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EQUITY AND OPPORTUNISM IN THE LAW OF CONTRACT:

A Case Study in Fusion by Diffusion

In recent years, the debate over the fusion of law and equity has been reinvigorated. One significant contribution comes from Harvard Law School's Professor Henry Smith, who has argued that equity displays a distinctive opportunism-countering function, serving as a "second-order safety valve", which arrests opportunistic conduct *ex post* via tailored standards, assisted by various proxies and presumptions. The purpose of this article is to explore Smith's "opportunism thesis" in the context of contract law, with particular reference to the doctrines of duress, undue influence and unconscionability. The present author argues that the opportunism thesis is a promising account of the doctrinal architecture of these vitiating factors, while emphasising that the recognition of such an "equitable" function does not necessarily point in an anti-fusionist direction. On the contrary, the author argues that the evolution of the "anti-opportunism" idea has tracked a narrative of "fusion by diffusion" – a process by which equity's original "anti-opportunism" function has travelled across the common law–equity jurisdictional divide in a highly interactive manner, generating doctrinal transplantation and cross-fertilisation.

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I. Introduction

1 To fuse or not to fuse? It is said that "[d]ebate about the fusion of law and Equity goes back for centuries".[1] Moreover, the terms of the

* I am grateful to Henry Smith, John Goldberg and participants of Harvard Law School's Private Law Workshop 2016–2017 for helpful comments.

1 Keith Mason, "Fusion, Fallacy or Finished?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 75.

debate have shifted over time.[2] It is not always clear what form of fusion is at stake – whether it be the fusion of administration, procedure, terminology, substantive doctrines and remedies, or something else altogether.[3] Generally speaking, we have transitioned from an early interpretive debate over the effect of the UK Judicature Acts of 1873 and 1875[4] to a more wide-ranging discourse in which anti-fusionists seek to identify a distinctive quality to equity that sets it apart from the common law, while pro-fusionists deny this exists and hence seek to fold equity back into the main private law categories of tort, contract and restitution, often in the name of "consistency", "rationality" and "coherence".[5]

2 In recent years, American commentators have shown a renewed interest in this debate.[6] Significant among these is the contribution of Harvard Law School's Professor Henry Smith, who in a series of papers has presented what the present author will call "opportunism thesis" of equity.[7] This thesis seeks to unify equitable doctrine through what Smith has described as its characteristic opportunism-countering function –

2 Earlier literature on fusion includes the following: Wesley Newcomb Hohfeld, "The Relations between Equity and Law" (1913) 11(8) Mich L Rev 537; Lord Evershed MR, "Reflections on the Fusion of Law and Equity after 75 Years" (1954) 70 *Law Quarterly Review* 326; Anthony Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *Law Quarterly Review* 238; and Joshua Getzler, "Patterns of Fusion" in *The Classification of Obligations* (Peter Birks ed) (Oxford University Press, 1997) at pp 157–192.

3 For instance, Keith Mason distinguished between four varieties of fusion: "fusion of administration, procedure, remedies and doctrines": see Keith Mason, "Fusion, Fallacy or Finished?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 45.

4 Supreme Court of Judicature Act 1873 (c 66) (UK); Supreme Court of Judicature Act 1875 (c 77) (UK); see further Keith Mason, "Fusion, Fallacy or Finished?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) and paras 5–6 below.

5 See further Lionel Smith, "Fusion and Tradition" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at pp 23–26.

6 See, *eg*, Samuel L Bray, "The System of Equitable Remedies" (2016) 63 *UCLA Law Review* 530 and Caprice L Roberts, "The Restitution Revival and the Ghosts of Equity" (2011) 68 Wash & Lee L Rev 1027.

7 See Henry E Smith, "Fusing the Equitable Function in Private Law" in *Private Law in the 21st Century* (Kit Barker, Karen Fairweather & Ross Grantham eds) (Hart Publishing, 2017), "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015), "Equity and Administrative Behaviour" in *Equity and Administration* (P G Turner ed) (Cambridge University Press, 2016), "The Equitable Dimension of Contract" (2012) 45 *Suffolk University Law Review* 897, "An Economic Analysis of Law versus Equity" (22 October 2010), available at https://law.yale.edu/system/files/area/workshop/leo/document/HSmith_LawVersusEquity7.pdf (accessed 1 December 2017) and "Property, Equity, and the Rule of Law" in *Private Law and the Rule of Law* (Lisa Austin & Dennis Klimchuk eds) (Oxford University Press, 2014).

a "second-order safety valve" approach that catches opportunistic conduct *ex post* via tailored standards, assisted by various proxies and presumptions.[8]

3 The purpose of this article is to explore the opportunism thesis of equity in the context of the law of contract, in particular the vitiating factors of duress, undue influence and unconscionability. The gist of the present author's argument is that the opportunism thesis is indeed a very useful and promising account of the doctrinal architecture of these vitiating factors, which can be seen as possessing an opportunism-countering function in the sense in which Smith understands it. However, the author caveats that the opportunism thesis does not necessarily point in an anti-fusionist direction. Rather, while one can and should certainly preserve a distinct anti-opportunism function, the author argues that the evolution of the "anti-opportunism" idea has in fact tracked a narrative of "fusion by diffusion" – a process by which ideas travel across the common law–equity jurisdictional divide in a highly interactive manner, resulting in borrowing, intermingling and cross-fertilisation, with the result that legal and equitable doctrines become much more tightly knit. In fact, the interpretive account the author puts forward makes it clear that equity's anti-opportunism function can be best preserved not by attaching it to a circumscribed body of equitable doctrine demarcated by jurisdictional source, but by diffusing it across the legal and equitable landscape.

4 The discussion proceeds as follows. Part II provides a brief tour of the fusion debate.[9] Part III outlines Smith's opportunism thesis, its contribution to the debate, and its implications for fusion.[10] Part IV develops the thesis suggested above – the model of fusion by diffusion that explains how equity's anti-opportunism function has travelled across the doctrines of duress, undue influence and unconscionability through a process of transplantation and mutual learning.[11] Part V concludes.[12]

II. Search for distinctive equity

5 In the early days of the fusion debate, commentators were preoccupied with what Roderick Meagher, William Gummow and John Lehane famously (or infamously) termed the "fusion fallacy", which is supposed to involve the conclusion that the Judicature Acts were "not

8 See paras 14–21 below.
9 See paras 5–13 below.
10 See paras 14–21 below.
11 See paras 22–63 below.
12 See paras 64–65 below.

devised to administer law and equity concurrently but to 'fuse' them into a new body of principles comprising rules neither of law nor of equity but of some new jurisprudence conceived by accident, born by misadventure and nourished by sour but high-minded wet nurses".[13]

6 Of course, despite the "vehemence of the authors' views",[14] their argument has been subject to scrutiny as itself involving a straw man fallacy. Anthony Mason has observed that "[t]o-day the accepted view is that the Judicature Acts had a procedural operation and that the Acts did not bring about automatic fusion of the rules of common law and equity".[15] Keith Mason, likewise, calls the fusion fallacy "something of a non-existent bogeyman", since the examples of fallacious reasoning provided by Meagher, Gummow and Lehane rarely involve courts actually expressly or implicitly drawing on the Judicature Acts in applying equitable concepts in common law contexts.[16] Even the editors of the latest edition of *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* have acknowledged that "probably no one today seriously asserts that the Judicature legislation itself effected a substantive fusion of equity and common law"[17] and that "for all the heat and light generated by the fusion fallacy in the twentieth century, the time has come to look forwards to the development of principle in the twenty-first".[18]

7 Accordingly, today's anti-fusionists do not rest their case on a somewhat passé interpretive argument but have instead put forth a number of substantive options for identifying a distinctive equity. In this regard, the usual candidates include the idea of *equitable discretion* – it is commonly said that "[i]f we are looking for distinguishing features between the common law and equity, the former is a rule-based system, whereas equity has always relied upon the existence of discretions to alleviate the consequences of principles and doctrines".[19] Relatedly, one might point to *flexibility* – given that "any attempt to lay down a set of

13 R P Meagher, W M C Gummow & J R F Lehane, *Equity: Doctrines and Remedies* (Butterworths, 3rd Ed, 1992) at para 221.

14 As described by Andrew Burrows, "We Do This at Common Law But That in Equity" (2002) 22(1) *Oxford Journal of Legal Studies* 1.

15 Anthony Mason, "Fusion" in in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 12.

16 Keith Mason, "Fusion, Fallacy or Finished?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at pp 58–60.

17 *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (J D Heydon, M J Leeming & P G Turner eds) (LexisNexis Butterworths, 5th Ed, 2015) at p 64.

18 Heat and light generated by themselves: see *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (J D Heydon, M J Leeming & P G Turner eds) (LexisNexis Butterworths, 5th Ed, 2015) at p 66.

19 Anthony Mason, "Fusion" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 17.

rules in advance would always run up against situations that had not been envisaged by the rule-maker", it fell to the "role of equity to leaven the rule-based system with some flexibility".[20] A recent article by Matthew Harding has put forward a justification of equity's discretion and flexibility along "rule of law" lines, arguing that without equity, citizens might abuse their legal rights to the point where society ceases to have a disposition to engage with the law, impeding the function of law in providing normative guidance, facilitating planning and constituting goals and purposes, which ultimately compromises the rule of law as a mode or technique of governance.[21]

8 Another commonly cited distinguishing feature of equity is said to be its *conscience-based jurisdiction*. In a recent paper, Alastair Hudson has called conscience the "organising concept of equity" and observed that the idea of "conscience" and its technical corollary "unconscionable conduct" have invariably appeared in judgments invoking equitable doctrines.[22] Hudson defends the concept of conscience as an objectively constituted phenomenon (rather than being purely subjective), pointing to the Freudian idea of the clash between the super-ego (as conscience) and the ego generating a commonly identified sense of guilt, as well as Immanuel Kant's suggestion that human conscience is an internal authority not voluntarily made but incorporated into one's being.[23] Thus, the court in any case "is not asking the defendant what they personally claim to think is right or wrong", but is asking "what the person's conscience, formed by inter-action with that society, ought to have prompted them to do".[24]

9 Others commentators reject these options for differentiating equity in favour of similar sounding, but perhaps more specifically identified, distinguishing features. Lionel Smith has argued that equity gives effect to a moral norm requiring *respect for other people's obligations* (in other words, creating a binding obligation that others do not interfere with people's obligations, which equity instantiates through its technique of *converting personal rights into property rights* – a feature which accounts for a range of equitable doctrines, for instance, the enforceability of express trust interests against gratuitous transferees

20 Lionel Smith, "Fusion and Tradition" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 30.

21 See Matthew Harding, "Equity and the Rule of Law" (2016) 132 *Law Quarterly Review* 278 at 295–302.

22 Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2(1) CJCCL 261.

23 Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2(1) CJCCL 261 at 277–278.

