

THE LAW OF CONTRIBUTION – AN EQUITABLE DOCTRINE OR PART OF THE LAW OF UNJUST ENRICHMENT?

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This article looks at the changes made to the equitable doctrine of contribution by the New Zealand Supreme Court in a 2016 decision, Hotchin v New Zealand Guardian Trust Co Ltd. The approach now favoured by the Supreme Court is that to establish a claim for contribution by one defendant against another, there is no need to find any greater degree of coordination between the liabilities other than that the plaintiff could pursue either defendant for its loss and either would be liable for it, in whole or in part. The underlying rationale is that by paying the plaintiff, the defendant who was pursued not only discharges itself but also discharges the other defendant's liability. If mutual discharge is established, the court then determines the amount of contribution based on what is just and reasonable in the circumstances. The Supreme Court's approach to the doctrine of equitable contribution, which is a significant change to previous law, bears similarities to the approach proposed in the leading text on unjust enrichment, raising the issue of whether a future claim for contribution could be approached using an unjust enrichment analysis.

I INTRODUCTION

A practitioner facing an issue of contribution involving her client might well be excused for being confused. Looking for guidance, she might reach for two leading practitioners' texts. One is *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*.¹ The other is *Goff & Jones: The Law of Unjust Enrichment*.² Both are recent publications (the latest editions being 2015 and 2016 respectively). Both contain chapters describing the law on contribution. *Equity Doctrines and Remedies* describes contribution as an equitable doctrine. There is a long line of cases that confirms

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1 JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity: Doctrines & Remedies* (5th ed, LexisNexis Butterworths, Chatswood, 2015).

2 Charles Mitchell, Paul Mitchell and Stephen Watterson *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016).

this categorisation.³ The other text claims contribution is part of the law of unjust enrichment.⁴ The authors of *Goff & Jones* are not alone in claiming that the law of contribution is part of the law of unjust enrichment. This view is supported by Virgo in the United Kingdom,⁵ and Edelman and Bant in Australia.⁶ The solicitor might wonder whether the equitable doctrine of contribution has somehow jumped ship and landed in a different branch of the law. Or is the profession witnessing the birth of a new form of action, in unjust enrichment, which gives one defendant the ability to claim contribution from another if the elements of enrichment, at the expense of the claimant, which is unjust, are satisfied?

This article considers these questions in light of recent decisions in New Zealand and Australia, and by reference to the related law of subrogation. It examines whether the law of contribution today is an equitable doctrine, governed by equitable rules developed by the courts, or is part of the law of unjust enrichment, or potentially both.

The courts in New Zealand have not been asked to consider whether it might be appropriate to apply an unjust enrichment analysis to a contribution claim. The Supreme Court in a recent decision, *Hotchin v New Zealand Guardian Trust Co Ltd*, approached the claim as if it was a claim in equity.⁷ This suggests that contribution is still considered by the New Zealand courts as an equitable doctrine, attracting an equity analysis. However, it may now be possible, in light of the changes made to the equitable doctrine by the Court in *Hotchin*, to apply an unjust enrichment analysis to resolve future claims. The approach taken in *Hotchin* opens the door to that possibility.

This article suggests that the enthusiasm shown by the Supreme Court to adopt a more straightforward approach to the doctrine of equitable contribution is to be welcomed. The approach now supported by the Supreme Court can be expressed as follows: a right to claim contribution arises where the plaintiff could pursue either the person who is claiming contribution (the claimant) or the person against whom contribution is being claimed (the defendant) for its loss and either would be liable in whole or in part for it. This in turn is based on the underlying rationale that payment by the claimant to the plaintiff discharges the liability of the defendant (in whole or in part), and similarly payment by the defendant to the plaintiff would discharge the liability of the claimant (in whole or in part). If that test is satisfied, a right to claim contribution arises and the court will then assess the amount of contribution that is appropriate. At that stage, the court assesses relative culpability and causal significance. This is a significant departure from the approach to equitable contribution claims

3 Starting with *Craythorne v Swinburne* (1807) 14 Ves 160 at 164, 33 ER 482 at 483. See generally Heydon, Leeming and Turner, above n 1, at ch 10.

4 Mitchell, Mitchell and Watterson, above n 2, at [19.03] and [20.01].

5 Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford Scholarship Online, 2015) at 246.

6 James Edelman and Elise Bant *Unjust Enrichment* (2nd ed, Hart Publishing, Oxford, 2016) at 292.

7 *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906.

taken in Australia where the courts require that for a claim in equitable contribution to succeed, the claimant's and defendant's actions must meet a test of equal or comparable culpability and equal or comparable causative effect.

There are similarities between the approach now adopted by the New Zealand Supreme Court and the unjust enrichment analysis. Relevantly, an unjust enrichment approach has been taken in England in recent decisions involving claims for subrogation. Subrogation is the appropriate claim if the defendant's liability has not been discharged but the plaintiff is forbidden to recover from both (the classic situation being where an indemnity insurer has paid out on an insurance claim and then issues proceedings in the name of the insured against the defendant). A recent New Zealand decision has shown support for the English approach to subrogation, and in light of the *Hotchin* decision it would be conceivable that a New Zealand court might apply an unjust enrichment analysis to the next claim for contribution that comes before it.

One might argue that the underlying rationale for the equitable doctrine, natural justice, requires a fundamentally different inquiry to that which is conducted under an unjust enrichment analysis, suggesting that the better approach is to continue to treat the law of contribution as an equitable doctrine. However, a comparison between the approach that has been adopted in *Hotchin* and that proposed in *Goff & Jones* suggests that the approaches are sufficiently similar that it would be a small step to recognise that contribution can be regarded as part of the law of unjust enrichment. The *Hotchin* decision has left us with an equitable doctrine under which, once the threshold test of mutual discharge is satisfied, the court has a broad discretion to determine the amount of contribution to award. The *Goff & Jones* approach similarly takes "equitable" considerations into account at the apportionment of responsibility stage.

II THE EQUITABLE DOCTRINE OF CONTRIBUTION

Contribution was historically available both at common law and in equity.⁸ Both common law and equity gave a person the right to obtain contribution to a payment made by that person in discharging a common obligation. The equitable action had several procedural and substantive advantages over the common law action. McHugh J stated in 2002 that, "equitable principles now cover the field. Those principles are based on the equitable doctrine of equality."⁹ The basis of the action is generally seen as natural justice.¹⁰ In the classic 1920 text, *Commentaries on Equity Jurisprudence*, the basis of the equitable doctrine was explained as follows:¹¹

8 Heydon, Leeming and Turner, above n 1, at [10-020]–[10-030].

9 *Burke v LFOT Pty Ltd* [2002] HCA 17, (2002) 209 CLR 282 at [38] (footnotes omitted).

10 *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 350–351.

11 AE Randall (ed) *Commentaries on Equity Jurisprudence* (3rd ed, Sweet & Maxwell, London, 1920) at §493.

The claim ... has its foundation in the clearest principles of natural justice; for, as all are equally bound and are equally relieved, it seems but just that in such a case all should contribute in proportion towards a benefit obtained by all ...

The cases establish that there must be a degree of coordination between the liabilities for a claim for contribution to succeed. As stated by the Australian High Court in 1969 in the landmark case of *Albion Insurance Co Ltd v Government Insurance Office*:¹²

... persons who are under co-ordinate liabilities to make good the one loss (e.g. sureties liable to make good a failure to pay the one debt) must share the burden pro rata.

However, what is actually required by way of coordination is not easy to define.

