A Principled Response to Pre-Contractual Remuneration
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Abstract:
Under English law, there are uncertainties as to the circumstances in which a contractor can recover remuneration for any work done in anticipation of a contract that fails to materialize. The reluctance to adopt the Continental duty of good faith in the negotiation process has led to piecemeal responses to pre-contractual problems. Following Yeoman’s Row Management v Cobbe, there seems to be a judicial gravitation towards unjust enrichment as the basis of liability. However, unjust enrichment as the sole justification cannot adequately address the rationale of imposing pre-contractual liability. This paper argues that the rationale is to remedy two types of harm: (i) the detrimental reliance suffered by the claimant and (ii) the wrongful transfer of value from the claimant to the defendant. Thereafter, the concept of risk will be explored and bifurcated into factual risk and normative risk to help us achieve a better understanding of the cases. This paper suggests that a model, consisting of promissory estoppel and unjust enrichment, will provide a better fit with the rationale. It will be shown that normative risk and fault can be assimilated into the two causes of action to form a composite picture of pre-contractual remedies. The discussion will culminate in a neat framework for analyzing anticipated contract scenarios that will hopefully bring consistency and order to the troubled realm of anticipated contracts.

Keywords:
Pre-contractual liability, Anticipated contracts, Unjust enrichment, Risk taking.

1 Introduction

An established developer decides to invest in a multi-billion dollar project and enters into negotiations with a contractor. Due to the complexities of the project and the fluctuating costs of building materials, the parties are unable to draw up a complete agreement on the costs and several important terms in the meantime. The developer wants to complete its mega project within four years and instructs the contractor to commence with the construction works. Subsequently, the working relationship between the parties turns sour and the contractor is anxious to recover his expenses on the project. Will he be able to do so? If the developer refuses to pay, what legal cause of action should the contractor take?

The courts have responded to such problems with piecemeal solutions such as the collateral contract theory\(^1\), the law of restitution\(^2\), promissory estoppel\(^3\), risk

\(^1\) Way v Latilla [1937] 3 All ER 759 (HL).
analysis\textsuperscript{4} and the quantum meruit claim\textsuperscript{5}. Although the different approaches may usually achieve a similar outcome for the parties, clear classification of the claim under a general principle is desirable for the “pursuit of rationality, consistency and order”\textsuperscript{6}. Nevertheless, in our attempt to achieve a consistent picture of pre-contractual claims, we should be careful not to conflate the different causes of actions without due care to their underlying basis. The application of different principles can sometimes lead to differing measures of damages and affect the availability of defences, and this could result in disparate outcomes.

The purpose of this paper is to present a principled response to pre-contractual problems. It begins by proposing a rationale based on the harm theory. Two types of harm pertinent to the pre-contractual context are identified, viz. the detrimental reliance suffered by the claimant and the wrongful transfer of value from the claimant to the defendant. Thereafter, the concept of risk will be explored and bifurcated into factual risk and normative risk to help us achieve a better understanding of the cases. This paper suggests that a model, consisting of promissory estoppel and unjust enrichment, will provide a better fit with the rationale. It will be shown that normative risk and fault can be assimilated into the two causes of action to form a composite picture of pre-contractual remedies. The discussion will culminate in a neat framework—constructed upon a gradation scale of risk and fault—for analyzing anticipated contract scenarios that will hopefully bring consistency and order to the troubled realm of anticipated contracts.

2 Unjust Enrichment as the Basis of Liability?

There has been widespread academic debate on the bases of liability for pre-contractual remuneration. Following Yeoman’s Row Management v Cobbe\textsuperscript{7}, there seems to be a judicial gravitation towards unjust enrichment. There, the parties made a agreement-in-principle regarding the development of a parcel of land, however, negotiations fell through subsequently and the claimant sued to enforce the agreement. The House of Lords found that the agreement was merely “binding in honour”, and also rejected the proprietary estoppel argument for want of certainty. Although the claimant failed to

\begin{itemize}
\item \textsuperscript{2} British Steel Corp v Cleveland Bridge and Engineering Ltd (1981) [1984] 1 All ER 504 (Com Ct) [British Steel];
\item Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 (High Court of Australia) [Walton Stores];
\item Commonwealth of Australia v Verwayen (1990) 170 CLR 394 (High Court of Australia) [Verwayen].
\item Brewer Street Investments Ltd v Barclays Woolen Co Ltd [1954] 1 QB 428 (CA) [Brewer Street]; Jennings & Chapman Ltd v Matthews and Co. [1952] 2 TLR 409 (CA) [Jennings].
\item Sintalow Engineering Pte Ltd v Nashimatsu Lum Chang JV [1996] SGHC 274 (High Court of Singapore); Vicson General Contractors Pte Ltd v Dai-Dun Co Ltd [1997] SGHC 345 (High Court of Singapore); Yeoman’s Row, supra note 2. Although the term quantum meruit is frequently used in textbooks (See for example, D Wallace, Hudson’s Building and Engineering Contracts, Vol 1 (11\textsuperscript{th} edn Sweet & Maxwell, London 1995); S Furst and V Ramsey, Keating On Construction Contracts (8\textsuperscript{th} edn Sweet & Maxwell, London 2006) 110), the legal basis of such claims is unclear (See British Steel, supra note 2, 509 (Goff J); J Bailey, ‘Reputation, Termination and Quantum Meruit’ (2006) 22(4) Const LJ 217, 235), and one author has called for the term to be eradicated to clear grounds for a more lucid exposition of the liability model underpinning remuneration award (K Barker, ‘Coping with Failure – Reappraising Pre-Contractual Remuneration’ (2003) 19 JCL 105, 128. [Barker]).
\item Supra note 2.
\end{itemize}
enforce the agreement, recovery of his pre-contractual remuneration was granted on the grounds of unjust enrichment. Most recently, in Whittle Movers, the Court of Appeal refused to imply a contract for the services performed in anticipation of a contract, and stated that any recovery must be effected under a restitutionary claim.

