute a contribution for the purposes of resulting trusts (except, in rare circumstances, the payment of mortgage instalments).[159]

Besides the law of partnership, contractual joint ventures and resulting trusts, the rules relating to equitable accounting between co-owners of property are also relevant to the quantification of relief based on the JEP. In *Henderson*, Young CJ in Eq had in mind, when determining the rights of the plaintiff who had contributed to the joint endeavour by erecting improvements to a property, the equitable accounting principle 'that it is usually proper to allow the lesser of the costs and improved value … where one owner has spent money on improving the property'.[160] Thus,

153 See, eg, *Justesen v Denham* [1999] WASC 181, [45]–[46] (Wheeler J). Note that, as others have pointed out (see Bant and Bryan (n 10) 190–1), *Muschinski* (n 1) was anomalous in this respect. The constructive trust in *Muschinski* (n 1) only secured the plaintiff's entitlement to be repaid her contributions to the joint endeavour in absolute terms, and did not otherwise adjust the parties' beneficial interests in the property: at 623–4 (Deane J). It was really a constructive trust in name only, as an equitable lien would have achieved the same result. Indeed, a return of contributions in kind, by means of adjusting beneficial interests in property, inherently relies on a proportional assessment: the orders in *Muschinski* (n 1) were only possible because the real issue in that case was ownership of the proceeds of sale of the property, rather than ownership of the property itself.

154 See, eg, *Taylor v Streicher* [2007] NSWSC 1006, [68] (McDougall J) ('*Taylor*').

155 *Muschinski* (n 1) 623 (Deane J); *Spink* (n 107) [270]–[277] (Robb J).

156 See below nn 202–8 and accompanying text.

157 *West* (n 13) 24,443 [56] (Campbell J). See also *Baumgartner* (n 2) 155–6 (Gaudron J).

158 *West* (n 13) 24,443–4 [56]–[61] (Campbell J).

159 Ibid.

160 *Henderson* (n 12) 23,589 [97].

on application of the JEP, the plaintiff in *Henderson* was basically entitled to a sum representing the increase in the value of the property caused by her improvements ($39,000), rather than the amount she expended ($58,000).[161] Strictly speaking, this equitable accounting rule is relevant regardless of whether the form of relief is a monetary award or the grant of a beneficial interest in property since, even in the latter case, it is really the present value of property, rather than any initial outlays, which is the proper object of analysis.[162] However, when quantifying beneficial interests in property, it may be more appropriate, to avoid the unhelpful pursuit of 'complicated factual inquiries',[163] to simply count expenditure on improvements as a proportionate contribution to the overall 'purchase price' of the property without having regard to any increase in value.[164]

Other kinds of contributions which are non-financial, such as physical labour[165] or domestic support,[166] may be more difficult to quantify in accordance with legal principle. Where non-financial contributions are incapable of being quantified in an objective way, or if there is inadequate proof of their value, there cannot be any unconscionable retention of the benefit thereof, and so they cannot be taken into account.[167] However, statute may be drawn upon in this regard; for example, the guidelines for assessing the contributions of parties to a dissolved marriage under section 79 of the *Family Law Act 1975* (Cth) have been held to be relevant to assessing contributions for the purposes of the JEP.[168] Analogy to family law legislation provides a powerful justification for taking into account non-financial contributions in determining a remedy based on the JEP since such legislation manifests the general principle that 'the courts do not disregard or discount the non-financial contributions made to the property and finances of the parties to a marriage or marriage-like relationship'.[169] As well, there is now a large body of cases which provide guidance as to the assessment of non-financial contributions in the context of a joint endeavour, so there is unlikely to be any excessive imprecision in their quantification.[170]

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161 Ibid 23,589 [99], [104], 23,590 [109]. See also *Sirtes v Pryer* [2005] NSWSC 1082, [13]–[17] (Burchett AJ); *Taylor* (n 154) [60]–[65] (McDougall J).

162 *Miller v Sutherland* (1990) 14 Fam LR 416, 424–5 (Cohen J) ('*Miller*'); *Robinson v Rouse* [2005] TASSC 48, [31]–[32] (Blow J). See also *Silvester v Sands* [2004] WASC 266, [117] (EM Heenan J); *Knox v Knox* (Supreme Court of New South Wales, Young J, 16 December 1994) 13; *West* (n 13) 24,451 [89] (Campbell J).

163 *Baumgartner* (n 2) 150 (Mason CJ, Wilson and Deane JJ).

164 See, eg, *Hibberson v George* (1989) 12 Fam LR 725, 743 (McHugh JA); *Sivritas* (n 102) 386 [172] (Kyrou J).

165 *Miller* (n 162) 422–4 (Cohen J).

166 *Togias* (n 129) 113–14 [111] (Mitchelmore JA).

167 *Austin* (n 40) 30, 656–7 [192] (Ward J).