24 Alastair Hudson, "Conscience as the Organising Concept of Equity" (2016) 2(1) CJCCL 261 at 279.

from the trustee).[25] He has also suggested a second distinguishing feature which he calls "justiciability of motive". As he has pointed out, while the common law usually does not examine a party's motives, equity "inquires into good faith as a matter of course", for example, in the *bona fide* purchaser defence.[26] More broadly, he has suggested the possibility of a distinctive equitable "tradition", which (like language) plays a part in identity and is hence worth conserving: "[i]f Equity, with its particular vocabulary and syntax of legal reasoning, is part of one's identity, then one can hardly be expected to give it up on the basis of an argument that things would be easier to understand if there was only one legal language at play".[27]

10 Recent contributions in the anti-fusionist vein have opted for more systemic or structural distinguishing features (rather than more abstract jurisprudential ideas uniting equitable doctrines). Samuel Bray's recent article[28] has argued that equity has a *distinctive remedial system*: equitable remedies like injunctions are often needed to compel action or inaction; these remedies require managerial devices such as *ex post* revision, contempt orders and equitable "helpers" to ensure compliance; and being subject to abuse, the managerial devices require constraints in the form of adequacy and specificity requirements, as well as maxims of restraint and residual equitable discretion.[29] This integrated system sets equitable remedies apart from legal ones. Justice Mark Leeming, on the other hand, has argued that equity has a *comparative distinctiveness* in the sense that there is increased scope for equitable development by cross-reference to other jurisdictions in the Commonwealth with equitable traditions,[30] citing examples from the law on knowing assistance, the rule in *Saunders v Vautier*,[31] and judicial advice to trustees, to suggest that equitable "norms transcend national boundaries" and that there is a "closely interwoven fabric of legal doctrine, which permits regard to be had to the convincing language and reasoning in different countries' courts in the Commonwealth".[32]

25 Lionel Smith, "Fusion and Tradition" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at pp 32–35.

26 Lionel Smith, "Fusion and Tradition" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at pp 35–36.

27 Lionel Smith, "Fusion and Tradition" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at pp 28–29.

28 Samuel L Bray, "The System of Equitable Remedies" (2016) 63 *UCLA Law Review* 530.

29 Samuel L Bray, "The System of Equitable Remedies" (2016) 63 *UCLA Law Review* 530 at 534.

30 Justice Mark Leeming, "The Comparative Distinctiveness of Equity" (2016) 2(2) CJCCL 403.

31 (1841) 41 ER 482.

32 Justice Mark Leeming, "The Comparative Distinctiveness of Equity" (2016) 2(2) CJCCL 403 at 419.

11 The present author's purpose here is not to engage in detail with any of these suggestions for a unique equity. It suffices for now to point out the general countervailing arguments put forward by pro-fusionists, who would, on the whole, deny that equity can claim exclusive possession of any of the above characteristics. Leading figures in this camp include Sarah Worthington and Andrew Burrows, who each has argued for integrating equity into the fabric of existing law. For instance, Worthington[33] has argued that by "using two sets of rules, there is a significant risk that like cases will not be treated alike, and that different cases will not be treated in appropriately different ways";[34] hence, integration is necessary to "ensure that legal developments are … coherent, principled, rational, and properly directed to meeting the underlying policy objectives".[35] Worthington has rejected suggestions that equity is a peculiarly "conscience-based" or "discretionary" jurisdiction. She has pointed out that it is a "crude caricature" to see equity's mode of adjudication as focussed on conscience and morality, while assuming that common law courts never rely on any form of moral reasoning.[36] Changes in the common law are often driven by changes in societal morality, demonstrated in common law doctrines governing dismissal in employment, consumer protection, anti-discrimination regulations and the like.[37] Neither is equity especially or uniquely discretionary in approach, since "*both* the Common Law and Equity employ discretion in adjudication"[38] [emphasis in original] – the common law often doing so in assessing unfair contractual terms, duties of care and broad reasonableness standards that cut across the law of obligations.[39]

12 Of course, neither Worthington nor Burrows has promoted abolition for its own sake, and their arguments are fairly nuanced – Worthington has suggested that integration is necessary where law and equity are "doing the same thing for the same reasons", but agrees with a more discriminating approach where the dual jurisdictions are "doing different things for the same reasons" (for instance, equitable specific performance and common law damages for contract breaches) or doing "different things for different reasons" (for example, distinctive equitable fiduciary duties of loyalty).[40] Burrows, likewise, has acknowledged a category of cases where common law and equity exist coherently and

33 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006).
34 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 325.
35 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 321.
36 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 329.
37 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at pp 329–330.
38 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 334.
39 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 333.
40 Sarah Worthington, "Integrating Equity and the Common Law" (2002) 55(1) *Current Legal Problems* 223 at 243–261.

where the historical labels remain helpful terminology (such as the deeply embedded idea of legal and equitable interests in a trust).[41]

13 Nevertheless, fusionists like Burrows and Worthington call for fairly radical reforms and the discarding of dual regimes across various areas of law – Burrows has argued that there is "no rational reason for having another category of wrongs, labelled equitable wrongs" and would fold breaches of fiduciary duty, breaches of confidence, dishonest assistance and equitable estoppel back into tort or contract,[42] and accordingly would also abolish equitable compensation as a separate category from compensatory damages at common law notwithstanding much-debated authority on whether certain restrictions on the latter (remoteness, causation and contributory negligence) apply equally to the former.[43] Worthington has gone so far as to suggest that the concept of the trust can be approached without the idea of equitable title, if ones simply focuses on the underlying property interest as a right to enjoy particular defined benefits accorded special protection against third party interference.[44]

III. Equity and opportunism thesis

A. Smith's "equity as anti-opportunism"

14 Against the above backdrop, Smith has offered a novel account of equity that conceived of it as "a decision-making mode that aims to counter opportunism"[45] – what the present author refers to as the "opportunism thesis" of equity. The basic idea of "anti-opportunism" is traceable to early statements concerning the contexts in which equity customarily intervenes, which tended to involve vulnerable parties particularly susceptible to advantage-taking, hence commonly classified under the heading of "mistake, accident, and fraud", as well as situations

41 Andrew Burrows, "We Do This At Common Law But That in Equity" (2002) 22(1) *Oxford Journal of Legal Studies* 1 at 5.

42 Andrew Burrows, "We Do This At Common Law But That in Equity" (2002) 22(1) *Oxford Journal of Legal Studies* 1 at 8–9.

43 Andrew Burrows, "We Do This At Common Law But That in Equity" (2002) 22(1) *Oxford Journal of Legal Studies* 1 at 11–12. Equitable compensation is a particularly relevant topic in recent years following the UK Supreme Court decision in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] 3 WLR 1367; see further Yip Man & Goh Yihan, "Navigating the Maze: Making Sense of Equitable Compensation and Account of Profits for Breach of Fiduciary Duty" (2016) 28 SAcLJ 884 and *Equitable Compensation and Disgorgement of Profit* (Simone Degeling & Jason N E Varuhas eds) (Hart Publishing, 2017).

44 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 323.

45 Henry E Smith, "Equity and Administrative Behaviour" in *Equity and Administration* (P G Turner ed) (Cambridge University Press, 2016) at p 330.

of "meditated mischiefs", "oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains".[46]

15 Smith has built on this to offer an updated and more precise definition of "opportunism" invoking standard economic language: opportunism is said to be behaviour that is "undesirable but that cannot be cost-effectively captured – defined, detected and deterred – by explicit *ex ante* rulemaking … It often consists of behaviour that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others".[47] Lawmaking, by its nature, involves promulgating general rules and standards, and this inevitably results in unforeseeable gaps, ambiguous provisions and loopholes in the law which opportunists would be keen to exploit, since these are weak spots which cannot be easily plugged *ex ante*.[48] One useful analogy is tax evasion: if tax law were only *ex ante* without the possibility of an *ex post* discretionary inquiry into the substance of a transaction, many taxpayers would simply structure their transactions to skirt the rules.[49] Similarly, equity acts as an *ex post* partially discretionary "second-order safety valve" to address the problems of opportunism.[50] Critically, Smith has been keen to emphasise that this account of equity is distinguishable from a general "fix-it" approach to equity that may be more expansive and invoke subjective and highly contested conceptions of distributive justice – equity as anti-opportunism involves narrow *ex post* tailored standards as opposed to broad *ex post* untailored standards, which "invites all the criticism of equity as destabilizing and chilling".[51] In illustrating the tailored nature of this second-order intervention, Smith has drawn upon Aristotle's exposition of equity as being like the leaden measuring rules of the builders of the island of Lesbos, which would

46 Henry E Smith, "Equity and Administrative Behaviour" in *Equity and Administration* (P G Turner ed) (Cambridge University Press, 2016) at p 330, citing Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (Charles C Little & James Brown, 4th Ed, 1846) at § 29.

47 Henry E Smith, "An Economic Analysis of Law versus Equity" (22 October 2010) available at https://law.yale.edu/system/files/area/workshop/leo/document/HSmith_LawVersusEquity7.pdf at pp 10–11 (accessed 1 December 2017).

48 Henry E Smith, "Fusing the Equitable Function in Private Law" in *Private Law in the 21st Century* (Kit Barker, Karen Fairweather & Ross Grantham eds) (Hart Publishing, 2017) at pp 6–7.

49 Henry E Smith, "An Economic Analysis of Law versus Equity" (22 October 2010) available at https://law.yale.edu/system/files/area/workshop/leo/document/HSmith_LawVersusEquity7.pdf at p 7 (accessed 1 December 2017).

50 Henry E Smith, "Fusing the Equitable Function in Private Law" in *Private Law in the 21st Century* (Kit Barker, Karen Fairweather & Ross Grantham eds) (Hart Publishing, 2017) at p 3.

51 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at p 26.

adapt itself to the shape of a stone for the purposes of precise measurement, unlike iron rules, which do not bend and cannot be used in such a tailored fashion.[52]

16 Turning to the nuts and bolts of equity's regulatory techniques, Smith has explained that equity often employs proxies and presumptions targeted at identifying opportunism – hence a proxy-like disproportionate hardship might put equity on notice of a potential situation of advantage-taking which, coupled with some degree of vulnerability, might raise a rebuttable presumption that a party to a transaction may have acted opportunistically, which then calls for a fuller evaluation of good or bad faith relevant to determining the actor's conduct in this regard.[53] Since equity functions as a "narrow safety valve", non-opportunists are likely to avoid triggering these proxies and presumptions, which makes for a more efficient system minimising the potential for chilling legitimate behaviour.[54]

17 An accessible illustration given by Smith is the traditional equitable approach to building encroachments in American property law, which is also interesting because it involves a further layer of complexity – a potential scenario of bilateral opportunism which equity seeks to regulate. An encroaching structure was usually considered a continuing trespass subject to injunctive relief, which introduced potential for extreme hardship if the building owner were forced to tear down the structure.[55] Equity intervened to prevent disproportionate hardship to the good-faith encroacher by softening the remedy to damages in the case of a good-faith mistake, with the assumption being that the encroacher in this scenario was in fact the victim of the landowner who might otherwise exploit his holdout power to demand an extortionate sum (just short of the loss from demolition) to waive his injunctive rights.[56] On the other hand, where there was a finding that the encroachment was in fact in bad faith (with knowledge and intention to trespass), the inference drawn would be that the wrongdoer was being opportunistic by deliberately violating the landowner's rights and attempting to take advantage of equity's more forgiving approach,

52 Henry E Smith, "Equity and Administrative Behaviour" in *Equity and Administration* (P G Turner ed) (Cambridge University Press, 2016) at p 336.