However, acceptance of unjust enrichment as the sole basis of liability is not without problems since it is a gain-based cause of action, which presupposes that the defendant has been enriched by the conduct of the claimant. An unjust enrichment analysis may hence be inadequate to justify recoveries in cases where the defendant does not receive any benefits. In Brewer St, the defendant, in anticipation of leasing the claimant’s property, requested the claimant to perform some work on the premises. The lease failed to materialize and the defendant was unable to benefit from the work done. Nevertheless, the Court of Appeal allowed the claimant to recover for the value of the work done. The defendant was surely not enriched here, unless one interprets enrichment broadly to include any work requested for, even if the defendant did not receive the benefit of the work done. However, this might be seen as a distortion of the natural meaning of enrichment, so as to protect the claimant’s reliance loss. The objective of unjust enrichment is to reverse a defective transfer of value and it cannot apply where no actual transfer of value occurs. Reliance loss and wrongful transfer of value are two separate harms and cannot be conflated.

3 The Theoretical Bases for Pre-Contractual Liability

The issue of pre-contractual liability is often characterized by the question of which legal principles best form the bases of liability, and misses the more fundamental question of why pre-contractual liability should be imposed. It is beyond the scope of this paper to prescribe the perfect theoretical model for pre-contractual liability. Instead, this paper makes a humbler suggestion that the harm theory offers appropriate answers to the question of why pre-contractual liability should be imposed. In particular, the harm theory provides an explanation as to why there is a divergence of opinions with regards to the best liability model and shows that there is no single legal framework that can encompass all pre-contractual cases.

3.1 The Reluctance to Impose Pre-Contractual Liability

The rights of parties in a negotiation are shaped by two notions of freedom:

“the positive freedom of contract, which means that the parties are free to create a binding contract reflecting their free will, and the negative freedom of contract, which means that the parties are free from obligations so long as a binding contract has not been concluded”.

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8 It should be noted that Lord Scott appeared to be of the view that unjust enrichment and quantum meruit were separate common law remedies but produced co-extensive results. See [40] – [42].
9 Supra note 2.
10 Supra note 4.
11 Countrywide Communications Ltd v ICL Pathway Ltd [2000] CLC 324 (QB) 349 [Countrywide].
The premium placed upon freedom of contract under English law has resulted in its reluctance to embrace the Continental idea of duty of good faith in the bargaining process. The adoption of such a duty would also be “inherently repugnant” to the assumption at English law that parties take “adversarial positions” when involved in negotiations.\(^\text{13}\) This “aleatory view” of negotiations stands as the greatest obstacle to the imposition of pre-contractual liability: “a party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations”.\(^\text{14}\) As Barry J stated in *William Lacey (Hounslow) Ltd v Davis*: \(^\text{15}\)

“[The claimant] undertakes this work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of such contracts as are made…”

One of the main concerns of imposing pre-contractual liability has been that it would have a “chilling” effect on parties.\(^\text{16}\) As the courts seek to protect the claimants from their pre-contractual losses, the courts have to respect the defendants’ autonomies. Otherwise, parties may adopt an overly defensive stance when entering into negotiations and stifle the spirit of cooperation that is desired. Hence, strong justifications must be provided for curtailing the defendants’ autonomies.

### 3.2 Harm Theory

The harm theory justifies the imposition of pre-contractual liability from a moral perspective. One can trace the roots of freedom of contract to the liberty of an individual, but liberty in itself has never been recognized as an unqualified right. In *On Liberty*, Mill theorises that:

“the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”.\(^\text{17}\)

Therefore, each individual has the liberty to act as he wishes, so long as these actions do not harm others. In the anticipated contracts context, the defendant is free to withdraw from the negotiations unless in so doing, he would cause harm to the claimant. This paper suggests that such harm is manifested in two forms – the reliance loss suffered by the claimant and wrongful transfer of value from the claimant to the defendant. While these two types of harm have a degree of overlap, they are separate and distinct, and are thus addressed by two different normative theories: (1) the duty to ensure reliability of induced assumptions and (2) corrective justice.

#### 3.2.1 Duty to Ensure Reliability of Induced Assumptions

A duty to ensure the reliability of induced assumptions can be derived from the general duty not to cause harm. Spence defines the duty as one which:

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\(^\text{13}\) *Walford v Miles* [1992] 2 AC 128 (HL) 138.


\(^\text{15}\) [1957] 1 WLR 932 (QB) 934.