The list of coordinate liabilities attracting contribution is not closed.¹³ The liabilities can have different sources, for example contract, statute and tort and still be coordinate.¹⁴ Equity did not recognise a right of contribution between tortfeasors and this led to the enactment of statutory rights of contribution in many jurisdictions, for example s 17 of the Law Reform Act 1936 (NZ) and s 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW). All of these statutes were modelled on the Law Reform (Married Women Tortfeasors) Act 1935 (UK).¹⁵

III THE "SAME NATURE AND EXTENT" TEST

The test commonly applied in recent decisions (prior to *Hotchin*) in both New Zealand and Australia to assess whether liabilities are coordinate, meaning that a right to contribution in equity arises, is whether they are of the same nature and to the same extent. This test is sourced from *BP Petroleum Developments Ltd v Esso Petroleum Co Ltd*¹⁶ and was applied in *Burke v LFOT Pty Ltd*¹⁷ and *Marlborough District Council v Altimarloch Joint Venture Ltd*.¹⁸

What is meant by "of the same nature and to the same extent" has not been clearly established by the cases. Some (in particular the Australian) cases refer to a requirement for comparable culpability

12 *Albion Insurance Co Ltd v Government Insurance Office (NSW)*, above n 10, at 350. See also *Burke v LFOT Pty Ltd*, above n 9, at [90]–[91] and [99] per Kirby J; and *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 at [129] per Tipping J.

13 Heydon, Leeming and Turner, above n 1, at [10-050]; and *Burke v LFOT Pty Ltd*, above n 9, at [49] per McHugh J, [91]–[92] and [101] per Kirby J.

14 *BP Petroleum Developments Ltd v Esso Petroleum Co Ltd* 1987 SLT 345 (OH) at 348.

15 Some Australian states have statutes that provide a right to claim contribution for all wrongs (as is the case now in the United Kingdom under the Civil Liability (Contribution) Act 1978 (UK)).

16 *BP Petroleum Developments Ltd v Esso Petroleum Co Ltd*, above n 14.

17 *Burke v LFOT Pty Ltd*, above n 9.

18 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 12.

and comparable causation.¹⁹ Comments made by Lord Ross in *BP Petroleum* suggest the rationale behind this requirement is that if one wrongdoer is primarily liable, then contribution is not the appropriate remedy (and instead the claim should be for subrogation).²⁰ It is also related to the fact that the equitable doctrine traditionally resulted in an equal contribution by claimant and defendant.²¹ However, the New Zealand Supreme Court has, in *Hotchin*, moved away from an approach that denies contribution where the actions of the wrongdoers cannot be regarded as of an equivalent level. The "same nature and extent test" was rejected by the majority in *Hotchin*, as was the need for equal apportionment. A similar approach was taken by Kirby J in *Burke*, who in the course of his dissenting decision said:²²

Given the purpose and character of contribution as an equitable remedy, I am unconvinced that, as a matter of principle, rateable apportionment in differing amounts is alien to the notion of contribution.

It can be argued that the founding principle of "natural justice" does not inherently require comparable levels of culpability and causation, and this was the view taken by Elias CJ in *Hotchin*, who said, "[c]ontribution is an equitable remedy to right what would otherwise be an injustice, but only to that extent."²³ In addition, such a requirement is problematic because judges can have differing views on relative levels of culpability and causative effect, as illustrated by the *Burke* decision.

In *Burke*, H Ltd was a purchaser of land. LFOT was the seller of the land. B was the solicitor for the purchaser, advising on the transaction. In essence, LFOT told H Ltd there was a high quality tenant in residence in one of the commercial units on the land. This was not true and was in breach of the Australian Trade Practices Act 1974 (Cth) prohibition on false and misleading conduct. H Ltd brought a claim under that Act and succeeded in obtaining an order for damages against LFOT. LFOT then claimed that B should be required to make a contribution to LFOT, as B had been negligent and that had contributed to H Ltd's loss. B had failed to make the enquiries that a reasonable solicitor would have made in these circumstances and which would have revealed that the tenant in question was not a high quality tenant.

Four out of five of the judges in the High Court allowed B's appeal, which in effect denied LFOT any right of contribution. Three different sets of reasoning were given in the majority decisions. All of the majority judges applied the traditional test for assessing whether a claim for equitable contribution will arise, namely, the liabilities of the co-obligors must be "of the same nature and to

19 *Burke v LFOT Pty Ltd*, above n 9, at [16]–[20]; *AMP Bank Ltd v Brown* [2017] NSWSC 313; and *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 12, at [219]–[221].

20 *BP Petroleum Developments Ltd v Esso Petroleum Co Ltd*, above n 14, at 348–349.

21 See authorities referred to below at n 64.

22 *Burke v LFOT Pty Ltd*, above n 9, at [119].

23 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [157].

the same extent".²⁴ This included notions of equal or comparable culpability and equal or comparable causal significance.²⁵

According to Gaudron and Hayne JJ, there was:²⁶

... much to be said for the view that the culpability of LFOT ... and the causal significance of their conduct to the loss suffered by Hanave was of such a different order from that of Mr Burke that they should not be entitled to contribution.

In addition, if LFOT was allowed to claim a contribution, it would not have paid its "proper share" because it would then receive an amount in excess of the true value of the premises.²⁷

However, Kirby J took the view that the wrongdoers were equally culpable. In Kirby J's view, H Ltd could have sued either LFOT or B for the same loss. It should not matter who the plaintiff chooses to proceed against. There was a common burden; full liability could have been recovered from each. Substantial justice required that contribution be allowed.²⁸

In *Altimarloch*, only McGrath J focused specifically on the need to find comparable levels of culpability and causation, finding there were comparable levels in this case.²⁹ However the majority judges all had their own reasons for disagreeing with the result reached by McGrath J, illustrating how differing interpretations can be made of what is meant by liabilities being "of the same nature and to the same extent".

For example, Tipping J found that liability for the failure to perform a term of the contract was different from making a negligent misstatement and different duties underlay each of those obligations.³⁰ The losses were also different. Blanchard J found there was no "common liability" between the two obligors because the amount the vendor had to pay was measured on a performance basis. The only loss for which the Council was liable was the diminution in value.³¹ He also stated

24 *Burke v LFOT Pty Ltd*, above n 9, at [15], [38] and [49].

25 At [16].

26 At [19].

27 At [22].

28 At [115].

29 *Marlborough District Council v Altimarloch Joint Venture Ltd*, above n 12, at [219], [227] and [231].

30 At [146].

31 At [75].

that a tortfeasor could not be liable to contribute to a loss of a character for which it can have no liability to the plaintiff.³²

A recent decision of the Supreme Court of New South Wales, *AMP Bank Ltd v Brown*, confirmed in the context of a claim for contribution between co-sureties, that liability for coordinate obligations cannot be apportioned other than equally.³³ The Court stated that the doctrine of contribution is founded in equity on the ground of equality of burden, and that a right to contribution only arises "if the parties' liabilities are coordinate, meaning 'of the same nature and to the same extent'" and that "equal exposure to coordinate liabilities demands equal contribution".³⁴ The law recognises, said the Court, only a few limited exceptions, for example where one surety is guilty of fraud or gross negligence.³⁵ The law in New Zealand and that in Australia appears therefore to have diverged as a result of the *Hotchin* decision, at least where the liabilities have different sources.

IV THE NEW ZEALAND SUPREME COURT ADOPTS A DIFFERENT APPROACH

In *Hotchin*, Elias CJ rejected the "same nature and extent" test when assessing if the liabilities of the claimant and defendant were sufficiently coordinate meaning that a claim for contribution would be available.³⁶ The goal of achieving substantive justice did not in her view require comparable levels of culpability or causative effect. Questions of relative culpability and causal significance could be reflected, she said, in the eventual orders made.³⁷

The New Zealand Supreme Court decision in *Hotchin* has significantly altered the law on contribution as it applies in New Zealand. The law has been altered in three important respects. First, the Court rejected the need to find any greater degree of coordination between the liabilities other than the plaintiff could pursue either the claimant or the defendant and either would be liable.³⁸ As explained below, this encompasses a requirement for mutual discharge of liability. Secondly, the claimant and defendant do not need to both be liable for the full amount of the plaintiff's loss. It is

32 At [75]. He was also influenced by the fact that if the vendor succeeded, that would result in the vendor getting an overpayment and receiving more than the land was worth: at [76].