53 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at pp 65–68.

54 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at p 27.

55 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at p 17, referencing Restatement Second, Torts (1965) §§ 158 and 161(1).

56 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at pp 17–18.

hence an injunction would be the appropriate remedy. As Smith has noted, this is a "more tailored and less destabilizing way" of dealing with problems arising from opportunism.[57]

18 For our purposes, another important example raised by Smith is the inference of opportunism raised by equity in cases of "near-fraud" or "constructive fraud" in contractual transactions, which are often dealt with under the unconscionability doctrine or its close cousins.[58] As Smith has observed, "unconscionability is the core of equitable anti-opportunism, but it is a very targeted kind of unconscionability"[59] – primarily procedural rather than substantive. Again, any disproportionate hardship is relevant not for its own sake but as a proxy for opportunism. Hence, Smith has argued that equity takes note of a "combination of a very strange-looking deal and vulnerability that makes the transaction presumptively invalid, or voidable",[60] citing American commentators[61] who have suggested that the unconscionability doctrine protects those most susceptible to opportunism, such as "particular classes of people who were deemed to be easily duped, such as widows, orphans … and the weakminded",[62] or in more colourful language, what Arthur Leff called "presumptive sillies".[63]

B. Evaluating opportunism thesis

19 The strength of Smith's anti-opportunism account of equity are manifold. Matthew Conaglen has referred to Smith's distinction between *ex ante* and *ex post* forms of regulation as a "useful way of thinking, in general terms, about the distinctions between common law and equity", bringing into "sharper relief the fact that a number of equitable doctrines involve *ex post* review of prior conduct", such as the fraud on a power doctrine which necessarily involves an *ex post* evaluation of whether a power was exercised outwith the range of purposes for which

57 Henry E Smith, "Fusing the Equitable Function in Private Law" in *Private Law in the 21st Century* (Kit Barker, Karen Fairweather & Ross Grantham eds) (Hart Publishing, 2017) at p 14.

58 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at pp 30–33.

59 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at p 30.

60 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at p 32.

61 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at p 31.

62 Jane P Mallor, "Unconscionability in Contracts between Merchants" (1986) 40 *Southwestern Law Journal* 1065 at 1066.

63 Arthur A Leff, "Unconscionability and the Code – The Emperor's New Clause" (1967) 115 U Pa L Rev 485 at 532.

it was granted.[64] Other virtues of this account include its ability to give specific content to many of the traditional ideas associated with a distinctive equity, such as "discretion", "flexibility", "conscience" or "justiciability of motive". Smith's account tethers discretion and flexibility to a specific purpose of countering opportunism, rather than a free-floating "policy-based" equity; it narrows the definition of "conscience" to opportunistic behaviour identified in line with commercial norms over which there is some consensus rather than more abstract accounts invoking certain philosophical or psychological ideas; and it situates equity's special emphasis on motive within a larger functional narrative.

20 Accordingly, this article endorses the opportunism thesis to a large degree. However, it rejects any suggestion that the opportunism thesis provides a conclusive answer to the fusion debate. Smith's arguments for a distinctive equity appear to lean against fusion, and in recent writings, he has elaborated on the problems of "carrying fusion too far", particularly in American law.[65] It is important to clarify, however, the particular sense in which Smith advocated a retention of equity. Smith seeks first and foremost to preserve equity in the sense of its anti-opportunism function and the associated doctrinal techniques (for example, reliance on certain proxies and presumptions, and limited *ex post* review of conduct) that serve this function. He is clear that there "is no need to resurrect the jurisdictional divide as long as we are clear on what the equitable function is, regardless of the court that is performing it".[66] Moreover, Smith has stated that he does "not claim that this function of countering opportunism [is] the exclusive province of the equity courts" nor that "rooting out and preventing opportunism [is] the only function of equity jurisdiction",[67] though he wants to say this is a highly significant theme of equity's identity and evolution.

64 Matthew Conaglen, "Equity's Role" in *Equity and Administration* (P G Turner ed) (Cambridge University Press, 2016) at pp 508–509.

65 Some of these include a proliferation of multifactor balancing tests instead of a second-order safety valve approach, an unnecessary polarisation between formalism and contextualism, and the flattening of remedies instead of more nuanced approach relying on equitable proxies and presumptions: see Henry E Smith, "Fusing the Equitable Function in Private Law" in *Private Law in the 21st Century* (Kit Barker, Karen Fairweather & Ross Grantham eds) (Hart Publishing, 2017) at pp 16–28. To be clear, these complications appear to be particularly pronounced in the American experience, given its comparatively consummate flattening of law and equity relative to other jurisdictions in the common law world.

66 Henry E Smith, "Fusing the Equitable Function in Private Law" in *Private Law in the 21st Century* (Kit Barker, Karen Fairweather & Ross Grantham eds) (Hart Publishing, 2017) at p 28.

67 Henry E Smith, "Equity and Administrative Behaviour" in *Equity and Administration* (P G Turner ed) (Cambridge University Press, 2016) at p 335.

21 Accordingly, and to foreshadow the discussion in the following Part,[68] there is room to argue for a form of fusion consistent with the opportunism thesis, or what the present author will describe as "fusion by diffusion", where the anti-opportunism function of equity travels across the common law–equity jurisdictional divide to enrich and transform both streams of doctrine. In this sense, the author suggests that there is indeed fusion, though equity in its distinct anti-opportunism guise continues to survive.

IV. Opportunism thesis and "fusion by diffusion": Illustrations from duress, undue influence and unconscionability

A. Fusion by diffusion

22 In this Part, the present author suggests that Smith's opportunism thesis can be understood in a manner consistent with the position taken by fusionists, though the precise mode of fusion here is important. Roughly speaking, the author argues that the notion of equity as serving an opportunism-countering function is correct, but that this equitable function has permeated throughout the common law via a process of cross-fertilisation which the author terms "*fusion by diffusion*".

23 The present author hastens to add that the model he is articulating is not entirely new, and finds support in much of the literature advocating some measure of integration between law and equity, though the process has been described under different labels and with the use of different examples. For example, Burrows has used the term "fusion by analogy",[69] also adopted by other commentators, such as Anthony Mason, who have argued that the Judicature Acts "[contain] no prohibition against judicial development of equity rules by reference to common law principle and doctrine and vice versa".[70] Anthony Mason pointed out that where the scope of legal and equitable duties is similar, there is "certainly a case for fusion by analogy" – for instance, if one takes vulnerability to be the touchstone of a common law duty of care, this may suggest (even if not conclusively) "a basis for an analogy between the fiduciary's liability for negligence and the common law

68 See paras 22–27 below.

69 Andrew Burrows, "Remedial Coherence and Punitive Damages in Equity" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005); see also James Edelman & Simone Degeling, "Fusion: The Interaction of Common Law and Equity" (2004) 25(3) *Australian Bar Review* 195.

70 Anthony Mason, "Fusion" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 12.

duty".[71] The point is that such an argument should not be ruled out simply for the sake of preserving equity as a separate body of rules.[72]

24 Worthington uses the term "cross-fertilisation" to describe the transfer of potentially transformative ideas and concepts across the common law–equity divide, suggesting that this is no unbridgeable gap. She has noted that cross-fertilisation "is an ongoing process", one that has taken place for centuries, as equity "borrowed from the outset … adopt[ing] the Common Law's eleventh and twelfth-century *in personam* remedies and develop[ing] them into its own more sophisticated regimes".[73] Keith Mason has made a similar point, observing that "[o]ver the centuries, judges at common law and in equity moulded principles whereby the two 'systems' acted in aid of each other where appropriate, recognised and applied each other's rules when necessary to do so, and borrowed ideas from time to time",[74] in a process that has invoked the metaphors of *confluence*, *intermingling* and *intertwining*.[75] In this sense, the notion of fusion should not be refracted through a single statutory moment in 1875, but "represents an ongoing and interactive process".[76] For instance, he has pointed to developments in trust jurisprudence which permit a beneficiary to sue on behalf of the trust for a breach of a common law obligation in circumstances where the trustee unreasonably refuses to act or disappears, which he has suggested would be heresy to an equity purist in the past.[77]

25 Likewise, in a recent article, Leonard Rotman has used the term "equitable bleed" to describe the process where "concepts of equity are allowed to bleed into the common law and themselves become a part of the latter".[78] Equitable bleed is the reality recognised by the equity pragmatist (rather than the purist), who sees that "the common law and equity are not watertight compartments, but part of the 'tapestry of law'

71 Anthony Mason, "Fusion" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at pp 16–17.

72 Anthony Mason, "Fusion" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at pp 16–17.

73 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at pp 326–327.

74 Keith Mason, "Fusion, Fallacy or Finished?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 41.

75 Keith Mason, "Fusion, Fallacy or Finished?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 76.

76 Keith Mason, "Fusion, Fallacy or Finished?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at p 45.

77 Keith Mason, "Fusion, Fallacy or Finished?" in *Equity in Commercial Law* (Simone Degeling & James Edelman eds) (Lawbook Co, 2005) at pp 72–73, referencing *Parker-Tweedale v Dunbar Bank plc* [1991] Ch 12, *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560 and *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432.

78 Leonard I Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-fusion of Legal and Equitable Matters" (2016) 2(2) CJCCL 497 at 534.

and can be drawn upon freely or even in combination".[79] Rotman has referenced recent Canadian case law articulating an organising principle of good faith in contract law[80] to illustrate equitable bleed (good faith being associated more with an equitable jurisdiction than common law), and has suggested that this brings the common law of contract closer to breaches of fiduciary duties.[81] In other words, there is a recognition that it is possible and appropriate "for law to enlarge the range of relief to remedy breaches of contract in a manner akin to what was historically done in equity so long as doing so does not result in doctrinal impropriety or an improper blurring of conceptual distinctions".[82]

26 There is thus a measure of consensus over the fact that, as a descriptive matter, equity and the common law have developed in a mutually supportive manner, drawing inspiration from each other and in the process tightening their conceptual connections while maintaining some degree of doctrinal detachment. This is the process the present author terms "fusion by diffusion", not simply to add to the list of existing metaphors highlighted above, but with a view toward developing a more analytical framework for this process. "Diffusion" is a term widely known in the comparative literature on legal transplants,[83] often referring to the transfer and transformation of legal doctrines and concepts as they are imported across jurisdictional divides.[84] However, some of the fundamental questions raised in the "diffusion of law" literature are equally applicable to the phenomenon of diffusion across the law-equity jurisdictional divide:

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79 Leonard I Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-fusion of Legal and Equitable Matters" (2016) 2(2) CJCCL 497 at 507.