“… places primary and secondary obligations on a party who (i) induces an assumption in the mind of another party and (ii) induces the other party to rely upon that assumption. The primary obligation is that the inducing party must, in so far as he is reasonably able, prevent harm to the relying party. ‘Harm’ consists in the extent to which the relying party is worse off because the assumption has proved unjustified than he would have been had it never been induced. The secondary obligation is that, if the relying party does suffer harm of the relevant type, and the inducing party might reasonably have prevented it, then the inducing party must compensate the relying party for the harm he has suffered.”

Spence’s formulation of the duty may favour the claimant unduly and a qualifier, that (iii) the assumption must be reasonable in the particular context, should be added. The reformulated duty and Spence’s definition of ‘harm’ thus narrow down Mill’s broad harm principle and demarcates clear boundaries that a substantive rule can operate within.

This duty also strikes a fair balance between a defendant’s negative freedom of contract and a claimant’s reliance interest. Where the defendant engages in negotiations and takes care not to induce any assumptions in the mind of the claimant, the defendant has the freedom to withdraw from negotiations any time prior to the formation of the contract. Even where he has induced an assumption, the defendant may still withdraw if he does so before the claimant has suffered any reliance loss. However, once the claimant has incurred expenses in reliance on his reasonable assumptions, the defendant will be liable to compensate the claimant for any reliance loss. Such a duty may be reminiscent of the continental duty of good faith, but they have two important conceptual differences. First, the duty of good faith suggests that both parties are expected to act in their common interests, while the duty to ensure the reliability of induced assumptions allows parties to take adversarial positions short of misleading the other party. Second, the duty to ensure reliability of induced assumptions is a theoretical duty and does not attract legal liability when it is breached per se. The claimant can only obtain compensation if he has a substantive cause of action against the defendant.

It may be argued that a claimant who does work in the absence of a contract takes the risk of non-payment and hence cannot claim to suffer harm. However, such a view is overly broad and detached from commercial reality. For example, it is the industry norm for contractors to commence work once a letter of intent is received and it is unrealistic for contractors to delay performance until the contract is finalized. Giliker cites two common law studies to show that parties are unlikely to “approach negotiations in an antagonistic manner” where they “share common interests, are dependent on each other or wish to develop a long-term relationship”. McFarlane explains that insistence on a commitment from the defendant may send the defendant

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19 Eg. contract, estoppel or restitution.
21 Giliker, ibid., 176 – 177.
unwelcome signs as to the claimant’s suitability as a contracting party and commercial parties may prefer to trust that notions of reciprocal fairness will provide a sufficient incentive for performance. In such situations, it would be inappropriate for the claimant to insist on entering into a binding contract before making any pre-contractual investment.

Although a harm theory based on a duty to ensure reliability of induced assumptions presents a normative reason why a pre-contractual expenditure ought to be recoverable, it cannot adequately explain some anticipated contract cases. For instance, where Y does work on X’s land under an agreement (expressly made ‘subject to contract’), Y may be reasonably led to assume that he had a good chance of obtaining the contract. Since the agreement was ‘subject to contract’, Y ought to know that he risks non-payment for the work done. However, Y’s risk-taking does not negate his assumptions that a contract might be forthcoming; Y still believes that a contract might be made eventually. How should one reconcile the theoretical duty with the concept of risk-taking? It would be unrealistic to say that risk-taking obviates any assumptions since it clearly does not. Risk is merely ancillary to any assumptions Y may make.

The duty also fails to justify recovery in instances where there is an absence of overt representations. By virtue of the smooth negotiations, both parties may share a common belief that a contract will eventuate in due course. However, since there was no clear act of inducement, Y’s assumptions that a contract will materialize simply arose from his own perception of the negotiations. Therefore, X would not be liable to compensate Y for Y’s pre-contractual expenditure. However, if X obtains a benefit as a result of Y’s efforts, X would be unjustly enriched at the expense of Y. It has been argued that the theoretical basis of unjust enrichment is founded upon the idea of corrective justice. Where the equality of the parties is disturbed in relation to a transaction between them, the imposition of restitutionary liability on one to the other would restore the parties to equilibrium. The disruption to the equality of X and Y translates into a type of harm to Y, however the duty to ensure reliability of induced assumptions is too narrow to address such harm. It is then inaccurate to see the duty as synonymous with the harm theory. The duty is merely a sub-set of the harm theory. There is thus a need to supplement this duty with another variation of the harm theory, viz. corrective justice.

3.2.2 Corrective Justice

The idea of harm in the context of corrective justice is not based on wrongdoing, but on the broader notion of normative gains and losses. Weinrib perceives the fundamental concern of the Aristotelian notion of corrective justice to be the maintenance of transactional equality. Where one party upsets an existing distribution of resources

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24 Weinrib, ibid., 117; Grantham and Rickett, ibid., 98.
25 Weinrib, ibid., 114 – 120.
between himself and another, liability is imposed on the party to restore the parties to the equilibrium position. While Aristotle failed to justify the normative content of corrective justice, Weinrib borrows the Kantian concept of right to provide an explanation. The Kantian right encompasses two types of legal rights – the right to the integrity of one’s body and the right concerning the external objects of the will. The former addresses the traditional concept of harm as commonly invoked under tort law; the latter includes rights to property and to contractual performance. In the pre-contractual context, we are more concerned with the right concerning the external objects of the will.