33 *AMP Bank Ltd v Brown*, above n 19.

34 At [38].

35 At [40].

36 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [152].

37 At [158].

38 At [150]–[152].

enough if there is an overlap in liability.³⁹ Thirdly, the court can award variable contribution. It is not limited to allocating the (overlapping) liability equally or proportionately.⁴⁰

In *Hotchin*, the financial markets conduct regulator in New Zealand brought an action against the directors of a collapsed finance company, alleging misleading statements in a prospectus. The directors settled the claim on payment of several million dollars. One of them then sought contribution from the trustee that had supervised the issue.

The director argued that he had a claim for contribution against the trustee either under s 17 of the Law Reform Act (on the basis both were tortfeasors) or under the equitable doctrine of contribution (on the basis that his liability was statutory). The director had effectively admitted responsibility for the misleading prospectus because, while he was party to public statements made at the time of the settlement that denied liability, in order to make the claim for contribution under the Law Reform Act the director accepted he would have to establish that he was indeed liable in tort to the investors.⁴¹

Both the claim under the Law Reform Act and the claim in equity were dismissed by the High Court and the Court of Appeal.⁴² On appeal, both claims were allowed, by a majority of three to two, by the Supreme Court.

The Chief Justice gave the majority's decision on this issue, with Glazebrook and William Young JJ agreeing with her, subject to one reservation expressed by Glazebrook J.⁴³ The Court suggested that the test for whether a right of contribution arises under the Law Reform Act (which requires that both defendants be liable for the same damage) and whether a right to claim contribution arises under the equitable doctrine, is the same. It took an in-substance approach to the issue of whether the damage was the same. A right to claim contribution would arise if it could be said that "responsibility for the harm is shared. This is an inquiry that is practical and directed at the substance of the matter in the particular case."⁴⁴

The Chief Justice drew support from the minority judgments in each of the earlier cases of *Burke* and *Altimarloch*. In particular, she was drawn to the reasoning of Kirby J in *Burke*, which she said

39 At [152].

40 At [157].

41 At [36].

42 See *Financial Markets Authority v Hotchin* [2013] NZHC 1611, [2014] 3 NZLR 655; and *Hotchin v The New Zealand Guardian Trust Co Ltd* [2014] NZCA 400, [2014] 3 NZLR 685.

43 Glazebrook J suggested, at [90] and n 93, that while mutual discharge is a requirement for contribution it does not necessarily encompass the whole test: *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7.

44 At [152].

had also been attractive to McGrath J (who gave the minority decision in *Altimarloch*). The test for coordinate liabilities which Kirby J accepted as giving rise to contribution is whether:⁴⁵

... the liabilities of the co-obligors to the principal claimant are such that enforcement by [the claimant] against either co-obligor would diminish that obligor in his material substance to the value of the liability.

In *Hotchin*, her Honour said:⁴⁶

The approach I favour accords with that taken by Kirby J in *Burke v LFOT Pty Ltd* for reasons which seem to me to be compelling and which it would be superfluous to repeat.

...

The simpler approach expressed by Kirby J reduces the capacity for confusion through over-refinement of terms by making it clear that the jurisdiction arises where two parties are liable in respect of the same damage. It has the merit of ensuring that contribution under s 17(1)(c) [of the Law Reform Act] and at common law continues on the same principles from which s 17(1)(c) was derived and achieves practical justice.

V ***THE TEST ADOPTED IN HOTCHIN REQUIRES MUTUAL DISCHARGE***

Kirby J had explained that the idea behind the test he adopted is that equity intervenes:⁴⁷

... to recognise the availability of legal remedies against *both* of the propounded co-obligors, hence the coordinate liabilities, and thus the obligation of each of Mr Burke and the respondents together to contribute to Hanave's damages ...

However, it is not enough that the plaintiff can pursue two defendants, because the plaintiff could have two independent causes of action. His Honour then said:⁴⁸

By discharging their respective obligations to pay Hanave's damages, the respondents [LOFT] not only discharge themselves but they also discharge Mr Burke's liability which otherwise, as a matter of law, could have been enforced against him by Hanave.

In other words, according to Kirby J, what is required to be established in order to demonstrate that the liabilities are coordinate, is that the plaintiff could pursue either obligor for its loss, and either would be liable for it, and that payment by either one would discharge the liability of the other. It would seem that the Supreme Court of New Zealand has now adopted that approach as the law in

45 *Burke v LFOT Pty Ltd*, above n 9, at [103].

46 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [150] and [158] (footnotes omitted).

47 *Burke v LFOT Pty Ltd*, above n 9, at [104].

48 At [105] (footnotes omitted).

New Zealand. That mutual discharge is required is implicit in Elias CJ's statement that "it is unjust for the burden of meeting a loss for which others share responsibility to be borne by one party, to the benefit of those who escape liability".⁴⁹

The approach favoured by Kirby J (and now by the New Zealand Supreme Court) is very similar to that which has been adopted in several English cases to determine if a right to contribution arises under the Civil Liability (Contribution) Act 1978 (UK), and which is known as the "mutual discharge" test.⁵⁰ Under this test, a right to contribution arises if payment by either the claimant or the defendant to the plaintiff would relieve the other of liability. This test was adopted in *Howkins & Harrison v Tyler*⁵¹ and subsequently applied in *Eastgate Group Ltd v Lindsey Morden Group Inc*⁵² and *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd*.⁵³

In *Howkins*, a building society advanced money to a company. The debt was guaranteed by Tyler. The money was advanced in reliance on a valuation given to the building society by Howkins. The company defaulted. The guarantee was called on but no payment made. The property was sold and there was still £500,000 owing. The building society commenced proceedings against the valuer (Howkins) in negligence. Those proceedings were settled on payment of £400,000. Howkins then claimed contribution from Tyler. The claim was made under the Civil Liability (Contribution) Act (UK), which requires that both obligors be liable in respect of the "same damage". The English Court of Appeal found that the "same damage" requirement was not met.

Scott VC considered that the test broke down into two components. First, the parties must have been liable to a third party who is forbidden to accumulate recoveries. Secondly, the third party's rights must have been extinguished when paid by the claimant, and if the defendant had paid instead, it would have been possible to say that the claimant's liability would have been discharged. In *Howkins*, receipt of £400,000 from the valuer did not reduce the debt owing by the guarantor.

The mutual discharge test was subsequently rejected by the House of Lords in *Royal Brompton Hospital NHS Trust v Hammond* as being a threshold question, on the basis that questions of

49 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [152]. Other statements in *Hotchin* that support the requirement of mutual discharge are made at [90] per Glazebrook J, [171] and [206] per William Young J.

50 The Civil Liability (Contribution) Act (UK) allows contribution to be claimed by any person liable in respect of damage, from another person liable in respect of the same damage. Its application is therefore wider than the Law Reform Act 1936 (NZ) which only applies to tortfeasors.

51 *Howkins & Harrison v Tyler* [2001] Lloyd's Rep PN 1 (CA) at [17].

52 *Eastgate Group Ltd v Lindsey Morden Group Inc* [2001] EWCA Civ 1446, [2002] 1 WLR 642.