80 See *Bhasin v Hrynew* [2014] 3 SCR 494.

81 Leonard I Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-fusion of Legal and Equitable Matters" (2016) 2(2) CJCCL 497 at 534.

82 Leonard I Rotman, "The 'Fusion' of Law and Equity?: A Canadian Perspective on the Substantive, Jurisdictional, or Non-fusion of Legal and Equitable Matters" (2016) 2(2) CJCCL 497 at 534.

83 See, *eg*, William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009), Margit Cohn, "Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom" (2010) 58(3) Am J Comp L 583, Jonathan M Miller, "A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process" (2003) 51 Am J Comp L 839, Alan Watson, *Legal Transplants: An Approach to Comparative Law* (University of Georgia Press, 2nd Ed, 1993) and Pierre Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 *Maastricht Journal of European and Comparative Law* 111.

84 For a framework of diffusion, see William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) at p 279.

(a) For instance, we might inquire as to the *source* of diffusion or transplantation – does the concept in question emanate originally from common law or equity?

(b) *What* is being diffused – the subject-matter of transplantation – is another important factor. These might include equitable rules, concepts, doctrines, remedies, adjudicatory practices, structures, functions, or even more generally, some form of an equitable "state of mind".

(c) The "diffusion" literature also points us to the question of *timing*, or *when* a transplant is said to be effected or completed. As we have already suggested in relation to the "fusion fallacy" debate, there might be a specific point of reception of a common law or equitable transplant, or some sort of more complex interaction over time, taking into account path-dependencies and the fact that every transplant event sits in a longer narrative which is affected by previous events, and has the potential to affect future ones.

(d) The *methods and pathways* of diffusion are also important – while diffusion across geographic and sociocultural boundaries is arguably more complex, involving more variables, diffusion across an intrajurisdictional law–equity divide may also involve interesting conceptual journeys, for example, taking circuitous routes or involving reciprocal interactions of varying degrees.

(e) Finally, one might examine the *outcome* of diffusion, in particular the degree of assimilation achieved. There is a wider spectrum of possibilities than the simple binary choice of "no fusion" versus "complete fusion". Fusion by diffusion points us to a spectrum including: full convergence, substantial adoption with some contextual adaptation, some degree of layering and co-existence with mutual reference, or a rejection of any form of integration, to name but a few ways of describing the possibilities.

27 Looking forward, this framework and the questions raised within it facilitate a more meaningful illustration of fusion by diffusion which the present author describes below,[85] with particular reference to how the "opportunism" function of equity has travelled across common law and equitable doctrines in contract law.

85 See paras 43–63 below.

B. Duress, undue influence and unconscionability: Golden thread of "anti-opportunism"

28 In this section, the present author outlines the architecture of three vitiating factors in contract law – duress,[86] undue influence,[87] and unconscionability[88] – with a view to highlighting their opportunism-countering function in line with Smith's thesis. It is arguably possible to find examples of anti-opportunism across the realm of contract doctrines more generally,[89] but the focus on this triumvirate of vitiating factors is potentially more illuminating given that they are close cousins of the sort of examples in American contract law used by Smith himself to illustrate the equitable anti-opportunism function,[90] and since they are highly interconnected in a manner that is pertinent to the discussion below. See the table immediately below outlining the structure of opportunism-countering doctrines:

Vitiating factor	Hypothetical baseline (for contrast)	Duress	Undue influence	Unconscionability
Doctrinal subcategories	N/A	Includes: (a) duress to person; (b) duress to property; (c) threat to breach contract/ economic duress; and	Includes: (a) actual (rare) and (b) presumed undue influence (major category focused on below)	N/A

86 See generally Jack Beatson, "Duress as a Vitiating Factor in Contract" (1974) 33(1) *The Cambridge Law Journal* 97, Patrick Atiyah, "Economic Duress and the Overborne Will" (1982) 98 *Law Quarterly Review* 197, Rick Bigwood, *Exploitative Contracts* (Oxford University Press, 2003) and Stephen A Smith, "Contracting under Pressure: A Theory of Duress" (1997) 56(2) *The Cambridge Law Journal* 343.

87 See generally, Peter Birks & Nyuk Yin Chin, "On the Nature of Undue Influence" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedman eds) (Clarendon Press, 1995) at p 57, Rick Bigwood, "Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'?" (1996) 16(3) *Oxford Journal of Legal Studies* 503; "Contracts by Exploitation: From Unfair Advantage to Transactional Neglect" (2005) 25(1) *Oxford Journal of Legal Studies* 65 and Mindy Chen-Wishart, "Undue Influence: Vindicating the Relationships of Influence" (2006) 59(1) *Current Legal Problems* 231.

88 See generally Nicholas Bamforth, "Unconscionability as a Vitiating Factor" [1995] *Lloyd's Maritime Commercial Law Quarterly* 538 and David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 *Law Quarterly Review* 479.

89 For general discussion of equity's impact on contract law, see, Sir Anthony Mason, "The Impact of Equitable Doctrine on the Law of Contract" (1998) 27 *Anglo-American Law Review* 1.

90 See para 18 above.

		(d) lawful but illegitimate threats/lawful act duress		
(A) Type of opportunistic conduct	Active/passive advantage-taking	Illegitimate threat, usually accompanied by unreasonable demand	Abuse of trust or confidence, or failure to protect in vulnerable relationship	Unconscionable conduct
(B) Weakness	Vulnerability/ lack of bargaining power	Situational – induced to enter transaction under pressure amounting to duress (previously "overborne" will)	Vulnerability to opportunism due to trust or dependence on other party in existing relationship	Mental weakness, vulnerability or extreme lack of bargaining power
(C) Substantive unfairness in transaction	Oppressive or clearly bad bargain	No formal requirement, unreasonable demand acceded to may be evidence of duress	Transaction calling for an explanation may help raise rebuttable presumption of undue influence	Oppressive or clearly bad bargain
(D) Causal link between opportunistic conduct and transaction	To be proved on a "but for" or other basis	(a) **Duress to person**. "A" cause; (b) **Duress to property.** "But for" cause; (c) **Economic duress.** Sometimes "clinching or decisive" cause, minimally "but for" cause, and claimant must have "no reasonable alternative"; and (d) **Lawful act duress**. Unclear but likely similar to economic duress	Not discussed in case law	Not discussed in case law
Evidential presumptions	May use presumptions to	Some, but not all, authorities suggest	In presumed undue influence,	Generally must prove

used to establish above elements?	establish one or more elements	that proof of (A) (see first column) shifts burden to defendant to disprove (B) and (D)	a *relationship of influence* and a *transaction calling for an explanation* together raise a rebuttable presumption of undue influence ((B) and (C) sufficient to infer (A))	opportunistic conduct, weakness, and bad bargain (that is, (A), (B) and (C)); a few older cases suggest (A) can be inferred from (B) and (C)

29 Starting from first principles, if one were to design a hypothetical doctrine that is responsive to various situations of opportunism in the formation of a contract,[91] it would likely include within its elements the definition of the type of opportunistic conduct in question, a specification of the nature of the weakness or vulnerability that renders a party susceptible to opportunistic conduct, a consequently unfair or disadvantageous bargain that results from such opportunism, and a causal link between the opportunistic conduct and the resulting transaction. Establishing all these elements would generally trigger the need for a second-order safety valve law to come into play, and allow a court to infer the conclusion that some form of opportunism has been present in the formation of a bargain, thus rendering it potentially voidable.

30 Furthermore, building on what Smith's insights,[92] while a hypothetical lawmaker might sometimes require *all* these elements to be established as a collective proxy for legally recognised opportunism, the lawmaker might go further with his use of proxies and presumptions to *presume* opportunism once one or more key elements are established, leaving it to the putative opportunist to rebut this presumption. Hence, proof of disproportionate hardship or some form of a clearly disadvantageous bargain may assist in the inference of opportunistic conduct, especially in contexts ripe with potential for advantage-taking. The doctrines of duress, undue influence and unconscionability correspond with the opportunism-countering structure outlined above, though they differ in a number of subtle and meaningful ways as a result of the specific types of opportunistic conduct targeted.

91 See the table in para 28 above under "Hypothetical Baseline".
92 See discussion in paras 14–18 above.

(1) Duress

31 The doctrine of duress responds to four subcategories of opportunistic conduct in contract formation: (a) illegitimate threat to persons ("physical duress"); (b) illegitimate threat to goods or property ("duress to goods"); (c) threat to breach a contract ("economic duress"); and (d) technically lawful but illegitimate or unconscionable threat ("lawful act" duress).[93] These are fairly "active" forms of opportunism as they involve one party ("defendant") making a type of illegitimate threat mentioned above to the other party ("claimant"), usually accompanied by some fort of unreasonable demand.[94] The claimant's weakness in duress is "situational", in that the defendant exerts pressure to create a situation of weakness that is not "constitutional" or "inherent" to the claimant – such as a demand to purchase an item at undervalue backed by a threat to cause physical harm if the demand is not acceded to. The claimant is thus induced or coerced to enter into the contract by the defendant's conduct.[95]

32 While the duress doctrine does not formally require substantive unfairness as an element for establishing voidability, unreasonable demands that form part of the contract's terms may point to the existence of duress – as pointed out by Lord Scarman in *Universe Tankships, Inc of Monrovia v International Transport Workers Federation*,[96] the legitimacy of pressure depends on the nature of the threat as well as the demand, especially where an unreasonable demand accompanies a lawful threat,[97] such as in Lord Atkin's well-known illustration of the blackmailer who has to justify not so much the threat to communicate some compromising conduct but his unreasonable demand for money to refrain from doing so.[98] Hence, the fact that unreasonable demands have been acceded to may contribute to an inference of opportunism.

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93 See Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 14th Ed, 2015) ch 10; Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at pp 195–199.

94 See Andrew B L Phang & Goh Yihan, *Contract Law in Singapore* (Wolters Kluwer Law and Business, 2012) at p 296.

95 It was previously debated whether duress should be accounted for in terms of a victim's "overborne" will or the defendant's illegitimate pressure: see Patrick Atiyah, "Economic Duress and the Overborne Will" (1982) 98 *Law Quarterly Review* 197. Current academic consensus appears to recognise a combination of both "plaintiff" and "defendant"-sided factors, the exploration of which is beyond the scope of this article: see generally Donal Nolan, "Economic Duress and the Availability of a Reasonable Alternative" (2000) 8 *Restitution Law Review* 105 at 113.

96 [1983] 1 AC 366.

97 *Universe Tankships, Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400–401.