Grantham and Rickett derive two conditions for restitutionary liability from Weinrib’s theory of corrective justice. First, the transfer of wealth or value by the claimant to the defendant must be defective in the sense that the claimant did not exercise his choice freely. Where Y does work on X’s land on the basis that the parties would conclude a deal in due course, and the contract fails to eventuate, the basis for the transfer of wealth becomes defective. However, where Y knows that there is a clear risk of non-payment and he freely exercises his choice to do work despite the risk, he cannot thereafter claim that the transfer of wealth is defective. Second, there must be some reason or circumstance to implicate the defendant’s autonomy. This accords respect to the defendant’s interest in self-determination and his right over his personal wealth. Weinrib suggests that the defendant’s autonomy should be implicated where the value was not transferred gratuitously. Where Y does work in expectation of remuneration through a future contract, X cannot establish the benefit as part of his personal wealth without making some form of payment for it. X cannot demand respect to his autonomy without first respecting the autonomy of Y. However, Y is taken to have done the work gratuitously where he knows that there is a risk of non-payment but proceeds with it anyway. The value accrued thus forms part of X’s personal wealth and Y cannot insist on restoring the parties to the equilibrium position.

While corrective justice provides an alternative justification to the duty to ensure reliability of induced assumptions for the imposition of pre-contractual liability, it is crucial to view corrective justice only as a complementary theory. There are problems that cannot be adequately addressed by this theoretical model. Assume that after Y has done work on X’s land, X decides not to develop his land. The work done on the land is of no value to X. Neither has X been saved any necessary expenses since X would not have paid a third party to do the work that Y had done. Assume further that Y’s contribution to X’s land had not increased its value in any way. In fact, the uncompleted works decreased the value of the land since any potential buyer would need to clear the land before developing it. Here, Y has incurred reliance expenses, but X has not received any benefits. There is no transfer of value. Instead, there is an actual diminution of the collective wealth of both parties. There is no transactional inequality here that can be addressed by the notion of corrective justice. However, it is instinctively unfair that X’s liability to compensate Y is based on the adventitious circumstances of whether any value has been transferred. Corrective justice loses its

26 Ibid., 122.
27 Ibid., 128.
28 Ibid., 128.
29 Grantham and Rickett, supra note 23, 100–101.
explanatory force in such situations, and must thus be supplemented by the duty to ensure reliability of induced assumption.

4 The Concept of Risk

The courts are generally reluctant to impose any pre-contractual liability on the defendant when the claimant does work under the assumption of risk. Despite the central importance of the concept of risk in anticipated contract cases, there have been no attempts to elucidate the content of risk. Stoljar has defined this risk as “simply the risk we run where an agreement in which nothing is said about remuneration might yet be construed as remunerative, especially where the work done during that agreement cannot be considered to be gratuitous”. Ultimately, the issue of who should bear the risk is essentially a different manner of asking who should be liable to pay for pre-contractual preparations. The idea of risk is so intrinsically entwined with the fact-finding process that any attempts to give it substantive content would be tantamount to chasing the will-o’-the-wisp. Nevertheless, it may be helpful to distinguish the two different ways in which risk-taking may arise – the risk that has been allocated by the parties as a matter of fact and the risk that is imposed by law based on all the circumstances.

4.1 Allocation of Factual Risk

Whether there has been an allocation of risk is a matter of fact based on evidence. In the absence of a contract, courts have often relied on various factors to determine whom the risk of negotiations failing lies upon. Barker has helpfully distilled six evidential factors relevant to the determination of risk from his sample of pre-contract cases:

(1) whether negotiations were ‘subject to contract’;
(2) whether the work was an ‘accelerated part of contract performance’ or was merely ‘preparatory’ to the contract;
(3) whether the work was for a purpose extraneous or collateral to the contract itself, so as to fall outside its ‘ambit’;
(4) whether the defendant requested the work done;
(5) whether the work was of a kind normally provided free of charge;
(6) whether the claimant was acting in order to benefit the defendant, or out of his or her own ‘self-interest’.

31 Spence, supra note 18, 93.
32 Barker, supra note 5, 119–127.
33 Ibid., 120. This factor is a very strong indication that parties have allocated the risks. However, there could be instances where the parties used the term ‘subject to contract’ without appreciating its meaning. In such cases, the court may be more reluctant to find that term reflects the parties’ risk allocation.
34 Ibid., 122–123.
36 Ibid., 124–125.
37 Ibid., 125.
The above factors are meant to provide useful guidance to the courts in finding where the risk lies, but they are by no means exhaustive. The court may take into account of other factors, and whether there has been an allocation of risk must ultimately be determined on a case-by-case basis. A finding that the claimant has in fact taken the risk generally precludes the operation of any substantive rules of recovery.\textsuperscript{39}

\section*{4.2 Normative Risk Imposed by Law}

Even where there is insufficient evidence to support a finding that the parties have allocated the risk, the courts may nonetheless find that the claimant should be deemed to have taken the risk based on all the circumstances. In \textit{Brewer Street},\textsuperscript{40} where work done in anticipation of a leasing agreement was wasted when the agreement failed to materialize, Denning LJ stated:

\begin{quote}
“The question is: on whom is the loss to fall? The parties themselves did not envisage the situation which has emerged and did not provide for it; and we do not know what they would have provided if they had envisaged it. Only the law can resolve their rights and liabilities in the new situation, either by means of implying terms or, more simply, by asking \textit{on whom should the risk fall}?\textsuperscript{41}
\end{quote}