53 *Hurstwood Developments Ltd v Motor & General & Andersley & Co Insurance Services Ltd* [2001] EWCA Civ 1785.

contribution would become unnecessarily complex.⁵⁴ *Royal Brompton* involved a tripartite building contract between an employer, a contractor and an architect. The employer engaged the contractor as the main contractor for the construction of a new hospital. The architect had responsibility for a variety of tasks including monitoring the construction and deciding on requests for extension of time. If the construction was not completed by a certain date the contractor had to pay the employer liquidated and ascertained damages of a certain amount per week. The contractor made numerous applications for extension of time and for corresponding payment of loss and expenses for prolongation and disruption. The architect granted several extensions, meaning the construction was completed late. The contractor was relieved of any liability to pay liquidated and ascertained damages for the delay, due to the architect's extensions. The contractor also claimed and was paid an additional amount for prolongation and disruption.

In arbitration proceedings commenced by the contractor, a further amount for prolongation and disruption was claimed against the employer and the employer counterclaimed. The employer and contractor settled their dispute. The employer agreed to indemnify the contractor against any claim for contribution made against the contractor by the architect. The employer then claimed against the architect alleging it had been negligent on several grounds, including granting extensions of time. The architect claimed a contribution against the contractor in relation to that negligence claim, arguing that the contractor was liable to contribute to any amount the architect had to pay to the employer. The claim was made under the Civil Liability (Contribution) Act (UK), which requires that the architect and the contractor were liable in respect of the "same damage". The House of Lords found that the damage in this case was not the same.⁵⁵

The House of Lords referred to *Eastgate Group* as an illustration of its concern that adoption of the mutual discharge test would lead to unnecessary complexity. The "complexity" in *Eastgate Group* was that contribution will not be awarded if one of the claims is for repayment of a debt as opposed to a claim for damages. Longmore LJ in the English Court of Appeal found that when damages fall to be assessed against a negligent *valuer*, the value of the buyer's covenant to repay must be brought into account to reduce the claim against the valuer, meaning a contribution claim would not succeed (this was what happened in *Howkins*). But it did not follow that the same approach was correct for cases not of a borrower's covenant to repay his loan but of breach of contract, in other words a claim for damages.⁵⁶ Accordingly, the claim for contribution was allowed.

54 *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 at [28].

55 At [7] and [30].

56 *Eastgate Group Ltd v Lindsey Morden Group Inc*, above n 52, at [14]: "This is due to the essential difference between a claim for repayment of a debt (to which there can ordinarily be no substantive defence and in respect of which a claimant does not have to prove loss) and a claim for damages for breach of contract (to which there may be many defences and in respect of which the claimant must prove his loss)."

Another "complexity" that can arise in assessing mutual discharge is illustrated by the *Altimarloch* decision. If the claims are sequential, so that the loss resulting from the actions of one wrongdoer is calculated after taking into account any amount recovered from the other wrongdoer, a claim for contribution will not succeed. In *Altimarloch*, the view adopted by the Chief Justice was that the damage claimed against the Council was dependent on the net position reached on the liability of the vendors for breach of contract. Similarly, if the liabilities are distinct, a claim for contribution will not succeed. An example of distinct liabilities is *Royal Brompton*, where the architects were liable not in respect of the harm caused to the owner by the builder's delay in construction but for the distinct and consequential harm of compromising the owner's claim against the builder for delay.

These decisions illustrate that an assessment of whether payment by one defendant discharges the liability of another can raise complex issues of law. However, while complex issues of law are likely to arise, it is suggested that this is a preferable approach to the "same nature and extent" test. There is uncertainty about what "same nature and extent" requires, and if the court resorts to a test that requires comparable levels of culpability and causation then the threshold question of whether to allow a claim for contribution to proceed can turn on the view taken by individual judges of those matters.

VI THE NEW APPROACH ALLOWS CONTRIBUTION CLAIMS TO ATTACH TO THE OVERLAP IN LIABILITY

Not only did the Chief Justice in *Hotchin* adopt Kirby J's test for assessment of whether a claim for contribution arises. She went further and rejected the need for both the claimant and defendant to be fully liable for the plaintiff's loss. It is suggested that Kirby J contemplated that both would be fully liable for the plaintiff's loss. This was the situation in *Burke* and also in the context from which the test was sourced (the third edition of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*).⁵⁷ In *Hotchin* the Chief Justice indicated her support for the test for contribution to be met where each obligor is wholly or partially liable for the claimant's loss. The Chief Justice said "[t]he obligations need not be identical in their ... extent."⁵⁸

There is precedent for this approach in the context of a contribution claim made under statute. In *Nationwide Building Society v Dunlop Haywards (DHL) Ltd*, which involved a claim under the Civil Liability (Contribution) Act (UK), the plaintiff building society had claims against both the valuers,

57 RP Meagher, WMC Gummow and JRF Lehane *Equity: Doctrines & Remedies* (3rd ed, Butterworths, Sydney, 1992) acknowledges one situation where the obligors might be liable in differing amounts and contribution would be available, that is where each is liable for the whole of the obligation but with a limitation on the quantum recoverable: at [1017]. See also [10.090] and [10.125] of the fifth edition of this text: Heydon, Leeming and Turner, above n 1.

58 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [152]. See also [142] and [153] where her Honour expressed the view that the law is the same whether the claim is brought under the Law Reform Act or in equity.

who had fraudulently overvalued certain properties, and against the solicitors in negligence.⁵⁹ The solicitors settled the claim then claimed contribution from the valuers. The solicitors' liability in negligence was significantly less than the valuers' liability in deceit. The Court held that any category of loss for which only one of the obligors was liable should be ignored when identifying what was the "same damage". Clarke J said:⁶⁰

I see no reason why the court cannot distinguish between one category of economic loss for which DHL [the valuers] was responsible but Cobbetts [the solicitors] were not, viz loss not reasonably foreseeable which is only recoverable because DHL was fraudulent, and the foreseeable loss for which both were liable.

VII THE NEW APPROACH ALLOWS FOR VARIABLE AMOUNTS OF CONTRIBUTION TO BE AWARDED

The approach adopted by the majority in *Hotchin* is a two-stage test, as explained above. If Kirby J's test for coordinate liabilities is satisfied, the court moves onto the next stage, which is to assess what amount of contribution is just and reasonable in the circumstances. In *Hotchin*, the Chief Justice indicated that the court had a broad equitable discretion to determine the amount of contribution awarded.⁶¹ Only at the second stage, namely when assessing whether it is just and reasonable that contribution be awarded and the amount of the award, would the court consider matters of culpability and causation.⁶² Contribution would only be ordered if and to the extent necessary to right what would otherwise be an injustice.⁶³ At the second stage of the test proposed by the Chief Justice in *Hotchin* the court makes an assessment of whether the party who is claiming contribution has paid more than its "fair share" of the liability. Variable contribution is contemplated by the majority decision in *Hotchin*.

This is a significant development in the law. Traditionally contribution has been awarded in equal shares or in some circumstances proportionately, for example if the obligors have by contract limited their obligation to meet the full loss. The authors of *Meagher, Gummow and Lehane's Equity Doctrines & Remedies* opine that under the equitable doctrine, liability can only be apportioned

59 *Nationwide Building Society v Dunlop Haywards (DHL) Ltd* [2009] EWHC 254 (Comm), [2010] 1 WLR 258.

60 At [47]. This approach is supported by Stephen Todd "Multiple Causes of Loss and Claims for Contribution" (2013) 25 NZULR 960; and Ben Prewett "Wrongdoers' Rights to Contribution in Mixed Liability Cases" [2012] NZ L Rev 643. Further support for the proposition that the liabilities need not be to the "same extent" can be found in the insurance cases, where the policies cover a common risk but are not co-extensive (as in *Albion Insurance Co Ltd v GIO (NSW)*, above n 10).

61 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [149] and [157]. See also at [90], [99] and [160].