168 *Parij v Parij* (1997) 72 SASR 153, 166 (Debelle J); *Family Law Act 1975* (Cth) s 79. See also *Brown v George* (1998) 147 FLR 1, 9–10 (Gallop J), holding that sections 15 and 19 of the *Domestic Relationships Act 1994* (ACT) were relevant to determining a remedy under the JEP.

169 *Singer v Berghouse* (1994) 181 CLR 201, 212–13 (Mason CJ, Deane and McHugh JJ).

170 See, eg, the review of cases in *Togias* (n 129) 103–8 [70]–[87] (Mitchelmore JA).

The foregoing discussion shows that the JEP is not a radical innovation.[171] The value of any remedy which a plaintiff might be granted on application of the principle is determined in a manner entirely familiar to traditional equitable reasoning. Only a minimal extension from the law relating to partnerships, contractual joint ventures, resulting trusts and equitable accounting is necessary to explain, in most cases, why a plaintiff is entitled to a certain quantum of relief in accordance with the minimum equity rule. It is only non-financial contributions that are less familiar to equity. However, in this respect a principled basis for valuation can be derived by analogy to family law statutes.[172] On this analysis, the concept of unconscionability as guiding relief is also clarified. Unconscionability is not directed to unfairness in the abstract sense;[173] rather, the concept represents the set of normative values which can be derived from established equitable principle or by other means familiar to equity, such as analogy to statute.[174] Unconscionability, therefore, is not indeterminate or protean.[175]

V FORM OF RELIEF

A Equitable Compensation

The preceding Part has made clear that the quantum of relief to which a plaintiff is entitled pursuant to the JEP can be consistently determined in accordance with legal principle. The issue which Part V now addresses is whether the same can be said about determining the *form* of relief to which a plaintiff is entitled. This is a crucial point; besides the criticism of the JEP by the authors of *Jacobs* quoted in the introduction to this article,[176] it is worth quoting James Edelman's extrajudicial critique of *Muschinski* in this connection:

> Although affirming that the principles of unconscionability were based upon the application of rules and not discretion, the same approach was not taken in awarding the remedy. No reasons were given for why the remedy was proprietary instead of personal. What were the principles of law that should determine whether proprietary relief should be available?[177]

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171 See Meagher (n 144) 71–2. Cf AJ Oakley, 'The Development of the Constructive Trust as a Remedy in Australia' (1989) 5 *Queensland University of Technology Law Journal* 19, 32.

172 See generally Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law: The Statutory Elephant in the Room' (2013) 36(3) *University of New South Wales Law Journal* 1002, 1022–3; JD Heydon, 'Equity and Statute' in PG Turner (ed), *Equity and Administration* (Cambridge University Press, 2016) 211, 229 <https://doi.org/10.1017/CBO9781316529706.012>; Adam Waldman and Michael Gvozdenovic, 'Development of the Common Law by Analogy to Statute' (2023) 97(12) *Australian Law Journal* 912.

173 Cf *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, 193 (Somers J).

174 See *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 596 [76] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

175 Cf Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 16–17.

176 Heydon and Leeming, *Jacobs* (n 4) 275–6 [13-53].

177 Edelman (n 4) 296.

In light of the apparent obscurity attending the form of relief issue, it is tempting to develop a structured test to decide it. Thus, it has been argued that the form of relief based on the JEP is determined by the following rule: if the plaintiff makes contributions to a joint endeavour which increase the value of the defendant's interest in property, then a constructive trust is available, whereas if contributions do not cause such an increase in value, then an equitable lien is available.[178]

Respectfully, this kind of test is problematic for several reasons. Most importantly, the minimum equity rule requires that the determination of relief be precisely adapted to the circumstances and the requirements of conscience; this effectively militates against any structured approach.[179] As Dixon CJ, McTiernan and Kitto JJ observed: 'A court of equity … looks to every connected circumstance that ought to influence its determination upon the real justice of the case' and so rigid 'legal categories' cannot 'automatically determine' an appropriate remedial outcome.[180] Moreover, on the test presented above proprietary relief is always available if pleaded and if the relevant property remains in the hands of the defendant, but it remains unclear why this is so.[181] What is wanting, therefore, is an explanation as to why proprietary relief is or is not necessary to undo the unconscionable conduct of the defendant in certain circumstances and, if proprietary relief is necessary, whether an equitable lien is sufficient or if a constructive trust is required.

The minimum equity rule dictates that the court must first decide whether a personal remedy would be sufficient to relieve the conscience of the defendant before considering whether any proprietary relief should be awarded.[182] In this regard, it is notable that there are more dicta to the effect that some applications of the JEP will result in a merely personal remedy than cases in which such a remedy has actually been granted.[183] One scenario in which unsecured equitable compensation is likely to be the most appropriate remedy is where the property to which the joint endeavour relates has already been sold.[184] For example, in *Krajovska v Krajovska* ('*Krajovska*'), the plaintiff was granted equitable compensation, calculated based on contributions to the purchase price of one property, and the transfer of an interest in another property, pursuant to a joint relationship, in circumstances where both of those properties had been sold.[185] Black J held that there was no basis for the award of a lien over a property which was acquired by one of the defendants separately from the relevant joint relationship, despite the fact that the earnings of the plaintiff

178 Liew, 'The Joint Endeavour Constructive Trust' (n 5) 93.

179 *Pain v Pain* [2006] QSC 335, [84] (Lyons J) ('*Pain*').