(Emphasis added)

More recently, Lord Hoffman, in the context of a claim for mistaken payment, adopted the view that the risk is imputed:

\begin{quote}
“whether a party \textit{should be treated as having taken the risk} depended upon the objective circumstances surrounding the [enrichment] as they could reasonably have been known to both parties”.\textsuperscript{42}
\end{quote}

(Emphasis added)

What are the considerations taken into account by the courts when deciding on the normative risk? Although there is no clear judicial guidance on this issue, a few factors can be inferred from the cases. The first is the relative gains and losses of the parties. Where a claimant derives a benefit from his labour, while the defendant could not benefit from it, the claimant will usually be made to bear the loss.\textsuperscript{43} On the contrary, the courts will be more reluctant to find in favour of the defendant if the claimant does not obtain any gains.\textsuperscript{44} Second, the circumstances in which the negotiations broke down are germane.\textsuperscript{45} If the circumstances are beyond what reasonable parties would have directed their minds to, the court is more likely to find that they fall outside the scope of risk undertaken by the claimant at the outset. For example, if the project is a large one which is likely to take a long time to negotiate, the claimant is more likely to be deemed to have assumed the risk because parties can reasonably expect negotiations to be

\begin{thebibliography}{9}
\bibitem{Regalian} See \textit{Regalian Properties plc v London Docklands Development Corporation} [1995] 1 WLR 212 (Ch) \cite{Regalian}; \textit{Yeoman's Row}, supra note 2, [25]. Although Lord Scott, in \textit{Yeoman's Row}, was referring to a proprietary estoppel claim, the reasoning applies \textit{mutatis mutandis} to promissory estoppel.
\bibitem{supra note 4} Supra note 4.
\bibitem{supra note 4, 436.} Supra note 4, 436.
\bibitem{Deutsche Morgan Grenfell v IRC} \textit{Deutsche Morgan Grenfell v IRC} [2007] 1 AC 558 (HL) [28].
\bibitem{Jennings} Jennings, supra note 4.
\bibitem{Brewer Street, supra} Brewer Street, supra note 4.
\bibitem{Brewer Street} Brewer Street, supra note 4; \textit{Sabemo Pty Ltd v North Sydney Municipal Council} [1977] NSWLR 880 (New South Wales Supreme Court, Australia) \cite{Sabemo}; \textit{Countrywide}, supra note 11.
\end{thebibliography}
hampered by changing economic conditions. The third consideration is whether there is asymmetrical knowledge of the pre-conditions to the anticipated contract. In Jennings, the lessee proposed to sublet the premises to a solicitor and agreed to convert the place into an office. The sublease did not materialize due to certain covenants in the head lease. The court imposed the normative risk on the lessee since he knew of the obstacles but did not alert the solicitor to them. Again, these factors are neither exhaustive nor conclusive and each problem must be approached individually.

5 A Principled Approach – The Gradation Model

5.1 The Root of Divergence

The divergent approaches towards pre-contractual cases are triggered by their fundamentally distinct starting points – the reliance detriment suffered by the claimant because his induced assumption has been proved unjustified and the transactional inequality when value is unjustly transferred from the claimant to the defendant. The estoppel argument addresses the former, while the unjust enrichment argument tackles the latter. There is also a perpetual tension between the need to respect the parties’ freedom of contract and the desire to deter parties from abusing this freedom. The factual risk analysis and contractual solutions value the notion of freedom of contract. Fault-based decisions determine recovery in accordance with the degree of culpability of the defendant. Despite the different routes taken, they all lead to the common goal of serving justice.

5.2 A Gradation Model

This paper proposes a gradation model that attempts to incorporate the different approaches into a neat framework that achieves the rationale of the imposition of pre-contractual liability. The purpose of this model is not to prove that there is one substantive rule that fits all situations, but rather it is to show that the adoption of one approach to the exclusion of others would neglect the various objectives that the imposition of pre-contractual liability is supposed to achieve. There is no one correct rule to use in pre-contractual cases, but only the correct rule to use in achieving the desired aims.

Since the imposition of pre-contractual liability is to remedy two different types of harm, the model must consist of two causes of action: promissory estoppel to protect the claimant’s detrimental reliance and unjust enrichment to reverse any transactional inequality. Although there may be a degree of overlap, the two harms are of a different nature and there is no single action that can appropriately address the harms concurrently. A claimant who wishes to protect his reliance expenses should bring an

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46 Countrywide, supra note 11, 348.
47 Supra note 4.
48 The exact legal nature of the estoppel is beyond the scope of this paper. While English law does not recognize promissory estoppel as a cause of action, the difficulties of using promissory estoppel as a sword is not insurmountable. American and Australian courts have favoured the doctrine of promissory estoppel as the answer to imposing pre-contractual liability. (See Hoffman v Red Owl Stores, 133 NW 2d 267 (1965); Cyberchron Corp. v Calldata Systems Development, Inc., 47 F 3d 39 (2nd Cir. 1995); Walton Stores, supra note 3; Verwayen, supra note 3.) Promissory estoppel and variations of estoppel have also received substantial academic support (see Giliker, supra note 20, 151; Spence, supra note 18, 87; McFarlane, supra note 22, 11–12; R Goff and G Jones, The Law of Restitution (7th edn Sweet & Maxwell, London 2007), 672.)
action under promissory estoppel, while a claimant who desires to obtain the value unjustly transferred to the defendant should plead unjust enrichment. The model does not include a contractual approach because it simply expands the notion of contract so as to preclude the contract in question from failing. Hence, that is a separate question of how far should the ambit of contract law stretch and is beyond the scope of a model that addresses pre-contractual situations.