62 At [157]–[158].

63 At [157]. Elias CJ also saw this approach as consistent with the scheme of s 17 of the Law Reform Act at [153].

equally and cite a series of cases in support of that view.⁶⁴ The authors of that text claim that this is a difference between the equitable doctrine and the statutory regimes.

Kirby J expressed the view in *Burke* that equity allows the apportionment of liability, so that if for example there was unequal culpability, the court could apportion liability in a just and proportionate way.⁶⁵ However, this finding was obiter on the facts of *Burke*, because he was of the view that the misrepresentations by LFOT and B's negligence were each effective (and equal) causes of the loss.⁶⁶ In *Hotchin*, the Chief Justice indicated her support for the law to move in the direction preferred by Kirby J, saying "[c]ontribution is an equitable remedy to right what would otherwise be an injustice, but only to that extent."⁶⁷

VIII RELATIONSHIP BETWEEN CONTRIBUTION AND THE LAW OF UNJUST ENRICHMENT

The Supreme Court has indicated its support for the approach proposed by Kirby J in *Burke* that a right to contribution will arise if the plaintiff could pursue either the claimant or the defendant for its loss (in whole or in part) and either would be liable for it. As explained above, payment by the claimant must discharge the defendant's liability (in whole or in part), and similarly payment by the defendant (if pursued) would discharge the claimant's liability. If that test is satisfied the court will then exercise its discretion to assess the appropriate amount of contribution to award, based on what is just and reasonable in the circumstances.

The changes to the law of contribution made by the Supreme Court in *Hotchin* mean that the approach now favoured by the Supreme Court in New Zealand has significant similarities to that proposed by the authors of *Goff & Jones: The Law of Unjust Enrichment*.

64 *Leigh-Mardon Pty Ltd v Wawn* (1995) 17 ACSR 741 (NSWSC) at 752; *Bialkower v Acohs Pty Ltd* (1998) 83 FCR 1 at 13; *Hanave Pty Ltd v LFOT Pty Ltd* [1999] FCA 1568, (1999) 168 ALR 318 at [24]–[29]; and *Glenmont Investments Pty Ltd v O'Loughin (No 3)* (2001) 79 SASR 288 at [18]. See Heydon, Leeming and Turner, above n 1, at [10-090]. On the other hand, Charles Mitchell *The Law of Contribution and Reimbursement* (Oxford University Press, Oxford, 2003) takes the view that unequal apportionment of liability is possible and cites cases that support that proposition at [10.01] and following.

65 He acknowledged that the weight of authority was against unequal apportionments but said "[o]bservations favourable to this possibility have been made in Australian courts": *Burke v LFOT Pty Ltd*, above n 9, at [119].

66 At [122]. See also at [24] per McHugh J.

67 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [157]. Consistency as between the statutory and common law regimes also supports this approach.

A Overview of the Law of Unjust Enrichment

There is general acceptance that the law of unjust enrichment at a minimum provides a:⁶⁸

... unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.

In a recent decision of the Supreme Court of Western Australia, *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3)*, Edelman J explained how unjust enrichment has been recognised in Australia as a way of grouping claims that share certain characteristics.⁶⁹ The Court was faced with a claim for work done in anticipation of a contract that did not eventuate. The claim was brought in restitution for unjust enrichment. Edelman J said that "[i]n broad summary, a plea of money had and received is a plea in the 'taxonomic category' of unjust enrichment."⁷⁰ He explained that unjust enrichment was in his view a broad categorisation applicable to a group of claims that all share similar characteristics, like the word "tort" describes claims brought in tort.⁷¹

In New Zealand, the law of unjust enrichment has developed to the point where the courts have on occasion recognised a free standing cause of action in some circumstances. For example, in *Lykov v Wei* a claim was made by a purchaser of a leaky apartment against the previous owners, who had received a significant payment, after the sale, from a claim by the body corporate against the Council.⁷² Here, alternative claims were brought, one for breach of warranty under the sale and purchase agreement and the other on the basis of unjust enrichment. The High Court referred to the decision of the Court of Appeal in *Commissioner of Inland Revenue v Stiassny*,⁷³ and applied the principles of unjust enrichment to find that the claim against the vendors was made out (saying that the claim could be expressed alternatively as a claim in unjust enrichment or a claim for payment made to the vendors under a mistake).⁷⁴

68 *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5, (1987) 162 CLR 221 at [14]. A similar approach to the law of unjust enrichment in Australia was taken in *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269 at [88]–[89]; and in *Equuscorp Pty Ltd v Haxton* [2012] HCA 7, (2012) 246 CLR 498 at [30].

69 *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd (No 3)* [2014] WASC 162.

70 At [45].

71 At [49]–[52].

72 *Lykov v Wei* [2015] NZHC 3009, [2016] NZAR 28.

73 *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, [2013] 1 NZLR 140 at [92]. Followed in *Suisse International Ltd v Monk* [2015] NZCA 46 at [32].

74 *Lykov v Wei*, above n 72, at [50]–[56].

On the other hand, in *Torbay Holdings Ltd v Napier*,⁷⁵ the High Court said unjust enrichment is simply a term for the underpinning doctrine of law behind various restitutionary remedies. A similar approach was taken in *Phil & Teds Most Excellent Buggy Co Ltd v Out 'n' About ATP Ltd*, where Associate Judge Smith said:⁷⁶

The question of whether unjust enrichment is a free-standing cause of action is a developing area of the law, and accordingly one in which the Court must be cautious to exercise summary jurisdiction.

It is suggested that the issue is not whether a claim for contribution should be described as a claim in unjust enrichment or a claim in equity. The issue is whether it is useful to approach a claim for contribution using an unjust enrichment analysis. No New Zealand case has yet approached a claim for contribution using an unjust enrichment analysis. However, given there is some recognition that a claim for contribution is based on provision of restitution for unjust enrichment, that suggests one should consider the possibility of approaching a contribution claim using an unjust enrichment analysis. There is such recognition in *Burke*,⁷⁷ and also in the recent Australian case of *Lavin v Toppi*.⁷⁸ The Court in *Hotchin* came close to recognising this as the basis of contribution in the following statement:⁷⁹

Contribution is an equitable principle which expresses natural justice in its recognition that it is unjust for the burden of meeting a loss for which others share responsibility to be borne by one party, to the benefit of those who escape liability.

B How the Commentators Locate Contribution within the Law of Unjust Enrichment

As stated in the introduction to this article, the authors of *Goff & Jones* claim contribution is part of the law of unjust enrichment. They are supported in this view by Virgo in the *Principles of Restitution*, Edelman and Bant in *Unjust Enrichment*, and Mitchell in his earlier text, *The Law of Contribution and Reimbursement*.⁸⁰ The claim is made on the basis that an analysis of the requirements of a contribution claim reveals that such a claim shares the conditions necessary for recovery that are held by other claims based on unjust enrichment. In summary these are: enrichment,

75 *Torbay Holdings Ltd v Napier* [2015] NZHC 2477, [2015] NZAR 1839 at [164].

76 *Phil & Teds Most Excellent Buggy Co Ltd v Out 'n' About ATP Ltd* [2016] NZHC 71 at [144].

77 *Burke v LFOT Pty Ltd*, above n 9, at [38] per McHugh J: "An order of contribution prevents the injustice that would otherwise flow to the plaintiff by the defendant being enriched at the plaintiff's expense in circumstances where they have a common obligation to meet the liability which the plaintiff has met or will have to meet."

78 *Lavin v Toppi* [2015] HCA 4, (2015) 254 CLR 459 at [41].

79 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [38].