98 See *Thorne v Motor Trade Association* [1937] AC 797 at 806.

33 Importantly, and particularly for the subcategories of duress, the law calibrates its response to different types of opportunism by specifying different thresholds for establishing the causal link between a defendant's opportunistic conduct and the resulting transaction. In cases of duress to persons, the threat need only be "a" cause of a claimant's decision to contract.[99] In duress to goods, the law applies a "but for" standard,[100] which commentators have described as "easily met".[101] However, when it comes to economic or lawful act duress, the law requires a higher standard of causation,[102] at least a "but for" threshold, but often require the pressure to be "decisive or clinching",[103] and further that the claimant had "no practicable alternative" to but accede to the demand.[104] Why calibrate causation requirements in this manner? It has been pointed out that in *Huyton v Cremer*[105] that a stronger causal connection is required for economic duress given that it is less serious than duress to persons or goods.[106] We might venture to translate this as the fact that the law recognises different levels of opportunism, and where there is more consensus on a type of advantage-taking given its severity or the quality of interests under threat (personal and proprietary as opposed to economic), the law takes this normative judgment into account by lowering its causation requirements for establishing the link between opportunistic conduct and the transaction in question, and *vice versa*. Causation thresholds are in effect a subset of the evidentiary and procedural tools utilised by the law to manage gradations of opportunism, and are close cousins to evidentiary presumptions and burdens of proof, which we turn to next.

34 The case law is not abundantly clear on the approach to using evidential presumptions in duress scenarios. Two trends can be detected. The first is a bifurcated approach that requires the illegitimate threat, inducement to enter the transaction under pressure, and the relevant causal threshold to be proven by the claimant-victim in most cases except the fairly extreme situation of physical duress, whereupon proof of illegitimate pressure shifts the burden to the defendant to disprove presumed duress by demonstrating that the pressure had not

99 *Barton v Armstrong* [1976] AC 104.
100 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 196.
101 Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 5th Ed, 2015) at p 324.
102 Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 5th Ed, 2015) at p 337.
103 *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyds Rep 620 at 636.
104 *Universe Tankships, Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 400.
105 *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyds Rep 620.
106 Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 5th Ed, 2015) at p 327.

caused the claimant to enter into the transaction.[107] The second is a universal approach that calls for the shifting of the burden of proof in all cases of duress, whether physical, proprietary, economic or lawful act. This approach is suggested by some Australian[108] and Singaporean[109] authorities, and supported by some academics.[110] As long as evidential presumptions are being used at least in *some* categories (physical duress under the first approach), this corresponds with the architecture of opportunism-countering doctrines suggested by Smith. Proof of an illegitimate threat puts the law on notice that opportunism is potentially in play, which then requires the defendant to disprove the causative effect of opportunistic conduct. To the extent that a gradated rather than universal approach is adopted, this is consistent with the rationale for a "sliding-scale" of causation thresholds in duress – more serious and clear-cut types of opportunism are effectively countered by triggering presumptions of opportunism once an illegitimate threat of sufficient gravity (for instance, to murder) is made out. Conversely, when considering whether economic duress applies, one must take into account the possibility that a threat to breach a contract may be in good faith (unlike a threat to murder), and the possibility of other causative factors leading a claimant to agree to a modified contract, hence some courts have declined to "presume" duress in such scenarios where the threat in question is not a conclusive proxy for opportunism.[111] One might thus supplement Smith's account of "proxies and presumptions" by adding that the law is sensitive to the extent to which certain facts can suffice as effective indicia of opportunism, hence adjusting its use of presumptions accordingly.

(2) Undue influence

35 The doctrine of undue influence is likewise aimed at countering opportunism, but mainly in the contexts of relationships. It is sometimes said that in undue influence cases, the "language of advantage-taking and victimisation designates an *omission*: a failure by the defendant to protect the claimant's interest as the parties' relationship requires".[112] The doctrine has two subcategories: *actual* and *presumed* undue influence. In the former situation, the claimant alleging undue influence relies on

107 See *Barton v Armstrong* [1976] AC 104.

108 See, *eg*, *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40.

109 See, *eg*, *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR(R) 240 and *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232.

110 Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006) at pp 43–45.

111 See *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyds Rep 620.

112 Mindy Chen-Wishart, *Contract Law* (Oxford University Press, 5th Ed, 2015) at p 345.

direct proof of opportunistic conduct (the defendant having the capacity to, and exercising excessive influence), the claimant's relevant weakness (that his judgment was not free and independent because of a relationship of influence), and the causal connection (that the exercise of such influence brought about the transaction).[113] As Burrows pointed out, such cases "are very rare", because of the availability of the latter category of undue influence – "one is almost always concerned with presumed, rather than actual, undue influence".[114]

36 Presumed undue influence is heavily driven by the use of presumptions to counter opportunism, given the clear-cut potential for opportunism that arises from relational settings, and tracks closely the paradigmatic structure of an equitable opportunism-countering doctrine set out by Smith.[115] In such cases, the presumption of opportunism is triggered by a few key factors corresponding to Smith's description above of a "combination of a very strange-looking deal and vulnerability".[116] As Burrows has noted, unlike duress, "it would appear that it is not a requirement for undue influence that 'but for' causation is satisfied".[117] A claimant only needs to prove that he was: (a) in a relationship of trust and influence with the defendant at the time the contract was entered into; and (b) the transaction "calls for an explanation",[118] or is "disadvantageous … in the sense that it was not readily explicable by reference to the motives on which people ordinarily act".[119] Sometimes, the claimant does not even need to take much effort to prove the first element – the law simply assumes it in certain relationships (religious leader–disciple,[120] parent–child,[121] doctor–patient,[122] trustee–beneficiary,[123] solicitor–client,[124] *etc*). The

113 See Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at pp 200–201; see also, *eg*, *Tan Teck Khong v Tan Pian Meng* [2002] 2 SLR(R) 490, *Pek Nam Kee v Peh Lam Kong* [1994] 2 SLR(R) 750, *Rajabali Jumabhoy v Ameerali R Jumabhoy* [1997] 2 SLR(R) 296 and *Bank of Credit and Commerce International SA v Aboody* [1990] 1 QB 923.

114 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 201.

115 See paras 16–18 above.

116 Henry E Smith, "Equity as Second-Order Law: The Problem of Opportunism" *Harvard Public Law Working Paper* (15 January 2015) at p 32.

117 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 201, referring to *UCB Corporate Services Ltd v Williams* [2002] EWCA Civ 555; [2003] 1 P & CR 12.

118 *Royal Bank of Scotland plc v Etridge (No 2)* [2002] AC 773.

119 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 200.

120 See *Allcard v Skinner* (1887) 36 Ch D 145.

121 See *Gan Cheng Chan v Gan Meng Hui* [2005] SGHC 55.

122 See *Mitchell v Homfray* (1881) 8 QBD 587.

123 See *Tito v Waddell (No 2)* [1977] Ch 106.

124 See *Wright v Carter* [1903] 1 Ch 27.

second element involves situations such as in *Hammond v Osborn*,[125] where elderly man gave away 92% of his assets to a neighbour who helped him as he became physically weaker, a transaction which made him liable for a substantial tax bill to the point that he would not be able to meet the costs of his own care. This type of transaction cannot be reasonably accounted for on the grounds of friendship, relationship or charity.[126] Once both are established, there is a rebuttable presumption that the defendant has exercised undue influence in bringing out the transaction, and it is up to him to disprove that this is the case (for instance, by showing that the claimant obtained the fully informed, independent and competent advice of a solicitor).[127] In other words, the above elements are particularly strong proxies for the presence of opportunism, and in such situations, the law requires the defendant to demonstrate that no advantage was actually taken of a relational vulnerability.

(3) Unconscionability

37 The structure of the unconscionability doctrine shares some parallels with duress and undue influence, though the range of opportunistic conduct it targets and types of weaknesses it recognises in relation to the former are potentially much broader. Tracking the typical structure of an opportunism-countering doctrine, unconscionability consists of three elements:[128]

> First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken … secondly, this weakness of the one party has been exploited by the other in some morally culpable manner … and thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive …

On the types of weaknesses or vulnerabilities to opportunism, Burrows has suggested that these can be divided into two broad categories, mental and circumstantial,[129] the former including inexperience,[130] being poor and ignorant,[131] old or infirm,[132] while the latter includes

125 [2002] EWCA Civ 885.
126 See *Royal Bank of Scotland plc v Etridge (No 2)* [2002] AC 773 at [22].
127 See *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 and *Royal Bank of Scotland plc v Etridge (No 2)* [2002] AC 773.
128 *Alec Lobb (Garages) Ltd v Total Oil Great Britain Ltd* [1983] 1 WLR 87 at 94–95.
129 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 210.
130 See *Earl of Aylesford v Morris* (1873) 8 Ch App 484.
131 See *Evans v Llewellin* (1787) 1 Cox Eq Cas 333, *Fry v Lane* (1888) 40 Ch D 312 and *Creswell v Potter* [1978] 1 WLR 255.
132 See *Boustany v Piggott* (1995) 69 P & CR 298.

being under severely distressing circumstances, such as a vessel in danger of sinking.[133] The type of opportunistic conduct caught by unconscionability is often described in a manner that emphasises its egregiousness, such as "morally reprehensible" conduct, "unconscientious or extortionate abuse of power", or "actual or constructive fraud".[134] Burrows has attempted to pin this down by suggesting that the exploiting party acts in bad faith and has a blameworthy state of mind in knowing of the other party's weakness.[135] *Boustany v Piggott*[136] is a useful case in point – in procuring P's (an elderly woman) agreement to lease premises to B for an undervalue, B knew that P's affairs were usually managed by her cousin, and took the opportunity while he was away to quickly conclude the transaction with P, against legal advice. On the requirement of an oppressive bargain, this usually involves some extreme deviation from the market value of the subject matter of the contract,[137] which further contributes to an inference that opportunism is at play.[138]

38 In contrast to duress, unconscionability has no "but for" causation requirement.[139] It does not appear to use proxies and presumptions to the extent present in presumed undue influence; as Meagher, Gummow and Lehane have noted, "[i]n cases of unconscionable dealing there is no presumption against the transaction raised by any anterior relation of influence".[140] The burden of proof issue is not entirely clear, however, for as David Capper has observed, there appears to be a line of cases stemming from *Fry v Lane*[141] which suggest that "where there is relational inequality and transactional imbalance, coupled with no independent advice for the plaintiff, either receipt of the benefit of the transaction is unconscionable in itself or the burden passes to the defendant to show that the transaction is fair, just and reasonable".[142] While the present author's concern is not with the

133 See *The Medina* (1876) 1 PD 272.

134 *Boustany v Piggott* (1995) 69 P & CR 298 at 303.

135 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at pp 210–211.

136 *Boustany v Piggott* (1995) 69 P & CR 298.

137 See *Fry v Lane* (1888) 40 Ch D 312.

138 See David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 *Law Quarterly Review* 479 at 497.

139 See Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 209.

140 *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (J D Heydon, M J Leeming & P G Turner eds) (LexisNexis Butterworths, 5th Ed, 2015) at p 503.

141 (1889) 40 Ch D 312.

142 David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 *Law Quarterly Review* 479 at 495. Supporting *dicta* for a presumption of unconscionability can be found in a number of cases including *Morrison v Coast Finance Ltd* (1965) 55 DLR (3d) 710 at 713, *Harry v Kreutziger* (1979) 95 DLR (3d) 231 at 236–237, *Commercial Bank of Australia Ltd v Amadio* (1983)

(*cont'd on the next page*)

technicalities of the doctrine for its own sake, it might be observed that the somewhat less robust use of presumptions in unconscionability arguably reflects the fact that it deals with a broader range of situations than the relational context of undue influence where the potential for opportunism is manifest. In less targeted and potentially more "fuzzy" instances of opportunism, as in cases where unconscionability is pleaded, the law might calibrate its evidentiary thresholds accordingly to require more proof and the satisfaction of multiple proxies before a conclusion of opportunism is reached.