A sliding scale of fault and risk-taking constitutes the spine of the model. (See Diagram 1 below) On one end of the spectrum, we have a scenario in which Y has taken the greatest degree of risk by doing work under an agreement that was ‘subject to contract’ and in which X is relatively fault free. The court will be unlikely to impose any pre-contractual liability in this situation. On the other end of the spectrum, we have a scenario in which Y has taken minimal risk and in which X’s conduct was culpable (e.g. inducing Y into providing work for free when X had no intention to contract with Y). The court will be more likely to impose pre-contractual liability in this situation. In any particular scenario, the chances of success of a claim for pre-contractual compensation will depend on the interplay between the elements of risk and fault, subject to the substantive principles underlying the two causes of action.

5.2.1 Reconciling the Causes of Action with the Gradation Model

The causes of action relate back to the theoretical bases of pre-contractual liability, therefore the gradation model cannot be presented in isolation from the causes of action. If risk and fault form the skeleton of the model, then promissory estoppel and unjust enrichment constitute the flesh of this theory. Their relationship can be illustrated through the use of a pyramidal structure (see Diagram 2). In order to establish pre-contractual liability, the claimant must pursue his claim under either of the two causes of action. The results of the causes of action will in turn depend on the degree of risk and fault present in each factual scenario. The connection between risk, fault and the causes of action will be expounded next.
5.2.2 *Promissory Estoppel*

Promissory estoppel is often equated with a fault-based model and the language of risk-taking is conspicuously absent from the estoppel analysis. The concept of risk is an important aspect of establishing a claim under promissory estoppel but it has been masked under the unconscionability inquiry. Although the label “unconscionability” has commonly been associated with vagueness, Spence has provided us with a principled approach to determining unconscionability with his list of eight criteria:

1. How the assumption and reliance upon it were induced?
2. What is the content of the relevant assumption?
3. What is the state of relative knowledge of the parties?
4. What is the parties’ relative interest in the relevant activities in reliance?
5. What is the nature and context of the parties’ relationship?
6. What is the parties’ relative strength of position?
7. What is the history of the parties’ relationship like?
8. Whether the party who has induced the relevant assumption has already taken any steps to ensure that he has not caused preventible harm.

The focus here will be on factors (4), (7) and (8) because they are closely related to the element of risk.

The court is more likely to find unconscionability where the relying party has a greater interest in the relevant activities in reliance than the inducing party. The rationale is that “the greater the interest of the party against whom the estoppel is sought...
in the other party’s reliance, the more likely it is that he induced it”. Spence contrasts the case of Walton Stores with Powprop Pty Ltd v Valbirn Pty Ltd to support this view. Both cases involved construction work undertaken in anticipation of a prospective lease. In Walton Stores, the inducing party, who was the lessor, had a stronger interest in having the relying party act upon the assumption (that the formalities for the lease would be completed in due course) to build a premise to certain specifications. But in Powprop, the relying party, who was the lessor, had a greater interest because he “was extremely anxious to enter into a lease with the [lessee], and was prepared to ‘risk the expense of the alterations in the hope that it might achieve what it wanted.’” It thus appears that where the relying party takes the risk of expenditure to further his own interests, there is a greater likelihood that his expenses were not incurred in reliance on the inducement and it will not be unconscionable for the inducing party to resile from his representation.

Spence deems the history of the parties’ relationship as relevant towards a finding of unconscionability because reliance will more readily be induced in a lengthy relationship. Where the relying party has done work over a long period of time for the inducing party, the court is less likely to find that the relying party has taken the risk and provided his services gratuitously. In Sabemo, the claimant did substantial work over a period of three years, in the absence of a contract, before the defendant aborted the building project. In arriving at its decision that the defendant was liable to compensate the claimant, the court took cognizance that work had been done over three years, and it would be “unthinkable that the [claimant] would have been prepared to do what it did if it thought that the defendant might change its mind about proceeding with the proposal”.

The inducing party would be deemed to have taken steps to ensure that he has not caused preventible harm where he has given notice that the assumption is not to be relied upon. The classical example to this is where pre-contractual dealings are expressly provided to be ‘subject to contract’. As discussed earlier, the use of the term ‘subject to contract’ is usually clear evidence of risk allocation by the parties and the loss would fall where it lies when a party takes the risk in doing work. Where parties have clearly expressed their intentions not to be bound, the court should be slow to find reliance upon any assumptions.