80 Virgo, above n 5; Edelman and Bant, above n 6; and Mitchell, above n 64, at ch 3.

at the expense of the claimant, that is unjust. In brief, and this is explained further below, the defendant against whom a claim for contribution is made has been enriched by discharge in whole or in part of a liability to a third party. The person claiming contribution has borne the full burden of a liability that should be shared. What is the factor that makes the defendant's enrichment unjust is subject to debate amongst the different writers.

The claim in *Goff & Jones* that contribution properly sits within the law of unjust enrichment is supported by reference to cases where it is stated that contribution has a restitutionary basis. The English, New Zealand and Australian courts have all acknowledged that claims for contribution are based on restitutionary principles.⁸¹ In *Cockburn v GIO Finance Ltd (No 2)*, a decision of the New South Wales Court of Appeal, Mason J said:⁸²

The injustice prevented by an award of contribution or recoupment is the enrichment of the defendant at the expense of the plaintiff actually or imminently liable in part (contribution) or whole (recoupment) ... On this basis, the concept of unjust enrichment has been seen as the underlying principle.

In *Dairy Containers Ltd v NZI Bank Ltd*, Thomas J in the New Zealand High Court said: "Principles of equity and unjust enrichment have ensured that a party held liable for such wrongdoing can enforce a right of contribution against another non-tortious wrongdoer."⁸³

Recently the High Court of Australia was faced with a claim for contribution by one guarantor (the claimant) against another (the defendant). In *Lavin*, the claimant and defendant had jointly and severally guaranteed a loan to a company from a bank.⁸⁴ The defendant and the bank entered into a deed of settlement and release on the defendant's payment to the bank of around one quarter of the total owing under the guarantee. The bank covenanted in the deed of settlement not to sue the defendant in respect of the guarantee. The claimant was then pursued by the bank for the remaining 75 per cent and paid up, discharging the guarantee. The claimant then sought contribution from the defendant for one-half of the difference between the amounts paid (meaning each would end up paying half the liability). Finding that there was a right to claim contribution, the Court noted the importance of enrichment in a contribution claim, saying:⁸⁵

81 At 43–44. The English cases include *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 727; and *Berghoff Trading Ltd Swinbrook Developments Ltd* [2009] EWCA Civ 413, [2009] 2 Lloyd's Rep 233 at [24].

82 *Cockburn & Ors v GIO Finance Ltd (No 2)* [2001] NSWCA 177 at [24]. Similar comments were made in *James Hardie v Wyong Shire Council* [2000] NSWCA 107 at [36].

83 *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 at 123.

84 *Lavin v Toppi*, above n 78.

85 At [41].

When a common liability is discharged by a surety, the discharge of the liability inevitably benefits a co-surety in that, without a right of contribution in the surety, the co-surety who pays less than his or her fair share is unjustly enriched.

There is, however, a significant difference between, on the one hand, recognising that one party has been "unjustly enriched" in a general sense and that such enrichment underlies at least in part the "natural justice" rationale for contribution, and, on the other, applying an unjust enrichment analysis to a contribution claim. The latter approach recognises that "unjust enrichment" is a distinct way of approaching a claim for relief, based on a defined set of principles.

C What is Required to be Established in Order to Make Out a Claim for Contribution Using an Unjust Enrichment Analysis?

The authors of *Goff & Jones* propose a series of five criteria to be met in order to establish the conditions for a claim for contribution. If these criteria are satisfied then the basis for a claim for contribution exists, and accordingly there will be enrichment of the defendant, at the expense of the claimant. The "unjust" factor is discussed further below. The five criteria to be met are:⁸⁶

- (1) payment by the claimant discharged the defendant's liability;
- (2) the claimant and the defendant were both liable to the plaintiff;
- (3) the plaintiff was forbidden to accumulate recoveries;
- (4) the plaintiff could recover in full from either; and
- (5) it is appropriate that some or all of the burden of liability should be borne by the defendant.

What is useful about this approach is that it identifies the essential elements of a successful claim for contribution. It dispenses with the language of "coordinate liabilities" and also of the liabilities being of the same nature and extent. In other words, there is no need to find any greater degree of coordination between the liabilities beyond that which arises on satisfaction of the five criteria specified. This approach focuses on the fact that payment by the claimant discharged the defendant's liability, and couples that with a prohibition on accumulation of recoveries (although in practice the two inquiries are likely to overlap). It also allows for contribution to be awarded where there is an overlap in liabilities rather than requiring both claimant and defendant to be liable in full for the plaintiff's loss.

It is suggested that the five criteria identified in the *Goff & Jones* approach are also required to be met for a successful claim under the equitable doctrine of contribution. If the payment by the claimant has not discharged the defendant's liability, there can be no claim for contribution, because there has been no common burden, no relief and natural justice does not call for a remedy. If both parties are not liable to the plaintiff, again there is no reason why natural justice requires a remedy in the form of contribution. If the claimant is not liable, there is no basis on which to claim contribution. If the defendant is not liable, then the claimant's payment has not benefitted the defendant in any way so

⁸⁶ Mitchell, Mitchell and Watterson, above n 2, at [20.01].

there is no reason in natural justice for the law to allow a claim in contribution. Equity requires a remedy on the basis of natural justice where there is a common burden. The law of unjust enrichment reaches the same conclusion but is arguably more disciplined in the sense that all that must be shown is that there is enrichment, at the claimant's expense, and that there is a recognised unjust factor that makes the retention of the enrichment unjust.

If the plaintiff is permitted to accumulate recoveries (in other words, recover from both obligors), then again natural justice does not require that the claimant be permitted to claim contribution. The plaintiff can recover from the claimant and then pursue the defendant. But it is not as simple as stating that if the claimant's payment discharged the defendant's liability, then the plaintiff is prohibited from accumulating recoveries. In a situation where the liabilities of the wrongdoers are imposed by law (as opposed to having been assumed by contract), the generally accepted rule is that courts look to the underlying policy of the rules that impose liability to determine whether it would be consistent with that underlying policy to allow the plaintiff to accumulate recoveries.⁸⁷ For example, if both wrongdoers are liable in tort, then given that the primary purpose of imposing tort liabilities is to compensate tort victims for harm suffered, and not to make them better off than they were before the tort was committed, accumulation of recoveries is forbidden.

Where two wrongdoers cause separate injuries to the same plaintiff, there is no reason why the plaintiff should not recover from both of them. In this situation the policy of preventing double recovery does not apply. However, where the wrongdoers cause a single indivisible injury, double recovery is not permitted.⁸⁸ A situation given in *Goff & Jones* as illustration of the point that the "policies" inquiry can vary according to the circumstances of the case is where a purchaser is induced to enter into a contract of sale by a misrepresentation by a third party. The question as to whether the purchaser can accumulate recoveries from the vendor and the third party depends on whether the damages payable by the third party are assessed net of the damages the vendor is liable for.⁸⁹ The authors of *Goff & Jones* suggest that a useful inquiry at this point can be the application of the mutual discharge test.⁹⁰

It would seem therefore that there is a degree of overlap between the inquiry as to whether the claimant's payment has discharged the defendant's liability and that as to whether the plaintiff can accumulate recoveries. The answer to both those inquiries, which should be regarded as separate questions, requires consideration of all of the following: the nature of the liabilities of each of the

87 At [20.53]; and Mitchell, above n 64, at [7.14].

88 Mitchell, Mitchell and Watterson, above n 2, at [20.56].

89 At [20.56].

90 But they note, as illustrated by the *Howkins* decision, the fact that there is no mutual discharge does not necessarily lead to a conclusion that the plaintiff is permitted to accumulate recoveries: at [20.58]–[20.61]. A similar analysis is provided in Mitchell, above n 64, at [7.14]–[7.26].

claimant and the defendant, the policies underlying those liabilities, the circumstances of the case and rules around calculation of damages.