39 To what extent is Smith's opportunism thesis consistent with the rationales for the above vitiating factors offered by commentators in the common law world? Of course, even if the opportunism account comes across as novel, this would hardly be a reason to reject it. At the same time, at least one commentator has expressly articulated an "opportunism" model in looking at certain vitiating factors. In an article in the *Law Quarterly Review* in 1991,[143] Roger Halson analysed the problem of opportunism in the context of economic duress and contract modification from an economic perspective, defining opportunism as "the attempt by a party to a contract to exploit a vulnerability of his contractual partner which is created by the contract itself; the attempt is designed to secure a modification of the contract favouring the opportunist".[144]

40 Halson's example involved a contract between A and B, for B to construct a ship to be delivered by 1 January. A enters into a charter with C to commence on 7 January, and if B, knowing this, demands on the threat of non-delivery a 10% increase in the contract price to take advantage of A's difficulty in getting another ship to fulfil the charter at short notice, this will amount to opportunism. The law should arguably discourage opportunism of this sort through the economic duress doctrine because such conduct is wasteful in firstly, diverting time and resources toward rent-seeking negotiation resulting in wealth transfers without any additional increases in output, and secondly, incentivising A to arrange its business inefficiently to avoid opportunism (such as arranging a later charter).[145]

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151 CLR 447 at 474, *Louth v Diprose* (1992) 175 CLR 621 at 632, *Woods v Hubley* (1995) 130 DLR (4d) 119 at 126–127 and *Fong Whye Koon v Chan Ah Thong* [1996] 2 SLR 706 at [10]–[12].

143 See Roger Halson, "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 *Law Quarterly Review* 649.

144 Roger Halson, "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 *Law Quarterly Review* 649 at 650.

145 Roger Halson, "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 *Law Quarterly Review* 649 at 650–651.

41 It is useful to see how Halson's earlier analysis of duress dovetails with, and could be seen as a subset of, Smith's opportunism thesis, which might apply more broadly across doctrines. The rent-seeking conduct in Halson's example is precisely the type of behaviour Smith is concerned with – "technically legal" conduct done for the purposes of procuring "unintended benefits" which are smaller than the costs they impose on other contracting parties and the economic system in general.

C. Diffusion of "anti-opportunism" through both law and equity

42 The above analysis has demonstrated how the theme of "anti-opportunism" runs through the doctrines of duress, undue influence and unconscionability. But duress is a common law doctrine, undue influence an equitable one, and unconscionability, while often regarded as having equitable origins, also appears to have a common law heritage. How then does this square with Smith's linking of equity with the function of countering opportunism? As hinted at earlier, the true narrative appears to be one of "fusion by diffusion", a process through which equity's "anti-opportunism" role permeates across doctrines through the transplantation, intermingling, and cross-fertilisation of ideas. The present author develops this narrative in the discussion below, which traces the evolution of these doctrines, not in excruciating historical detail, but rather with particular emphasis on the interaction between legal and equitable sources at key turning points in the development of the doctrine.[146]

(1) Common law's limited view of opportunism

43 For the longest time, the common law appeared to take a surprisingly cramped view of the types of opportunistic conduct that could render a contract voidable. This is not to say that it completely neglected any form of illegitimate behaviour directed at procuring legally binding agreements, for it recognised physical duress (demands at pistol-point),[147] but basically did not go much further than this, even by the late 20th century. In an article published in 1974,[148] Jack Beatson highlighted the "underdevelopment of the duress doctrine outside

146 See paras 43–63 below.

147 See Jack Beatson, "Duress as a Vitiating Factor in Contract" (1974) 33(1) *The Cambridge Law Journal* 97 at 97–98, citing a number of venerable sources including Sir Edward Coke's 2 Inst 483, *Kaufman v Gerson* [1904] 1 KB 591 and *Skeate v Beale* (1841) 11 Ad & El 983.

148 Jack Beatson, "Duress as a Vitiating Factor in Contract" (1974) 33(1) *The Cambridge Law Journal* 97.

duress of the person", attributing this to a "factual overlap with the rules governing compromises and acts compelled by process of law".[149]

44 Historically, where Z demands payment and threatens to withhold X's painting, and X agrees to pay Z because X acknowledges the validity of Z's claim and submits to it, or pays to prevent Z from carrying out a threat to sue him, such an agreement will be valid under the "process of law" doctrine. Furthermore, where X agrees to pay while being unsure of the validity of Z's claim, Z's promise to abandon the claim will be good consideration under a valid contract of compromise. It is only where X clearly asserts his belief that a claim has *no* validity, but agrees to pay as the only means of getting back his painting, that a case for duress to goods can be made out. Beatson explained that the difficulty of distinguishing the third situation from the previous two essentially crowded out space for the duress doctrine to extend from physical duress to duress to goods, not to mention other forms of opportunistic conduct in contract formation.[150]

(2) Undue influence: Equity's answer to opportunism

45 Where the common law's view of opportunism was limited, equity intervened to address a broader range of such misconduct, both taking inspiration from, and going significantly further than, common law duress. In this sense, one may have "regard to the equitable doctrine of undue influence as an extended form of duress".[151] As Meagher, Gummow and Lehane have pointed out, "[e]quity intervened in a vast range of circumstances where no action under *Derry v Peek* [that is, common law fraud or deceit] would lie",[152] referring further to Lord Hardwicke's *dictum* in *Earl of Chesterfield v Janssen*[153] that the concept of equitable fraud was meant to "prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against the conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other".[154]

149 Jack Beatson, "Duress as a Vitiating Factor in Contract" (1974) 33(1) *The Cambridge Law Journal* 97 at 114.

150 Jack Beatson, "Duress as a Vitiating Factor in Contract" (1974) 33(1) *The Cambridge Law Journal* 97 at 103–104.

151 *Dimskal Shipping Co SA v International Transport Workers Federation (No 2)* [1992] 2 AC 152 at 169B.

152 *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (J D Heydon, M J Leeming & P G Turner eds) (LexisNexis Butterworths, 5th Ed, 2015) at p 482.

153 (1751) 2 Ves Sen 125; 28 ER 82.

154 *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125 at 155–156; 28 ER 82 at 100.

46 Actual undue influence was first recognised by equity in cases where "one party had induced the other to enter into the transaction by actual pressure which equity regarded as improper but which was formerly thought not to amount to duress at common law because no element of violence was involved", such as a promise of payment obtained by "a threat to prosecute the promisor, or his close relative, or his spouse, for a criminal offence".[155] These evolved from duress-type scenarios to what we currently recognise as relational pressure-type scenarios, *viz*, opportunistic advantage-taking of a pre-existing relationship, such as a parental, familial or other close personal tie.[156]

47 As Worthington has pointed out, "[e]quity went further than this [by] recognis[ing] *presumed undue influence*", responding to a different social environment where "[r]eligious advisers, doctors, solicitors, fiduciaries, and even parents had far more influential roles than now", and "[o]rdinary citizens were easily persuaded that a proposal was advantageous simply because it had been suggested by someone in these respected roles; they would suspend their own judgment, or 'defer to their betters'".[157] Equity thus adjusted its *ex post* discretionary jurisdiction to address the variety of situations in which potential for relational opportunism arose.

48 In the *locus classicus* of presumed undue influence, *Allcard v Skinner*[158] ("*Allcard*"), the UK Court of Appeal in Chancery recognised that a nun who had given up her worldly possessions to the convent under the influence of the mother superior was under "no duress, no incompetency, no want of mental power",[159] but nonetheless equity would intervene "to protect people from being forced, tricked or misled in any way by others into parting with their property", and the "equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud".[160] Equity was especially sensitive to established relationships of trust and influence, and was the progenitor of the burden-shifting tool we see at work in the discussion above.[161]

49 As Meagher, Gummow and Lehane have observed, the "feature of most importance following from Lord Hardwicke's formulation [in

155 Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 13th Ed, 2011) at para 10-015; see further *Williams v Bayley* (1866) LR 1 LH 200.
156 See *Langton v Langton* [1995] 2 FLR 890, *Drew v Daniel* [2005] EWCA Civ 507 and *Clarke v Prus* [1995] NPC 41.
157 Sarah Worthington, *Equity* (Oxford University Press, 1st Ed, 2003) at p 195.
158 (1887) 36 Ch D 145.
159 *Allcard v Skinner* (1887) 36 Ch D 145 at 190.
160 *Allcard v Skinner* (1887) 36 Ch D 145 at 183.
161 See para 47 above.

Earl of Chesterfield v Janssen] is the presumption raised in favour of the weaker party, which shifts the evidentiary burden from the party impugning the transaction",[162] applied in *Allcard*, where Lindley LJ commented that "[i]n such cases the Court throws upon the donee [in a gift context] the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part".[163] As equity responds to changing times and newer forms of opportunism, it shifts the focus of its tools from 18th or 19th century spiritual advisers to more modern contexts of opportunism, such as the enterprising litigation firm that proposes the establishment of a personal injury trust in relation to its client's settlement moneys (where its in-house trust corporation is to be a trustee), which again gives rise to presumed undue influence.[164]

50 A discussion of how equitable undue influence counters opportunism would be incomplete without at least passing mention of its well-known extension in "three party" contexts, where the source of the undue influence may be that of a third party but the defendant had actual or constructive notice of the third party's undue influence on the claimant which led the latter to enter into the transaction – the standard situation being a contract of guarantee between a bank and a wife, where the latter acts as guarantor for the debts of her husband or his company, being induced to do so under his undue influence.[165] In the language of opportunism, the bank's conduct falls within the sort of strategic behaviour that is technically legal (in that a formal contract of guarantee is procured) but done with a view to secure an unintended advantage from an unsuspecting wife, whose suffers the cost of her assets being placed at risk.

51 One important qualification is that as one moves from *actual* undue influence to *constructive* undue influence, and within the latter category, from the previous *higher* threshold for notice of requiring

162 *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (J D Heydon, M J Leeming & P G Turner eds) (LexisNexis Butterworths, 5th Ed, 2015) at p 482, referring to Lord Hardwicke's *dictum* in *Earl of Chesterfield v Janssen* (1751) 28 ER 82 at 100.

163 *Allcard v Skinner* (1887) 36 Ch D 145 at 181.