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50 Ibid., 63.
51 [1990] ANZ Conv Rep 529 (Supreme Court of Queensland, Australia).
52 Ibid., 530.
53 Spence, supra note 18, 64.
54 Supra note 45.
55 Sabemo, supra note 45, 319.
56 Spence, supra note 18, 65.
57 Attorney General of Hong Kong v Humphreys Estate (Queen’s Garden) Ltd [1987] 1 AC 114 (HL); Regalian, supra note 39.
5.2.3 Unjust Enrichment

Restitution scholars have oft mention that a risk taker should not be allowed to plead that the other party has been unjustly enriched. While there is general acceptance of this view, the exact relationship between risk-taking and unjust enrichment has been relatively unexplored by academics and judges alike. In Yeoman’s Row, the House of Lords noted that the claimant knew that the “agreement in principle” was only “binding in honour” but he chose to provide his services notwithstanding this. The language of risk-taking was expressly used by Lord Walker, who referred to the claimant’s undertaking of risk in deciding to rely on the defendant’s sense of honour. Despite the risk taken by the claimant, their Lordships imposed restitutionary liability on the defendant to reimburse the claimant’s outgoings and pay him a fee for his services. The decision thus appears to be incompatible with the dominant academic opinion that risk taking is incompatible with unjust enrichment.

This paper made the distinction between factual risk and normative risk earlier on and it is submitted that this distinction is essential to the understanding of the relationship between risk-taking and unjust enrichment. The finding of a factual risk is an evidentiary finding that the parties had, as a matter of fact, allocated the risk and the courts should therefore be slow to interfere with the conscious decision of the parties. Where the evidence is not enough to support a clear finding that the parties had allocated the risk, the court may nevertheless, as a matter of law, deem that the claimant had taken a risk if the existing evidence and other circumstances warrant such a conclusion. A parallel can be drawn with the situation where the parties have made a contract. Unjust enrichment cannot operate in the existence of a contract because that would “disturb the legitimate hope and fears inherent in the bargain”. However, where there is a gap in the contractual allocation of risk, restitution should be allowed since it would not unsettle the bargain of the parties.

Referring back to diagram 1 above, where the parties have provided that their negotiations are ‘subject to contract’, it will be a clear case that the parties have expressly allocated their risk so as to preclude an unjust enrichment claim. If there is insufficient evidence to support a clear finding of risk, then whether the claimant should be deemed as a risk taker would depend on the application of the principles of unjust enrichment. The notion of a normative risk is thus inherent in the substantive content of unjust enrichment.

We shall now turn to the issue of reading normative risks into the principles of unjust enrichment. Barker suggests that several of his factors are relevant both to the


\[^{59}\text{Supra note 2.}\]

\[^{60}\text{Yeoman’s Row, supra note 2, [15] (Lord Scott) and [74] (Lord Walker).}\]

\[^{61}\text{Ibid., [72].}\]


issue of risk allocation, as well as to the unjust enrichment inquiry. The type of work done may impact on the finding of an enrichment received by the defendant. Advance contractual performance is more likely to be beneficial to the receiver than preparatory work meant to help the claimant in his contractual bid. Work collateral to the failing contract may also be more valuable than work closely connected with the proposed contract because it has a value independent of the venture’s success. The kind of work done may also affect the finding of injustice. If the work in question is usually provided free of charge in the industry, it may negate a claim based on failure of consideration or free acceptance since an unconditional donative intent indicates that the claimant had consented to the defendant receiving the benefit without payment.

The concept of risk may also be relevant in the determination of the basis on which the claimant did work. The identification of the basis is necessary for the unjust factor of failure of consideration to apply, but “in the absence of an express stipulation as to the basis upon which pre-contract work is carried out, it is not easy to discern the basis upon which work is done”. In such cases, the courts will have to infer the performing party’s state of mind from the surrounding facts and circumstances. There are three reasons why a party would confer a pre-contractual benefit. First, the party may have an unconditional donative intent. Even if the party knew from the outset that he has no chance of ever being remunerated for his work, he would so proceed nonetheless. There may be other ancillary reasons why the party would commit unconditionally, such as to build up his reputation in the industry, but these reasons do not detract from the party’s primary intention to confer the benefit out-and-out. Such situations are, however, unlikely to occur in commercial cases. Second, the party may have conferred the benefit in the hope that he would secure a contract with the receiving party subsequently. Third, the party may have done work under the assumption that it would be paid for under subsequent arrangements. The first situation will rarely arise in reality and can only be proven where there is clear and unequivocal evidence. The basis for the conferment of a benefit usually falls into the second or third categories; however, only the third situation will give rise to a failure of consideration. How do the courts then distinguish between the two bases? Birks addresses this problem in the following passage:

“There is a fine line between, on the one hand, wanting a contract to come into existence but taking the risk that it may not, and, on the other, acting solely on the basis that it will. In general this line is found by asking whether the claimant made it clear to the recipient that he was not taking that risk or reasonably believed that the recipient knew that he was not.”

Burrows proposes a similar test to the one adopted by Birks above:

“In line with the standard meaning of failure of consideration, the claimant alleging that the rendering of the benefit was conditional on an unpromised future event can only avoid being treated as a risk-taker not entitled to restitution

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64 Barker, supra note 5, 122–127.  
65 Ibid., 123.  
66 Ibid.  
67 Ibid., 184.  
68 Birks 2003, supra note 58, 129.
if he either expressly communicated the contingent condition to the defendant or was *reasonably led to believe* by the defendant that he (the defendant) knew that the contingent condition was the basis for the benefit being rendered."