The requirement that the plaintiff be able to recover in full from either is a reference to the system of joint and several liability that English law operates, as opposed to a system of proportionate liability.⁹¹

The final limb of the *Goff & Jones* approach requires that it is appropriate that some or all of the burden of liability should be borne by the defendant. The authors of *Goff & Jones* state (agreeing with *Equity Doctrines and Remedies* on this point) that where there is no contractual allocation of responsibility between the claimant and the defendant, the courts have adopted a default rule of equal apportionment.⁹² However, the authors of *Goff & Jones* state that the courts have departed from this rule if the causative potency of the parties' actions was unequal,⁹³ or the moral blameworthiness of the parties was unequal,⁹⁴ or one of the obligors gains a larger benefit than the other from the transactions that give rise to the liabilities.⁹⁵

As explained earlier, in *Hotchin*, the Chief Justice indicated her support for the law to move in the direction preferred by Kirby J, saying, "[c]ontribution is an equitable remedy to right what would otherwise be an injustice, but only to that extent."⁹⁶ In *Hotchin* the Court reserved to itself a broad equitable discretion to determine the amount of contribution awarded, which is very similar to the *Goff & Jones* approach.⁹⁷ One might argue that the *Goff & Jones* approach is more principled than the Chief Justice's approach as it starts from a presumption of equal apportionment and only departs from that by reference to defined circumstances identified in the cases.

In summary, the approach now favoured by the New Zealand Supreme Court focuses on mutual discharge of liability. If the answer to that inquiry is yes, then it often follows that the plaintiff could not accumulate recoveries. Both approaches require an assessment of the proper share of the burden

91 In those jurisdictions where proportionate liability systems operate (such as Australia) the relevant legislation will have to be considered and will impact on whether this criteria is satisfied.

92 Mitchell, Mitchell and Watterson, above n 2, at [20.82].

93 At [20.92]–[20.95] (where case examples are given).

94 At [20.96]–[20.98] (where case examples are given).

95 At [20.99]–[20.100] (where case examples are given).

96 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [157].

97 Under an unjust enrichment analysis, the defendant would also be able to raise defences to the claim. It might be raised as a defence for example that in a situation (such as *Hotchin*) where the claimant settled then sought contribution to the settlement amount paid, the claimant should not have settled for that amount. See Mitchell, Mitchell and Watterson, above n 2, at [20.18].

to be borne by the defendant. The unjust enrichment approach as proposed in *Goff & Jones* appears to reserve to the court a broadly similar discretion around the amount of the award ultimately made.

D Debate over the "Unjust" Factor

An essential element in the unjust enrichment analysis of contribution is the presence of the unjust factor, in other words the reason why it would be unjust for the defendant to retain the benefit. There is debate amongst the unjust enrichment writers about the factor that makes retention of the enrichment unjust, in relation to a claim for contribution. In any unjust enrichment claim, the "unjust" factor is not determined based on notions of what is fair and reasonable in that situation but by reference to established factors.⁹⁸ The unjust factor that Edelman and Bant in *Unjust Enrichment* identify in relation to contribution claims is "powerlessness".⁹⁹ The obligor who was pursued by the plaintiff was powerless in relation to the fact proceedings were brought against it and not the other obligor. That makes the retention of the enrichment by the defendant unjust.

Other writers have identified the unjust factor in claims for contribution as policy (Mitchell)¹⁰⁰ and compulsion (Virgo).¹⁰¹ Mitchell acknowledges that the authors of *Goff & Jones* (5th ed) point to the compulsory nature of the claimant's payment to the plaintiff to explain why it is unjust for the defendant to enjoy the benefit it has gained at the claimant's expense.¹⁰² But Mitchell points out that this ground for recovery is difficult to sustain when considering cases where the claimant has freely undertaken legal liability to the plaintiff.¹⁰³ Mitchell proposes that there is a better, policy-based, explanation. Where a claimant and a defendant are both legally liable to a plaintiff, and the plaintiff is forbidden to accumulate recoveries by enforcing rights against both of them, the law recognises two conflicting objectives. First, the law aims to make the defendant bear an appropriate share of the burden of paying the plaintiff. On the other hand, the law aims to give the plaintiff the fullest possible means of recovering what is due to him or her. To achieve these objectives the law gives the plaintiff the right to recover from either in full. If the plaintiff then chooses to recover from the claimant, the law gives the claimant a right to recover an appropriate contribution from the defendant to ensure that equity as between the claimant and the defendant is not defeated by the choice of the plaintiff as to which obligor to pursue. However, Edelman and Bant would reject a policy-based explanation,

98 Edelman and Bant, above n 6, at 118–119.

99 At 293–295.

100 Mitchell, above n 64, at [3.28]–[3.29].

101 Virgo, above n 5, at 246.

102 Mitchell, above n 64, at [3.24].

103 At [3.27].

maintaining the unjust factor must be related to some matter that makes the claimant's intention to benefit the defendant, imperfect.¹⁰⁴

The policy argument finds support in the Chief Justice's decision in *Hotchin*.¹⁰⁵ However if the claim by Mr Hotchin had been approached using an unjust enrichment analysis, it would also have been possible to point to powerlessness on his part. More generally, he had no intention to benefit the defendant trustee by paying the regulator in settlement of the claim.

IX AN UNJUST ENRICHMENT ANALYSIS HAS BEEN ADOPTED IN SUBROGATION CLAIMS

As explained above, the rules on discharge are not straightforward. In some situations, in particular involving payments by indemnity insurers, payment by the insurer to the insured does not discharge the liability of the third party that caused the loss. Instead, the indemnity insurer has a right to be subrogated to the claims of the insured.¹⁰⁶

In *Caledonia North Sea Ltd v British Telecommunications plc*, Lord Hoffmann said that there are different ways of giving effect to the principle that a person who has more than one claim to indemnity is not entitled to be paid more than once.¹⁰⁷ In Lord Hoffmann's view, subrogation would generally be adopted as the remedy where the liability of the person who paid is secondary to the liability of the other party. The other solution would be to say that the liability of the other party has been discharged and to allow a claim for contribution. This is an oversimplification of the relationship between contribution and subrogation, and has been doubted.¹⁰⁸ Nevertheless, there is clearly a relationship between contribution and subrogation and the courts' approach to the unjust enrichment analysis in a subrogation context is therefore relevant.

In *Bofinger v Kingsway Group Ltd*, the High Court of Australia recently said, "[s]ubrogation may be seen as preventing the unjust enrichment of the principal debtor who otherwise might escape carriage of ultimate liability".¹⁰⁹ However, the Court also stated that "unjust enrichment was not a principle supplying a sufficient premise for direct application in a particular case".¹¹⁰ These statements demonstrate how the term "unjust enrichment" is capable of different meanings. In a general sense, the fact one party has been unjustly enriched has on occasion been seen as part of the

104 Edelman and Bant, above n 6, at 127–130 and 138–139.

105 *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [140] and [152].

106 Mitchell, Mitchell and Watterson, above n 2, at [21.01]–[21.06].

107 *Caledonia North Sea Ltd v British Telecommunications plc* [2002] 1 Lloyd's Rep 553 (HL).

108 Mitchell, above n 64, at [9.14].

109 *Bofinger v Kingsway Group Ltd*, above n 68, at [88].