180 *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 119, quoting *The Juliana* (1822) 2 Dods 504; 165 ER 1560, 1567 (Lord Stowell). See also William Gummow, 'The 2017 Winterton Lecture: Sir Owen Dixon Today' (2018) 43(1) *University of Western Australia Law Review* 30, 45.

181 Liew, 'The Joint Endeavour Constructive Trust' (n 5) 93–5.

182 *John Alexander's* (n 60) 45–6 [128]–[129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

183 See, eg, *National Australia Bank Ltd v Maher* [1995] 1 VR 318, 321 (Fullagar J); *Willis v Western Australia [No 3]* (2010) 4 ASTLR 359, 377 [78] (Buss JA); *Henderson* (n 12) 23,588 [84] (Young CJ in Eq).

184 See, besides the example which follows, *McLachlan v McLachlan* [2005] QSC 245, [69]–[70] (Cullinane J); *John Nelson Developments Pty Ltd v Focus National Developments Pty Ltd* [2010] NSWSC 150, [335], [346]–[347] (Ward J).

185 *Krajovska* (n 11) [54]–[59] (Black J).

were probably applied to its purchase.[186] Besides scenarios like this, the only other cases in which a remedy of unsecured equitable compensation has been granted are those in which the plaintiff has only sought a personal remedy.[187] An unsecured personal remedy may also be appropriate, however, if the joint endeavour concerned assets which became worthless, such as a failed business, or because of third party interests.[188] Otherwise, as will be seen, there is a principled justification, consonant with the minimum equity rule, for why a proprietary remedy is almost always necessary when the JEP is applied.

B Equitable Lien

Generally, the circumstances of joint endeavour cases justify, at least, an order granting the plaintiff a security interest in certain property held by the defendant to secure an award of equitable compensation. When the court makes such an order, the strictly correct terminology is 'equitable lien' rather than 'equitable charge', since the security arises independently of the intention of the parties.[189] Regrettably, of the many cases granting a remedial lien based on the JEP, very few discuss the reasons why a personal remedy would be insufficient which is, as explained, necessary to satisfy the minimum equity rule. What is required, therefore, is to identify the principled basis upon which an equitable lien is required to counteract the unconscionability associated with a failed joint endeavour.

In deciding whether a lien should be granted on the basis of the JEP in *Krajovska*, Black J applied the test provided by Deane J in *Hewett v Court* ('*Hewett*').[190] This is quite unsatisfactory. For one, *Hewett* dealt with a contractual relationship and so the test cannot be applied to a non-contractual joint endeavour without significant distortion.[191] As well, the test in *Hewett* concerns the imposition of a lien securing a *pre-existing* liability, whereas, where the court imposes a lien based on the JEP, that lien secures a liability which is *simultaneously* imposed by the court.[192]

A better way of justifying the grant of an equitable lien based on the JEP is by analogy with other kinds of equitable lien. In particular, a partner, on dissolution of the partnership, 'has a lien on the surplus assets for whatever is due to him from his co-partner in respect of the partnership'.[193] Thus, the rights of a mortgagee of partnership property may be postponed to the rights of a partner to be reimbursed

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186 Ibid [66]. See also below n 197.

187 See, eg, *Anderson v Jordan* [2001] WASC 98, [3] (Wallwork J).

188 *Disctronics Ltd v Edmonds* [2002] VSC 454, [212]–[215] (Warren J) ('*Disctronics*'). See also below Part VI.

189 JD Heydon and MJ Leeming, *Cases and Materials on Equity and Trusts* (LexisNexis Butterworths, 9th ed, 2019) 1051 [38.1].

190 *Krajovska* (n 11) [65], quoting *Hewett v Court* (1983) 149 CLR 639, 668 ('*Hewett*').

191 *Hewett* (n 190) 668.

192 Ibid.

193 WF Webster, *Ashburner's Concise Treatise on Mortgages, Pledges and Liens* (Butterworth, 2nd ed, 1911) 112. See also *Wilson v Carmichael* (1904) 2 CLR 190, 196–7 (Griffith CJ). This lien is given statutory effect by the descendants of the *Partnership Act 1890*, 53 & 54 Vict, c 39, s 39: *Partnership Act 1963* (ACT) s 45; *Partnership Act 1892* (NSW) s 39; *Partnership Act 1997* (NT) s 43; *Partnership Act 1891* (Qld) s 42; *Partnership Act 1891* (SA) s 39; *Partnership Act 1891* (Tas) s 44; *Partnership Act 1958* (Vic) s 43; *Partnership Act 1895* (WA) s 50.