The essence of the two tests can be restated as a 2-stage inquiry. First, did the claimant communicate his expectation to be remunerated under subsequent arrangements to the defendant? If he did, there is a failure of consideration. Otherwise, the second question must be asked: Did the claimant have a reasonable belief that the defendant knew that he (the claimant) expected to be remunerated under subsequent arrangements? If the answer is affirmative, there is a failure of consideration. However, if the question is answered in the negative, then the claimant is a risk-taker and all he has is merely a *hope* for remuneration. The reasonable belief of the claimant and his risk-taking are thus two sides of a same coin and depend on the same factual inquiry. Failure of consideration is inextricably linked to the element of normative risk.

The next obstacle to reconciliation with the gradation model is the apparent incompatibility of unjust enrichment and fault. Unjust enrichment has always been seen as a strict liability claim and is generally independent of fault. However, it is an overstatement to say that fault is always irrelevant. There are a few exceptional situations where the fault of the defendant is an essential ingredient of an unjust enrichment claim. For example, bad faith will deprive the defendant of the availability of the change of position defence. Fault can also be relevant in the identification of an enrichment and a defendant is prevented from subjectively devaluing a benefit after he has freely accepted the benefit. Furthermore, fault plays an important role as a ground of restitution under free acceptance. Although free acceptance is a controversial unjust factor due to its fault-based nature, once its efficacy is denied, it follows that either unjust enrichment is unable to justify many pre-contractual cases or that the cases which refer to fault are wrongly decided. Birks clearly valued free acceptance as an unjust factor and persuasively argued for a residual role for fault-based restitution when the inquiry into plaintiff-sided factors has produced a negative result. Without free acceptance, a risk-taker (in the factual sense) cannot protest that the other party has been unjustly enriched, even if the benefit had been extracted unconscientiously. However, free acceptance:

> “works because of the unconscientiousness of the recipient in not availing himself of the opportunity to save the intervener from the risk. The unconscientious nature of the resulting receipt is what justifies tipping the balance in favour of the intervener and allowing the *quantum meruit*.”

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69 *Burrows, supra* note 58, 408.


72 Rattee J appears to be of this view when he doubted whether the fault principle exists in English law in *Regalian*, *supra* note 39, 230–231.

73 *Birks 1991, supra* note 71, 144–145.

74 *Ibid.* at 111. It is unfortunate that Birks uses the term ‘*quantum meruit*’ since its legal basis is unclear (*supra* note 5). But *quantum meruit* here is clearly used in the restitutionary sense.
The unique fault-based nature of free acceptance allows it to justify recovery in instances where the claimant was a risk taker (as a matter of fact).

5.3 The Gradation Model Framework

This paper has established the conceptual relationship between the two causes of action and the basic ideas of risk and fault. Next, a framework to approach pre-contractual cases shall be proposed. The question of pre-contractual liability can be broken down into a four-stage inquiry:

(1) Do the circumstances of the case support a clear finding of risk allocation by the parties?75

(2) Is the conduct of the defendant of a sufficient degree of fault to negate any factual risk taking on the part of the claimant?

(3) What is the harm that the claimant desires to remedy?

(4) Are the elements of the cause of action satisfied on the facts of the case?

In stage (1), a clear finding that the claimant has taken the risk of non-recovery of his investment will generally preclude the imposition of pre-contractual liability. The parties have struck their bargain and the courts should refrain from interfering unless there are exceptional circumstances that warrant intervention. Whether there is a valid case for judicial intervention falls under the stage (2) inquiry. Unless the behaviour of the defendant falls far below the standards of reasonable businessmen, the court should be slow to disregard the risks allocated by the parties. The standard is neither one of good faith nor complete honesty since it has been recognized that parties do take “adversarial positions” in negotiations76 and business people cannot be expected to put their “cards face upwards on the table”77. If the parties have not allocated the risks under stage (1) or if they have done so, but the case falls under the exceptional circumstances in stage (2), the court shall proceed to stage (3). Otherwise, the pre-contractual claim fails. In stage (3), the court will need to identify whether the claimant is pleading to protect his detrimental reliance or for the reversal of a transactional inequality. The type of harm will necessarily determine the cause of action. Finally, the courts will apply the principles of promissory estoppel or unjust enrichment in stage (4) to determine if the case for imposition of pre-contractual liability has been made out.

75 See Section 4.1 for the list of factors that may provide useful guidance.
76 *Walford v Miles*, supra note 13, 138.
77 *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433 (CA) 439 (Bingham LJ).
6 Conclusion

There is a need to bring consistency and order to the troubled realm of anticipated contracts, but that cannot warrant the sacrifice of substance for form. An approach founded upon one single liability model is prone to the distortion of legal principles and must be rejected for its artificiality. While the imposition of pre-contractual liability is desired from an efficiency and moral perspective, the legal response should always correspond to the type of harm in question. The paper proposes that promissory estoppel should be invoked to remedy detrimental reliance, and unjust enrichment should be adopted to correct any transactional inequalities between parties. Risk and fault are not separate legal categories from the traditional models of liability, but the building blocks of the legal principles. Cases can be arranged along a gradation scale based on the degree of risk and fault involved, and that constitutes the starting point of every pre-contractual legal inquiry. Although the gradation model admittedly does not eliminate the uncertainties that arise from the fact-sensitive nature of pre-contractual problems, it reconciles the piecemeal solutions into a coherent picture. The contractor in dilemma may henceforth be able to enforce his legal rights on a more principled basis.
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