164 See *OH v Craven* [2017] 4 WLR 25; [2016] EWHC 3146 (QB).

165 See Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at pp 204–205; *Royal Bank of Scotland plc v Etridge (No 2)* [2002] AC 773; *Barclays Bank plc v O'Brien* [1994] 1 AC 180. Commentary on this issue include Andrew Phang & Hans Tjio, "The Uncertain Boundaries of Undue Influence" [2002] *Lloyd's Maritime Commercial Law Quarterly* 231 and Dominic O'Sullivan, "Developing *O'Brien*" (2002) 118 *Law Quarterly Review* 337. These three party cases may extend to other vitiating factors apart from undue influence, such as duress or unconscionable dealing: see *Tjong Very Sumito v Chan Sing En* [2012] 3 SLR 953 at [269].

specific "red flags" (such as the transaction *prima facie* being disadvantageous, evidence of the husband committing a clear legal or equitable wrong, or evidence of the wife's vulnerability,[166] such as looking dazed or uncomfortable during the signing of the guarantee),[167] to the current position with a *lower* threshold which puts the bank on inquiry in all non-commercial cases where a wife offers to stand as guarantor for her husband's debts,[168] the element of "notice" is clearly being "objectivised".

52 To the extent that opportunism is seen in increasingly objective terms, it does incline towards a broader concept covering what George Cohen has described as "any contractual conduct by one party contrary to the other party's reasonable expectations based on the parties' agreement, contractual norms, or conventional morality".[169] While this is not the place to resolve the perennial objective/subjective controversy, it might thus be said that there are differing "fault" levels of opportunism, from deliberately exploitative, rent-seeking and socially wasteful conduct, to wilful blindness accompanied by some sort of sharp practice, and opportunistic conduct closer to "negligence". Rick Bigwood has explained passive advantage-taking in undue influence as a defendant's failure to meet a required standard of conduct when bargaining with the claimant under conditions that he knows renders the claimant vulnerable to instrumental use at his hands (like the three-party guarantee situation alluded to above).[170] Once all links with a subjective element of intention or knowledge cut off, however, we should acknowledge that any form of "deemed notice" of undue influence has arguably less to do with opportunism than with a policy question of "balanc[ing] the need to protect the surety, and allow[ing] the wealth that inheres in the matrimonial home to be safely used as collateral".[171] The Australian jurisprudence in this regard appears to be a case in point, having decided early on in *Yerkey v Jones*[172] and reaffirmed in subsequent cases[173] that a "special equity" is reserved for wives that invalidates the type of guarantees discussed above upon proof of undue

166 See *Barclays Bank plc v O'Brien* [1994] 1 AC 180.
167 See *Hsu Ann Mei Amy v Oversea-Chinese Banking Corp Ltd* [2011] 2 SLR 178.
168 See *Royal Bank of Scotland plc v Etridge (No 2)* [2002] AC 773.
169 George Cohen, "The Negligence-Opportunism Tradeoff in Contract Law" (1992) 20(4) Hofstra L Rev 941 at 957.
170 Rick Bigwood, "Contracts by Unfair Advantage: From Exploitation to Transactional Neglect" (2005) 25(1) *Oxford Journal of Legal Studies* 65.
171 Andrew Phang & Hans Tjio, "The Uncertain Boundaries of Undue Influence" [2002] *Lloyd's Maritime Commercial Law Quarterly* 231 at 236.
172 (1939) 63 CLR 649.
173 See para 50 above and *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; HCA 48 and discussion in *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (J D Heydon, M J Leeming & P G Turner eds) (LexisNexis Butterworths, 5th Ed, 2015) at pp 490–491.

influence or where there was a failure to explain adequately the nature of the suretyship transaction, which Australian courts recognise as not depending on notice of unconscionable dealing but on a more protective policy towards surety wives.[174]

(3) New forms of duress: Common law gains equitable inspiration

53 While the story of equitable undue influence is fairly well-known, it is arguably less commonly recognised that the expansion of duress from physical duress to other forms of duress also has some equitable origins. For instance, more current expositions of the economic duress tend to restate the elements of the doctrine without exploring its roots in detail. The latest edition of *Treitel*[175] begins the section on economic duress by citing Lord Goff's observation in *The Evia Luck*[176] that "it is now accepted that economic pressure may be sufficient to amount to duress",[177] citing in footnotes the seminal decisions of *The Siboen and the Sibotre*,[178] *Pao On v Lau Yiu Long*,[179] and *The Atlantic Baron*.[180]

54 Interestingly, some of these early decisions on economic duress make direct reference to equitable jurisprudence. For example, in *The Atlantic Baron*, Mocatta J referred to counsel's citation of the Chancery case of *Ormes v Beadel*[181] ("*Ormes*") for the proposition that "in equity a contract entered into under circumstances of acute economic pressure … would be set aside in equity".[182] *Ormes* involved an architect's refusal to pay a builder, and the builder being further pressured by his unpaid workmen into signing an agreement with the architect to end the builder's original contract on unfavourable terms.[183] In *Burmah Oil Co Ltd v Governor and Company of the Bank of England*,[184] a House of Lords decision in 1980 (around the period of time where economic duress was entering the judicial consciousness as a distinct doctrine),

174 *Yerkey v Jones* (1939) 63 CLR 649 at [31].
175 Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 14th Ed, 2015) ch 10.
176 *Dimskal Shipping Co SA v International Transport Workers Federation (No 2)* [1992] 2 AC 152.
177 *Dimskal Shipping Co SA v International Transport Workers Federation (No 2)* [1992] 2 AC 152 at 165.
178 *Occidental Worldwide Investment Corp v Skibs A/S Avainti, Skibs A/S Glarona, Skibs A/S Navalis (The Siboen and the Sibotre)* [1976] 1 Lloyd's Rep 293.
179 [1980] AC 614.
180 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705.
181 (1860) 2 Giff 166; (1860) 2 De G F & J 333.
182 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 at 719.
183 The Court of Appeal reversed the lower court's holding that the contract was voidable, but on the ground of subsequent affirmation or acquiescence to the agreement entered into under pressure.
184 [1980] AC 1090.

Lord Scarman described economic duress as a development that was said to "spring from equitable principles established and recognised by the English Courts of Chancery".[185] Likewise, Andrew Phang Boon Leong JA of the Singapore Court of Appeal (in his pre-judicial capacity) has also mooted the possibility that as a matter of history,[186]

> [D]uress, in its original (and much narrower) form (principally centring on duress to the person and, arguably, goods) was common law in origin and rendered the contract concerned void, whereas *economic* duress (a much more recent development) is an equitable doctrine, rendering, as it does, the contract voidable. [emphasis in original]

55 Writing from an Australian perspective, Ross McKeand has similarly observed that "[u]nder the influence of equity, the common law has adopted as the rationale of the [duress] doctrine, that the law will not permit a benefit to be retained at the expense of an innocent party when it was obtained by the unconscientious application of pressure, physical or economic".[187] McKeand has explained that "principles of equity were applied to extend the defence of duress beyond its historical common law ties to concepts of physical duress",[188] referring, *inter alia*, to Lord Wilberforce and Lord Simon of Glaisdale's observation in *Barton v Armstrong* that "the law, under the influence of equity, has developed from the old common law conception of duress – threat to life and limb – and it has arrived at the modern generalisation expressed by Holmes J – 'subjected to an improper motive for action'",[189] with "improper" referring to unconscionable conduct or equitable fraud, a historically equitable rather than common law concern.[190]

56 The equitable roots of economic duress remain recognisable today, especially if one takes into account the line of cases utilising the concept of "good faith" to determine the legitimacy of a threat to breach a contract.[191] Good faith links up with equity's traditional focus on

185 *Burmah Oil Co Ltd v Governor and Company of the Bank of England* [1980] AC 1090 at 1140.

186 Andrew Phang Boon Leong JA also suggested that this may be seen as normatively unsatisfactory, "creating artificial distinctions owing to the vagaries of legal history and development": see Andrew Phang, "Undue Influence, Methodology, Sources and Linkages" [1995] *Journal of Business Law* 552 at p 569, fn 65.

187 Ross McKeand, "Economic Duress – Wearing the Clothes of Unconscionable Conduct" (2001) 17 JCL 1 at 12.

188 Ross McKeand, "Economic Duress – Wearing the Clothes of Unconscionable Conduct" (2001) 17 JCL 1 at 4.

189 *Barton v Armstrong* [1976] AC 104 at 121.

190 Ross McKeand, "Economic Duress – Wearing the Clothes of Unconscionable Conduct" (2001) 17 JCL 1 at 4–6.

191 See *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 at 545.

motive discussed above.[192] Examination of motive essentially reflects a concern with opportunism, since a bad-faith threat can be seen as a proxy for conduct aimed at exploiting the claimant's weakness rather than solving genuine financial or other problems arising out of unforeseen circumstances.[193] An example of this sort of analysis can be seen in the Singapore High Court decision of *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd*,[194] where a steel seller's demand for contribution to increased costs of freight was not held to be opportunistic, because it had badly misjudged freight costs due to inexperience, and was also prepared to bear its share of the additional freight – in such circumstances "it cannot be said that the plaintiff was seeking to exploit the situation to increase its profits".[195] Hence, the development of economic duress reflects the fact that the common law imbibed equitable ideas, in particular equity's concern with countering opportunism, through a process of cross-jurisdictional transplantation.

57 The same dynamic can be found at play in the evolution of lawful act duress, another subcategory of common law duress.[196] In examining the types of lawful but illegitimate threats to which this doctrine applies, it is said that such threats must "at least be *immoral or unconscionable*" [emphasis added].[197] In *Huyton v Cremer*, it was said that "good or bad faith may be particularly relevant when considering whether a case might represent a rare example of 'lawful act duress' … the state of mind of the person applying such pressure may in some circumstances be significant".[198] Again, the references to bad faith and unconscionability appear to gesture at equitable norms, an inference reinforced by the court's further observation that "[t]he law has frequently to form judgments regarding inequitability or unconscionability, giving effect in doing so to the reasonable expectations of honest persons".[199]

192 See para 9 above.

193 See Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2010) at p 233.

194 [2001] 2 SLR(R) 233.

195 *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd* [2001] 2 SLR(R) 233 at [34]–[37].

196 See Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 197, citing *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, *Alf Vaughan & Co Ltd v Royscot Trust plc* [1999] 1 All ER 856, *R v Her Majesty's Attorney-General for England and Wales* [2003] UKPC 22 and *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] 1 Lloyd's Rep 501; [2012] EWHC 273.

197 *Alf Vaughan & Co Ltd v Royscot Trust plc* [1999] 1 All ER (Comm) 856 at 863.

198 *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyds Rep 620; [1999] CLC 230 at 251.

199 *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyds Rep 620; [1999] CLC 230 at 251–252.

58 This equitable connection remains strong in the state of the current jurisprudence on lawful act duress – in the decision of *Dawson v Bell*[200] in 2016, the English Court of Appeal traced the evolution of lawful act duress and concluded that its "established principles … are founded on the concept of what is conscionable".[201] Moreover, lawful act duress draws upon equitable concepts with a specific view toward *countering opportunism*. In one of the earlier cases dealing with the concept, *CTN Cash and Carry v Gallaher*,[202] Lord Steyn referred an extract from Peter Birks' *An Introduction to the Law of Restitution*,[203] which contained the observation that if "lawful pressures are always exempt, those who devise outrageous but technically lawful means of compulsion must always escape restitution until the legislature declares the abuse unlawful".[204] This dovetails with Smith's explanation that the law invariably requires an *ex post* safety valve to address conduct that cannot be captured *ex ante*, lest it remains perpetually one step behind the opportunist who waits for the boundary lines to be drawn precisely in order to skirt it.