out of that property for the amount paid by him to discharge partnership debts.[194] The purpose of this 'partner's lien' is to ensure that assets which have been assimilated to a partnership are not dissipated until the rights of each partner have been properly accounted for.[195] Analogously, it could be said in joint endeavour cases that assets which have been assimilated to the joint endeavour should not, in conscience, be dealt with until the associated liabilities of each party be satisfied. This analogy is particularly strong since the JEP was derived largely from partnership law.[196]

By analogy, therefore, the following proposition can be derived: on the collapse of a joint endeavour, it is necessary, in accordance with the minimum equity rule, for a plaintiff who is granted a monetary award to have that award secured by an equitable lien over any property which has been assimilated to the joint endeavour.[197] Since, in almost every case where the JEP is applicable, the defendant holds property which was a subject matter of the failed joint endeavour, this explains why proprietary relief is almost always available upon application of the JEP.[198]

C Constructive Trust

It is more difficult to determine whether, in a given scenario, the minimum equity rule would justify the grant of a constructive trust, as opposed to an equitable lien. In each case, all relevant circumstances must be evaluated to determine whether awarding the plaintiff a beneficial interest in property would be necessary to undo the unconscionable conduct of the defendant.[199] This effectively militates against the formulation of any clear test which can distinguish when a constructive trust should be available[200] and, a fortiori, against any prima facie entitlement to a constructive trust based on the JEP.[201] However, there are certain key factors which have been held to justify, or weigh against, the award of a constructive trust.

One significant factor which weighs in favour of the award of a constructive trust is if the relevant property has increased in value from the time of the joint endeavour. This point is illustrated by *West v Mead*.[202] In that case, the plaintiff and the defendant were in a joint relationship for five years, during which the plaintiff paid funds into a joint account and out of which, in turn, mortgage repayments were made in relation to a property owned by the defendant.[203] Applying the JEP, Campbell J held that a constructive trust would be the only adequate remedy to account for the unconscionability of the defendant's retention of the property.[204]

194 See *Cavander v Bulteel* (1873) LR 9 Ch App 79 (Court of Appeal).
195 Walter Raeburn, 'The So-Called Lien of a Partner' (1949) 12(4) *Modern Law Review* 432, 433.
196 *Muschinski* (n 1) 618–20 (Deane J).
197 Thus, in *Krajovska* (n 11), a lien could not be granted over property which was not a subject matter of the joint endeavour: at [66] (Black J).
198 Cf McDonald (n 4) 776.
199 *Pain* (n 179) [84] (Lyons J).
200 Cf Liew, 'The Joint Endeavour Constructive Trust' (n 5) 93.
201 Cf *Swettenham v Wild* [2005] QCA 264, [45] (Atkinson J); Thomas, 'Families Behaving Badly' (n 17) 156–8.
202 *West* (n 13).
203 Ibid 24,433 [1], 24,437–8 [37] (Campbell J).
204 Ibid 24,451 [88].

A lien securing a monetary award would be insufficient because the value of the property increased at a rate greater than inflation and interest from the time at which the mortgage repayments were made.[205] This would mean that, if a lien were granted, the defendant would retain part of the benefit of the plaintiff's contributions (ie, the difference between the increase in the value of the equity in the property attributable to the plaintiff's contributions and the cost of those contributions at the time of the joint endeavour plus interest).[206] Especially given that the plaintiff gave up her plans to acquire her own real estate as part of the joint endeavour, the retention of this part of the benefit of the plaintiff's contributions would be unconscionable.[207] A similar finding was made by Burchett AJ in *Kriezis*, namely that the plaintiff was entitled to a constructive trust because an equitable lien would be insufficient in light of the long period since the acquisition of property, the substantial improvements made by the plaintiff's family and the fact that 'Sydney suburban house values have notoriously undergone great changes, usually in the direction of inflation'.[208] Relatedly, if the benefit unconscionably retained by the defendant is relatively small,[209] or if the contributions of the plaintiff are disproportionately small,[210] then this weighs against the grant of a constructive trust.

Besides any increase in the value of property, the length and nature of the joint relationship or endeavour is relevant in determining whether a constructive trust is necessary. For example, in *Huen*, the full Federal Court found that 'a lawful marital union in which children have been born and the parties have entered into conventional arrangements in relation to real property' provides a strong background for the imposition of a constructive trust.[211] By contrast, in *Kavurma v Karakurt*, Santow J held that it was inappropriate to impose a constructive trust, as opposed to an equitable lien, in circumstances where the relationship was 'between a married man and mistress', was not very substantial or long-standing, and had not progressed to a stage of co-habitation.[212] Likewise, in *Buchan v Young*, the circumstance of the 'breakdown of the joint endeavour almost at inception' was significant in finding that an equitable lien would be sufficient to atone for any unconscionability.[213] This point can be explained by the fact that a mutual entwinement of proprietary interests – justifying a participation in the interests *themselves* – is less likely to occur in a short relationship; it accords with the notion in family law legislation that, in the absence of marriage, there can generally only be an adjustment of proprietary rights after a relationship has existed for a sufficiently long period of time.[214] Where there has been a collapse in family relations, and it