110 At [85].

justification for equitable relief (as in *Cockburn* and *Lavin*).¹¹¹ However, it is not regarded in Australia as a stand alone cause of action nor is it recognised as the appropriate analysis to apply to determine if relief by way of subrogation is to be granted. In *Bofinger* the High Court has made it clear that in Australia, unjust enrichment is not the basis of subrogation. Rather subrogation is based on principles of equity and is applied in circumstances where it would be unconscionable not to grant relief.¹¹²

The English courts take a different approach. In the recent United Kingdom Supreme Court decision of *Menelaou v Bank of Cyprus UK Ltd*, the Court approached the subrogation inquiry using an unjust enrichment analysis (thereby acknowledging subrogation as part of the law of unjust enrichment).¹¹³ Here, the bank claimed it was entitled to be subrogated to an unpaid vendor's lien on a property (P1) by reason of having agreed to allow part of the proceeds of a sale of another property (P2), which was subject to legal charges in favour of the bank, to be used to purchase P1, on condition that the bank's debts were then to be secured by a charge over P1. Lord Clarke said simply:¹¹⁴

It appears to me that this is a case of unjust enrichment ... it is now well established that the court must ask itself four questions when faced with a claim for unjust enrichment. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?

In New Zealand, a recent High Court decision adopted the English approach. In *Intext Coatings Ltd (in liq) v Deo*, the High Court indicated a clear preference for the English approach, applying an unjust enrichment analysis to the issue of whether a claim for subrogation could succeed in a situation where money used in breach of a fiduciary duty was used to discharge a secured debt.¹¹⁵ After considering the case law and commentaries on the topic, Fitzgerald J said:¹¹⁶

What is required, however, is close consideration of whether the defendant has been enriched at the plaintiff's expense, and if so, whether that is unjust. And that is not to be considered in a moral or overarching "fairness" sense. Rather, a principled approach must be taken.

The approach to subrogation claims in England and New Zealand indicates a willingness to use the unjust enrichment approach to assess whether there is the basis for a claim, where the underlying wrong the court is addressing is that the defendant has been unjustly enriched at the claimant's expense. This is how a claim for contribution might also be approached.

¹¹¹ *Cockburn & Ors v GIO Finance Ltd (No 2)*, above n 82, at [37]; and *Lavin v Toppi*, above n 78, at [41].

¹¹² *Bofinger v Kingsway Group Ltd*, above n 68, at [85]–[98].

¹¹³ *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66, [2016] AC 176.

¹¹⁴ At [18]. See J Palmer "Restitution" [2016] NZ L Rev 435, for a criticism of this decision.

¹¹⁵ *Intext Coatings Ltd (in liq) v Deo* [2016] NZHC 2754, [2017] NZAR 47 at [143]–[146].

¹¹⁶ At [143].

X IS THERE ANY REASON WHY EQUITABLE CONTRIBUTION SHOULD CONTINUE TO BE CONSIDERED AS EXCLUSIVELY PART OF THE LAW OF EQUITY?

Notwithstanding the similarities in the approach taken by the Court in *Hotchin* and that proposed by the unjust enrichment writers, one might suggest that equitable contribution should continue to be considered part of the law of equity alone, because of the focus of the equitable doctrine on assessment of the equities of the individual situation (or put simply, the fairness of requiring contribution be ordered).

The doctrine of equitable contribution is grounded in natural justice. Were equity not to intervene, then it would remain within the power of the creditor to act as to cause one debtor to be relieved of a responsibility shared with another.¹¹⁷ Equity follows the law in the sense that it does not seek to direct the manner of exercise of the rights of the creditor, but equity does make an adjustment between the debtors. Thus, equity does not interfere with the action of the creditor but seeks to ensure the sharing of the burden between those subjected to it.¹¹⁸

Unjust enrichment on the other hand focuses on the fact of enrichment at the plaintiff's expense, where there is a recognised unjust factor. That factor may or may not give rise to an injustice on the facts of the individual case; that is not the purpose of the "unjust" factor. Both doctrines are concerned with addressing the fact that the defendant has gained something at the plaintiff's expense. However, equitable contribution focuses on the inequity that results from the fact that the creditor has chosen to pursue one obligor and not the other, in that particular case.

This difference means that it may be inappropriate to approach a claim for equitable contribution as a claim in unjust enrichment because of the focus in the equitable contribution cases on the injustice. The Australian courts have adopted a relatively strict framework for assessment of when it will be inequitable to allow retention of the benefit in the equitable contribution cases. The Australian High Court in both *Friend v Brooker* and *Burke* required that for the liabilities to be coordinate they had to be of comparable culpability and comparable causal significance.¹¹⁹ This was how the Court assessed whether the liabilities are of the "same nature". Importantly, in all cases the focus is on the injustice of allowing the burden to fall where it lies if no contribution was allowed. The equitable doctrine ensures that one obligor does not end up carrying a "disproportionate share of the burden".¹²⁰ Is there a risk that adopting an unjust enrichment approach would result in a loss of flexibility in the court's assessment of whether contribution should be ordered? It is relevant in this context to note that

¹¹⁷ Randall, above n 11, at §493.

¹¹⁸ *Friend v Brooker* [2009] HCA 21, (2009) 239 CLR 129 at [38].

¹¹⁹ *Friend v Brooker*, above n 118.

¹²⁰ *Lavin v Toppi*, above n 78, at [32].

the approach the Supreme Court has adopted in *Hotchin* has been to reinforce the flexibility of the equitable remedy. Subject to meeting the threshold test of mutual discharge, under the *Hotchin* approach the court is at liberty to take all circumstances into account when determining the appropriate amount of contribution (if any).¹²¹

The requirement in New Zealand for comparable culpability and comparable causal significance has been removed following the *Hotchin* decision. It is suggested that the unjust enrichment analysis as proposed in *Goff & Jones* is sufficiently flexible to accommodate assessment of the equitable considerations, given the latitude around determining the ultimate burden properly to be borne by the defendant.

XI CONCLUSION

Currently the New Zealand courts approach a claim for contribution as a claim in equity. Prior to the decision in *Hotchin*, the courts have required that there be a "common burden" before a claim for equitable contribution will succeed, which requires a degree of coordination between the liabilities.

The New Zealand Supreme Court in *Hotchin* has moved away from the requirement of a common burden, or at least has indicated that the test for a common burden in New Zealand is now mutual discharge. Mutual discharge has also been adopted as the test for whether the damage is "the same" by a line of English cases in the context of claims under the Civil Liability (Contribution) Act (UK), but this approach has been rejected by the House of Lords. The Australian courts continue to require a finding of common burden, often described as "coordinate liabilities", and require comparable levels of culpability and causative effect.

Following *Hotchin*, the law in New Zealand is that all which is required to establish that the liabilities are sufficiently coordinate such that a claim for contribution is established, is that the plaintiff could pursue either the claimant or the defendant for its loss and either would be liable for it, in whole or in part. This is based on the underlying rationale that payment by either the claimant or the defendant would discharge the liability of the other, in whole or in part. If that test is satisfied, the court then has a broad discretion to determine the amount of contribution to be awarded, if any. At that stage issues of relative causation and culpability become relevant. There is, however, no requirement for comparable levels of culpability or causative effect.

There is a significant overlap between this approach and the approach taken to the law of contribution by the authors of *Goff & Jones: The Law of Unjust Enrichment*. The conditions identified in *Goff & Jones* for a successful claim applying an unjust enrichment analysis can be met in the context of a claim for contribution, under the approach now adopted by the Supreme Court. The

121 The breadth of the considerations relevant at this stage is broad. For example, Glazebrook J suggested that the statements made by Mr Hotchin in relation to the settlement with the Financial Markets Authority would be relevant to the contribution claim: *Hotchin v New Zealand Guardian Trust Co Ltd*, above n 7, at [98].

"unjust" factor in the three-fold approach of enrichment, at the expense of the claimant, that is unjust, could be described as powerlessness, compulsion or (arguably) policy.

There is judicial precedent for applying an unjust enrichment analysis to establish a claim, in relation to the law of subrogation. The New Zealand courts have indicated a willingness to follow the English courts' approach of treating a claim for subrogation as a claim based on unjust enrichment. It would be possible for a future New Zealand court to take the same approach to a claim for contribution.