59 An example of lawful act duress can be found in *Borrelli v Ting*,[205] where the UK Privy Council held that the failure of a former chairman to co-operate with his company's liquidators, coupled with his use of false evidence to further his opposition to the liquidators' proposed scheme of arrangement, amounted to duress sufficient to vitiate a settlement agreement in which the liquidators agreed to waive any claims against him in consideration of him withdrawing any opposition to the proposed scheme. Ting had acted opportunistically by abusing his legal rights to oppose the scheme for a purely personal advantage (to secure contractual protection against potential liability for mismanagement), conduct which was analysed by the court in ostensibly equitable terms – Ting's opposition "was not made in good faith, but for an improper motive",[206] and amounted to "unconscionable conduct on his part".[207] Again, we see common law duress developing its *ex post* opportunism-countering function by borrowing equitable concepts that act as proxies for the kind of advantage-taking that cannot be specifically defined in *ex ante* rules.

200 [2016] EWCA Civ 96.
201 *Dawson v Bell* [2016] EWCA Civ 96 at [80].
202 [1994] 4 All ER 714.
203 Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985).
204 Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, 1985) at p 177.
205 [2010] Bus LR 1718.
206 *Borrelli v Ting* [2010] Bus LR 1718 at [28].
207 *Borrelli v Ting* [2010] Bus LR 1718 at [32].

(4) Unconscionability: Union of common law and equitable influences

60 Finally, the history of the unconscionability doctrine is also one of fusion by diffusion. Here, the doctrine imbibed both common law and equitable influences, in expanding the range of opportunistic conduct caught by *ex post* standards. Unconscionability is often associated with equitable roots – it "is a branch of the general equitable jurisdiction in fraud".[208] Capper has observed that the "doctrine is thought to have developed from the jurisdiction asserted by courts in England and Ireland in the 17th–19th centuries to set aside improvident or 'catching' bargains made with expectant heirs".[209] Similarly, Treitel explained that "[e]quity can set aside or modify an agreement with an 'expectant heir' made in anticipation of his expectations",[210] the typical case being that of a young man, expected to come into property, who in urgent need of funds agrees to transfer this property at an undervalue.[211] However, the equitable link is one side of the coin, common law being the other. As Burrows has explained, exploitation of weakness is the "principle underpinning both the equitable jurisdiction to set aside 'unconscionable bargains' and the common law jurisdiction to set aside extortionate salvage agreements".[212] The latter jurisdiction is traceable back to earlier decisions of the UK Admiralty Court which recognise that parties are on unequal bargaining terms and vulnerable to opportunism when a distressed vessel requires help and the rescuer is in a position to demand unreasonable terms.[213]

61 Of course, it is not possible to clearly separate these two streams of inspiration for the development of unconscionability, as they appear to be in constant interaction over time as part of the process of mutual learning. For instance, on a brief comparative note, in the "post-realist" and "post-fusion" US where equity and common law have long been intertwined,[214] the judicial approach to handling such distress situations has also drawn on a mixture of influences. In Melvin Eisenberg's well-

208 *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies* (J D Heydon, M J Leeming & P G Turner eds) (LexisNexis Butterworths, 5th Ed, 2015) at p 502.

209 David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 *Law Quarterly Review* 403 at 403.

210 Edwin Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 14th Ed, 2015) ch 10; Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 524.

211 See *Evans v Llewellin* (1787) 1 Cox Eq Cas 333.

212 Andrew Burrows, *A Restatement of the English Law of Contract* (Oxford University Press, 2016) at p 209.

213 See, *eg*, *The Port Caledonia and The Anna* (1903) P 184.

214 Henry E Smith, "*Equity as Second-Order Law: The Problem of Opportunism*" *Harvard Public Law Working Paper* (15 January 2015) at p 3.

known article on the limits of the bargain principle,[215] he has referred to authorities such as *Magnolia Petroleum Co v National Oil Transport Co*[216] – an example of common law admiralty jurisprudence incorporating and utilising equitable concepts – where the court held that "there is a clear right in the courts to set aside a salvage agreement, when made on the high seas under compulsion or hardship, morally or otherwise, when such agreement is unconscionable and inequitable".[217] Another illustration of unconscionability as the union of common law and equitable ideas can be found in Lord Denning's famous *dictum* in *Lloyds Bank Ltd v Bundy*.[218] Lord Denning referred to various legal and equitable doctrines – the former including duress of goods and extortionate salvage agreements, and the latter including the expectant heir jurisprudence, undue influence and undue pressure cases[219] – in the attempt to identify "a single thread" running through unconscionability cases resting on "inequality of bargaining power", a principle which:[220]

> [G]ives relief to one who, without independent advice, enters into a contract … for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other …

While this *dictum* has not been adopted as law in the sense of general principle subsuming the various vitiating factors,[221] it is a useful example of the shaping influences of common law and equity on the development of unconscionability.

62 While these influences lay the track on which the train of unconscionability's anti-opportunism function runs, there is naturally no single interpretation of unconscionability across all jurisdictions. A complete survey of the subsequent evolution of the doctrine is beyond the scope of this article, but a few comments might be made on this score. As Capper has pointed out in a comparative study of the unconscionability doctrine at the start of the decade,[222] the doctrine as

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215 Melvin Aron Eisenberg, "The Bargain Principle and Its Limits" (1982) 95(4) Harv L Rev 741.

216 281 F 336 (SD Tex 1922).

217 *Magnolia Petroleum Co v National Oil Transport Co* 281 F 336 at 340 (SD Tex 1922); see also Melvin Aron Eisenberg, "The Bargain Principle and Its Limits" (1982) 95(4) Harv L Rev 741 at 755–760.

218 [1975] QB 326.

219 *Lloyds Bank Ltd v Bundy* [1975] QB 326; [1974] 3 All ER 757 at 763–765.

220 *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 328.

221 See further Steven Greenfield & Guy Osborn, "Unconscionability and Contract: The Creeping Shoots of Bundy" (1992) 7 *The Denning Law Journal* 65.

222 David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 *Law Quarterly Review* 403.

developed in England and Wales "is starkly different from doctrines of substantially similar juridical bases that are applied by the courts of Ireland, Australia, New Zealand and Canada",[223] English law requiring morally reprehensible conduct and not being "receptive to the view that a contract can be unconscionable because the terms are very much to the advantage of the stronger party and the latter passively received those advantages in the knowledge that the other party was vulnerable".[224] Capper has argued that other courts in the common law world tend to be "much more alive to this problem and not at all hesitant about giving relief".[225] At present, this trend appears to hold true generally, with English courts continuing to be hesitant about expanding their approach to unconscionability. A search on the case law following the *locus classicus* of *Boustany v Piggott* reveals only ten cases since 1995,[226] and in the most recent case on the issue, *Minder Music Ltd v Sharples*,[227] involving a dispute between the claimants and the defendant over a settlement agreement which allotted a third of the copyright in a song to the defendant, the court rejected the second claimant's argument that she had been in financial difficulties and been pressured and bullied into signing the agreement, as the correspondence between parties appeared business-like and there was no evidence of any stress or confusion on the claimant's part, which led the court to infer that the defendant could not have been aware or taken advantage of her difficulties.[228] Naturally, the common law world has not remained entirely static either, and a fairly recent outlier in the Australian jurisprudence (though perhaps explicable on the facts) is *Kakavas v Crown Melbourne Ltd*,[229] where the High Court of Australia adopted a more conservative approach in preferring a requirement of actual rather than merely constructive knowledge of a special disadvantage, and rejected the claimant-property developer's claim that the defendant-casino had acted unconscionably by taking advantage of his gambling addiction to induce him to enter into gambling transactions where he lost millions of dollars.[230]

223 David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 *Law Quarterly Review* 403 at 417.

224 David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 *Law Quarterly Review* 403 at 417.

225 David Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 *Law Quarterly Review* 403 at 417. This is particularly the case in Australia: see discussion at 409–410.

226 This was according to a Westlaw search of decisions citing *Boustany v Piggott* (1995) 69 P & CR 298 as at 2 December 2017.

227 [2015] EWHC 1454.

228 *Minder Music Ltd v Sharples* [2015] EWHC 1454 at [32].

229 (2013) 298 ALR 35; HCA 25.

230 See further Warren Swain, "The Unconscionable Dealing Doctrine: In Retreat?" (2014) 31 JCL 255.

63 Again, the present author is not interested in running through the case law for its own sake, but to draw the link with the opportunism thesis. In so far as a broader approach toward the definition of "weakness" is adopted in some jurisdictions, this could conceivably signal a more robust approach to countering opportunism by recognising a broader range of circumstances in which advantage-taking might take place, and *vice versa*. As we observed in the three-party undue influence cases, where the notion of opportunistic conduct shades from "actual knowledge" or bad faith to "constructive" or "deemed" knowledge, this portends a move from Smith's standard case of the intentional opportunist actively seeking to seize upon a weakness through technically legal but ultimately wasteful rent-seeking behaviour, to a normative judgment that certain forms of passive conduct with limited knowledge of vulnerability can nonetheless fall within a legal notion of opportunism that draws from standards of commercial morality.

V. Conclusion

64 The present author has explored Smith's contribution to the fusion debate – the opportunism thesis – in the context of the doctrines of duress, undue influence and unconscionability in contract law. The author has argued that the opportunism thesis is a powerful unifying account which explains many of the structural and technical features of these doctrines, including their elements and usages of evidential tools such as causation requirements and burdens of proof, which are tweaked according to the contexts in which opportunism is likely to occur.

65 The author has also clarified that the opportunism thesis leans in a pro-fusion rather than anti-fusion direction, consistent with an understanding of Smith's account of equity focusing on its functional structure as opposed to jurisdictional source. The author has described the relevant fusion process in terms of a model of "fusion by diffusion". In terms of the "transplantation" framework discussed above[231] – pointing us to the "what", "where", "when" and "how" of conceptual diffusion – we have seen how the idea of equity's opportunism-countering function has travelled across the common law–equity jurisdictional divide in a criss-crossing manner, flowing from the seeds planted in common law duress to its maturation in the broader ambit of equitable undue influence, which has then re-inspired new forms of duress, and further galvanised the development of the unconscionability doctrine. Of course, unlike administrative fusion, the process we have explored cannot be reduced to the effect of a particular watershed event.

231 See para 26 above.

Progress occurs "by dint of slow legal evolution in both the Common Law and Equity".[232] In the final analysis, given the partnership of both jurisdictions in facilitating the preservation and refinement of second order opportunism-countering doctrinal structures, we might perhaps say, *pace* Maitland, that the law came not to destroy equity, but to fulfil it.

232 Sarah Worthington, *Equity* (Oxford University Press, 2nd Ed, 2006) at p 202.