205 Ibid.
206 Ibid. See also *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324, 331–2 (Lord Templeman for the Board). See above nn 143–6 and accompanying text.
207 *West* (n 13) 24,451 [88] (Campbell J).
208 *Kriezis* (n 114) [25]. See also *Peterson v Hottes* [2012] QCA 292, [37] (Muir JA) ('*Peterson*').
209 *Dawson v Western Australia* (2014) 12 ASTLR 217, 229 [68] (Simmonds J).
210 *Taylor v Ismailjee* [2001] WASC 36, [49] (Murray J).
211 *Huen* (n 84) 21 [74] (Ryan, Moore and Tamberlin JJ).
212 (Supreme Court of New South Wales, Santow J, 7 November 1994) 2, 19 ('*Kavurma*').
213 [2020] QDC 216, [132] (Long DCJ).
214 See *Family Law Act 1975* (Cth) s 90SB; *Property (Relationships) Act 1984* (NSW) s 17.

would not be possible for the parties to continue living together, then this may indicate that an equitable lien as opposed to a constructive trust should be granted since a clean break between the parties can be effected more simply by the former than the latter remedy.[215] As well, a commercial joint endeavour, as opposed to a familial joint relationship, would require greater caution in granting a constructive trust as opposed to lesser relief.[216]

The intention of the parties is also relevant when deciding the form of relief to be granted. There has been some confusion about the role of intention in the context of the JEP.[217] Although it must be accepted that, in the context of the JEP, a 'constructive trust serves as a remedy which equity imposes regardless of actual or presumed agreement or intention', this does not mean that intention is irrelevant to determining the appropriate remedy.[218] Rather, intention is relevant in the sense that the reasons why each party makes contributions to the joint endeavour, or the basis upon which contributions are made, are significant in determining the appropriate form of relief.[219] *Spink v Flourentzou* provides a good example of this.[220] In that case, the plaintiff made payments to the defendants in connection with the purchase of a property by the defendants.[221] The arrangement between the parties was that the plaintiff would be entitled to live at the property during her lifetime, but that the property would remain in the beneficial ownership of the defendants, subject to an obligation on the defendants to pay half of the plaintiff's contributions to one of the daughters of the plaintiff upon the plaintiff's death.[222] The fact that the plaintiff intended, and the defendants expected, that 'nothing would disturb [the defendants'] beneficial entitlement to the property' led to the conclusion that the appropriate remedy was an equitable lien, as opposed to a constructive trust.[223]

Wallis v Rudek was a similar case.[224] In that case, the plaintiffs transferred their interest in a property to the defendant pursuant to a joint endeavour, with the defendant paying the plaintiffs' outstanding debts relating to the funding of improvements made to the property.[225] Parker J held that, in the circumstances, it would not be proper to award a constructive trust because it was the evident intention of the parties that the defendant own the property in the future, there would be unreasonable inconvenience to grant the plaintiffs a beneficial interest since the defendant and her husband had made the property their home, and the defendant had saved the property from the bank by paying the plaintiffs' debts.[226] However, even if there is an intention that the defendant retain full beneficial

215 *Stoklasa v Stoklasa* [2004] NSWSC 518, [42] (Gzell J).
216 See *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 584–6 (Kirby P).
217 See, eg, Liew, 'The Joint Endeavour Constructive Trust' (n 5) 93.
218 *Baumgartner* (n 2) 148 (Mason CJ, Wilson and Deane JJ).
219 *West* (n 13) 24,444 [62] (Campbell J); *Austin* (n 40) 30,656 [188] (Ward J).
220 *Spink* (n 107).
221 Ibid [4] (Robb J).
222 Ibid [204]–[206], [292].
223 Ibid [293].
224 [2020] NSWSC 162.
225 Ibid [3]–[4], [113] (Parker J).
226 Ibid [116], affd [2020] NSWCA 207, [104]–[105] (Emmett AJA).

ownership of certain property, this does not necessarily mean that no constructive trust can be imposed over the property in favour of the plaintiff, as intention is only one relevant factor; other circumstances, including those explained above, might otherwise militate in favour of the plaintiff being granted a beneficial interest.[227]

This Part has shown that there is a principled basis for deciding whether a proprietary remedy is necessary when the JEP is applied and, if so, whether an equitable lien is sufficient, or a constructive trust is required. Deciding whether a constructive trust is required evidently requires closer attention to the individual circumstances of any given case than deciding whether an equitable lien is available, since analogy to the partner's and vendor's lien shows that proprietary relief in the nature of an equitable lien is almost always necessary in JEP cases. However, just because the circumstances must be closely attended to in deciding whether to impose a constructive trust does not mean that the process of reasoning involved in doing so is contrary to principle or productive of uncertainty.[228] Indeed, that process of reasoning is necessary to give effect to the mandatory import of the minimum equity rule.[229] As well, deciding relief based on analogy and disanalogy to other cases – and the main factors discussed as being determinative in those cases – can provide remedial certainty to a substantial extent without the need for any structured test.[230] There is, therefore, no basis for criticising the JEP on the grounds that it is unclear when and why a certain form of remedy should be granted on application of the principle.

VI THIRD PARTIES

So far, this article has only discussed the different ways in which the minimum equity rule determines what relief is appropriate to do justice to the *parties* of a failed joint endeavour. However, the High Court has made clear that *third party* interests must be kept in mind when formulating a remedy. For instance, in *John Alexander's*, the Court observed that 'third party interests must be borne in mind in deciding whether a constructive trust should be granted'.[231] As well, in *Bathurst*, the Court stated that '[a]n equitable remedy which falls short of … a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over other equally deserving creditors of the defendant'.[232] These statements intimate that the need to mind third party interests is really a distinct aspect of the minimum equity rule.[233]

However, it is the very fact that proprietary relief – whether in the form of a constructive trust or equitable lien – will generally confer priority over other creditors

227 *Peterson* (n 208) [30]–[42] (Muir JA).

228 Cf Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 (March) *University of Western Australia Law Review* 1.

229 *John Alexander's* (n 60) 45–6 [128]–[129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

230 See *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 88 [267] (Edelman J).

231 *John Alexander's* (n 60) 46 [129] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ).

232 *Bathurst* (n 59) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

233 See above n 61 and accompanying text.

of the defendant which makes such relief so valuable: '[t]hat is what a proprietary remedy is all about'.[234] Priority is ordinarily conferred by means of backdating proprietary relief so that it takes effect from the time at which the circumstances entitling the plaintiff to relief arise (so, in the case of the JEP, from the time at which there has been an unconscionable assertion of legal rights following the collapse of the joint endeavour).[235] The reason why relief is ordinarily backdated is consistent with the minimum equity rule: equity regards as done that which ought to be done, so, if unconscionable conduct should have been corrected from the very time of its occurrence, it will be, in so far as possible.[236] When a proprietary remedy is backdated in this way, the plaintiff will, in the case of the defendant's insolvency, have priority over any unsecured creditors of the defendant,[237] as well as, generally, any other person with an equitable proprietary interest which arose subsequent to the circumstances entitling the plaintiff to relief.[238] The task at hand, therefore, is to identify the circumstances in which the conferral of priority over third party creditors would be 'unfair' such that relief should be adjusted to protect the interests of those creditors.[239] In turn, any unfair priority should be avoided in a manner which interferes with the plaintiff's rights to the minimum extent possible.

It is clear that the mere presence of third parties whose interests may be negatively affected by a proprietary remedy is insufficient to derogate from circumstances which would otherwise justify such a remedy as necessary *inter partes*. There is a fairly clear line of authority, especially in the context of insolvency, that prejudice to third parties does not prevent the full enforcement of a constructive trust.[240] For example, in *Re Sabri; Ex parte Brien v Australia & New Zealand Banking Group Ltd*, Chisholm J imposed a constructive trust over property in favour of the wife of a bankrupt taking effect prior to the bankruptcy, thereby prejudicing the bankrupt's creditors.[241] Likewise, in the context of corporate insolvency, Derrington J in *Staatz v Berry [No 3]* ('*Staatz*') decided, in the circumstances, that prejudice to third party creditors did not subvert rights *inter partes* to a backdated constructive trust.[242] However, this line of authority must not be taken as standing for the proposition that courts do not, or should not, take into account third party interests when determining relief based on the

234 Mason (n 67) 113.
235 *West* (n 13) 24,450 [84] (Campbell J); *Agnew* (n 34) 365 [18] (Drummond, Sundberg and Marshall JJ).
236 *Muschinski* (n 1) 614 (Deane J); Campbell, 'Bribes Held on Constructive Trust' (n 37) 330–1.
237 *Daly v Sydney Stock Exchange Ltd* (1986) 160 CLR 371, 379 (Gibbs CJ); *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 16 FCR 536, 555 (Gummow J).
238 *Heid v Reliance Finance Corporation Pty Ltd* (1983) 154 CLR 326, 333–6 (Gibbs CJ), 339–43 (Mason and Deane JJ); *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, 276 (Kitto J).
239 *Bathurst* (n 59) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Boumelhem* (n 36) 370 [165] (Ward J).
240 *Boumelhem* (n 36) 370 [168] (Ward J), citing *Re Jonton Pty Ltd* [1992] 2 Qd R 105; *Sabri* (n 7); *Parsons v McBain* (2001) 109 FCR 120. Cf *Re Osborn; Ex parte Trustee of Property of Osborn v Osborn* (1989) 25 FCR 547, 553–4 (Pincus J); *Re Popescu; Popescu v Official Trustee in Bankruptcy* (1995) 55 FCR 583, 588–9 (Einfeld J).
241 *Sabri* (n 7) 181–2, 185.
242 (2019) 138 ACSR 231, 275–6 [161]–[164] ('*Staatz*').

JEP.[243] Rather, the key point is that 'unfairness' to third parties, over and above mere detriment to their interests, must be identified if relief is to be modified to avoid the conferral of priority on the plaintiff.[244]

Regrettably, however, there is 'no authoritative guidance as to what is meant by "unfair priority"'.[245] Deciding this issue therefore requires consideration of more general principles mentioned in the cases involving third parties. One important factor in determining whether there would be any unfair priority conferred by imposing a proprietary remedy is the ability of third parties to protect themselves. For example, in *Staatz*, the third party creditors could have obtained security for their debts but forwent doing so.[246] This was in circumstances where there was a clear risk of insolvency: the third parties were lending to a proprietary company with no trading activity which owned only one substantial asset (the property over which the constructive trust was sought).[247] There was, therefore, no relevant unfairness in the third parties' loss of priority in what was 'an unfortunate but not uncommon consequence of the financial mismanagement of a company'.[248] As a corollary of this point, it will be much easier to identify unfair prejudice to third parties who have in fact sought to protect themselves by obtaining an interest in the property over which a proprietary remedy is sought, as compared with unsecured creditors of the defendant.[249]

Relatedly, it will be more difficult to identify any unfair prejudice to third parties resulting from proprietary relief in circumstances involving a collapsed familial joint relationship if that relationship is formalised as a marriage, or is otherwise substantial and long lasting.[250] This is because, as Atkinson J stated in *Clout v Markwell*, '[c]reditors should be expected in these times to be aware of the possibility of constructive trusts or of equitable interests which may arise when the debtor is married or in a de facto relationship'.[251] By contrast, if the relevant joint relationship is comparatively less substantial, and could not be expected to involve the conferral of proprietary rights, then it cannot be incumbent upon third party creditors to protect themselves and it will, therefore, be easier to identify unfairness in imposing a proprietary remedy.[252] Another factor relevant to identifying unfairness is any inequitable conduct by the third parties in question or by the relevant insolvency practitioner. Thus, for example, it will be harder to find unfairness to third party creditors arising from the award of a constructive trust where a trustee in bankruptcy has unconscientiously declined to take any

243 Cf Liew, 'Constructive Trusts and Discretion' (n 15) 978–9.
244 *Bathurst* (n 59) 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Varma v Varma* (2010) 6 ASTLR 152, 261 [516] (Ward J).
245 *Boumelhem* (n 36) 370 [165] (Ward J).
246 *Staatz* (n 242) 275 [162] (Derrington J). Cf *Boumelhem* (n 36) 370 [166], 371–2 [175]–[177] (Ward J).
247 *Staatz* (n 242) 275 [162] (Derrington J).
248 Ibid 275 [163].
249 See, eg, *Boumelhem* (n 36) 370 [171] (Ward J).
250 See *Huen* (n 84) 21 [74] (Ryan, Moore and Tamberlin JJ).
251 [2001] QSC 91, [21].
252 See *Kavurma* (n 212) 19.

action with respect to the property over which a constructive trust is claimed, to the detriment of the claimant.[253]

Where third parties are deserving of protection from unfair prejudice, relief should be modified to the minimum extent necessary. Thus, if the plaintiff is entitled to a constructive trust *inter partes*, then the court should first attempt to fashion the terms of that trust so as to protect third party interests, if required. *Muschinski* is itself an example of this. It will be recalled that in that case, instead of imposing a constructive trust which took effect retrospectively, the orders which Deane J made, and which were agreed to by Gibbs CJ and Mason J, were that a constructive trust was to be imposed, but, '[l]est the legitimate claims of third parties be adversely affected', only taking effect 'from the date of publication of reasons for judgment of this Court'.[254] These orders reflected Deane J's statement earlier in the judgment that 'where competing common law or equitable claims … may be involved, a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgment'.[255]

Problematically, there was no identified third party in any of the judgments in *Muschinski*, so it is somewhat opaque as to precisely why third parties needed protection in the circumstances. The most probable explanation is that Mrs Muschinski and Mr Dodds had granted an unregistered mortgage of the relevant property to their respective solicitors in order to secure their legal costs; such a practice was not uncommon in New South Wales at the time.[256] The priority of the equitable interests of the solicitors could therefore be simply protected by postdating the effect of the constructive trust from the time of judgment.[257] This would avoid the evident unfairness of the imposition of a constructive trust to the detriment of the solicitors where they could not possibly have protected themselves, the basis for the constructive trust being a novel principle of law.[258]

In some circumstances, however, third party interests may require the court to decline to impose a constructive trust altogether, and instead to grant an equitable lien[259] or unsecured equitable compensation.[260] *Boumelhem* is an example of this. In that case, the plaintiffs entered into a joint endeavour with their son to purchase and develop a property and made financial contributions to that effect.[261] The arrangement was that the son would construct two duplexes on the property, one of which would be transferred to the plaintiffs.[262] The issue was that the son came into difficulties with his businesses, and granted equitable charges over the acquired property, which he held as sole registered proprietor, to secure trading

253 See *Draper* (n 76) 77 [98] (Rares J).
254 *Muschinski* (n 1) 623 (Deane J, Gibbs CJ agreeing at 598, Mason J agreeing at 599).
255 Ibid 615.
256 Campbell, 'Bribes Held on Constructive Trust' (n 37) 331.
257 Ibid.
258 Ibid 331–2.
259 *Giumelli* (n 27) 125 [49]–[51] (Gleeson CJ, McHugh, Gummow and Callinan JJ).
260 *Disctronics* (n 188) [212]–[215] (Warren J).
261 *Boumelhem* (n 36) 342–3 [19], 343–4 [25], 355 [90] (Ward J).
262 Ibid 341–2 [15].

debts to third parties ABTS and Boral.[263] The son then entered into bankruptcy, with the construction of the duplexes remaining unfinished.[264] The plaintiffs sought a beneficial interest in the property on the basis of either the JEP, a common intention constructive trust or a resulting trust.[265]

Ward J found the plaintiffs entitled to relief in the nature of a beneficial interest in the property on the basis of a resulting trust as a result of contributions to the purchase price, and an equitable lien on the basis of the subsequent construction costs.[266] The significant factor in finding that relief in relation to the construction costs should be effected by means of an equitable lien, as opposed to a constructive trust, was the third party interests of ABTS and Boral.[267] The equitable charges of ABTS and Boral only secured property in which the son had an equitable interest, so, if any constructive trust were granted, this would have unfairly diminished their security.[268]

However, Ward J declared the equitable lien to take effect from the date of the making of the contributions to the construction costs, thereby allowing the lien priority over the third party equitable charges, except for one.[269] This must mean that Ward J imposed the equitable lien on the basis of the common intention constructive trust doctrine or proprietary estoppel rather than the JEP, although her Honour considered that the relief could be justified by either doctrine.[270] The contributions to the construction costs were made prior to the collapse of the joint endeavour, so the JEP, at that time not yet operative, could not justify a backdating to the extent which was done.[271] If the JEP was the basis for the equitable lien, then it could only have been backdated to after the grant of the equitable charges to ABTS and Boral, and so those charges would have priority.[272] By contrast, the backdating would be justified by a proprietary estoppel if the contributions indicated the time at which that equity arose: 'the time of the reliance which would render departure from the fulfilment of the promise unconscionable'.[273]

An important implication of the preceding discussion is that the effect of the JEP on third parties is necessarily different to that of other doctrines, such as proprietary estoppel. Empirically, the circumstances in which the JEP is generally applicable differ to the circumstances in which other doctrines are generally applicable. This means that unfair prejudice – requiring a modification of proprietary relief which would otherwise be justified *inter partes* – may be more or less difficult to identify, in accordance with the factors canvassed above, when different doctrines are

263 Ibid 343 [21], 346 [39].
264 Ibid 346 [41]–[42].
265 Ibid 347 [45].
266 Ibid 370–1 [172]. See also above nn 96–100 and accompanying text.
267 Ibid 370 [171].
268 Ibid 372 [177]–[178].
269 Ibid 372 [178].
270 Ibid 370–1 [172].
271 Ibid 343–4 [25], 346 [41]. See also *West* (n 13) 24,450 [84] (Campbell J). Cf GE Dal Pont, 'Timing, Insolvency and the Constructive Trust' (2004) 24(3) *Australian Bar Review* 262, 278.
272 *Boumelhem* (n 36) 346 [39] (Ward J).
273 *McNab v Graham* (2017) 53 VR 311, 344 [107] (Tate JA).

operative. At the level of principle, the reasons why, in any given case, proprietary relief is justified, why it should take a particular form and why it should generally be effected from a certain time, depend on the particular doctrine which is applied. Thus, if unfair prejudice would not negative an entitlement to proprietary relief or the backdating of the same, a difference in applicable doctrine can have profound effects on third parties.[274] This shows the importance of analysing the remedial operation of individual equitable doctrines in their specificity, as this article has done of the JEP.

VII CONCLUSION

This article started with the proposition that the remedy for a failed joint endeavour must be only the minimum necessary to relieve the conscience of the defendant. From that statement of the minimum equity rule, it has been possible to resolve the present uncertainties concerning the remedial operation of the JEP. In doing so, the legitimacy of the JEP as 'an example, par excellence, of judicial development of the law in accordance with principle' has been upheld, contrary to academic criticism.[275] The JEP, unlike what was the English 'new model' constructive trust, does not arbitrarily override other doctrines; having regard to the latter, the JEP only operates to ground a remedy if absolutely necessary. Any remedy, in turn, is quantified by assessing the extent of the unconscionable conduct of the defendant; this process is effected by minimal extension from well-established equitable principles. There is, moreover, a principled means of determining when and why proprietary relief is available based on the JEP, and when and why a constructive trust is necessary, or an equitable lien is sufficient. If proprietary relief is justified based on the JEP, the interests of third parties can be adequately protected by modifying that relief if necessary.

274 See above nn 269–73 and accompanying text.
275 Meagher (n 144) 71.