A Proposal for a Single Model of Equitable Estoppel

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(Ph.D.)

Volume I

Declaration

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31 March 2017

Summary of methods used and major findings

The research objectives were to build a unified equitable estoppel model that simplified the irregularities in the equitable estoppels as identified in England, while consolidating the essential principles to be applied in a unified model, with a view to potentially applying the model generally. Other jurisdictions which received notable focus were Ireland and Australia, chosen respectively because of the fertile Irish ground for further development, and because the Australian approach diverges significantly from that in England. The model sought to simplify and consolidate equitable estoppel, and to make it generally applicable.

The focus on English cases throughout the thesis served to highlight some difficulties within equitable estoppel as it has developed in that jurisdiction in particular and hence identify the most confusing features of the doctrine. Two surveys were conducted, which showed four key issues: an imprecision of terminology, a perception that estoppel is a fallback claim, a possible lack of development of the doctrine, and some welcoming attitudes towards a possible unified doctrine and of fulfilling such missing development. In particular, it was questioned whether these concerns were more broadly indicative of the existence of doctrinal inconsistencies, and whether a unified model could be proposed which would address those inconsistencies.

A model was incrementally built by addressing some wider doctrinal concerns in the English law. A conceptual sketch found that there is space for welcome development of a doctrine reddressing detrimental reliance, and that this concept is associated with equitable estoppel. On the basis of the views of McFarlane and Liew respectively, it was, first, found that a possible unified equitable estoppel would be in the nature of a liability, and, it was, secondly, suggested that it would give rise to a reflective remedy in the shape of a minimum equity.

Meanings of unconscionability, a concept in equitable estoppel which has led to a great deal of commentary, were separated and analysed. It was found that unconscionabilty can mean, first, the jurisdiction in the sense of a basis for the existence of equitable estoppel in the first place; secondly, the context in which the reliance takes place; thirdly, the justifiability of the reliance; fourthly, whether it is unconscionable to move to an inconsistent position; fifthly, whether the court ought to grant a remedy; and, finally, what parameters aid the court in shaping the remedy.

Meanwhile, several inconsistencies were found in the processes of shaping a liability and a remedy in English law. English law and doctrinal commentary generally prefers not to view some estoppels as giving rise to a cause of action, and not to accept a unified doctrine: contrasting views were put forward dealing with both matters. The liability-finding process itself was found to have a simpler basis than it currently has, and the remedy-finding process tending towards the award of an expectation was compared with similar processes in other jurisdictions. All were viewed as potential barriers to further development of doctrine and thus as having a direct bearing upon the findings in the surveys, and their implications. All of this was argued to be conceivably soluble by building a unified model.

Having addressed the main doctrinal questions, the findings were used to begin building some answers.

A simplified and unified model was built which established the required steps as follows: (A) proof by the claimant of detriment, (A)(i) proof by the claimant of the relevance of that detriment by reference to a subject-matter, (B) disproof by the defendant of inducement, (B)(i) a defence of unreasonable reliance – which, if leading the court to find that a liability had been raised, completed (C)(i). Then, (C)(ii) allowed the court to find that conscience required the granting of a minimum-equity-based remedy, and (C)(iii) allowed the court to vary the remedy as found. The steps were built upon distinct findings throughout the thesis: for example, (C)(ii) built upon a combination of meaning five of unconscionability, and an analogy with legitimate expectation.

The model was then tested using real-life cases. Its positive points and limitations were discussed in relation to its possible adoption in England, Australia, and Ireland. Issues relating to concurrent liability were discussed, and possible general weakenesses identified.

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Chapter 1: Introduction

1.1 The short summary

The impetus for this thesis was the suspicion that equitable estoppel is being declared obsolete in academia, and by some judges, despite its potential to be a powerful secondary doctrine accompanying contract and with a role similar to that of unjust enrichment and some forms of trust. If not always seen as being obsolete, it is often misunderstood. Several issues contribute to such perceived mystery. There is a plethora of terms used for different types of estoppel.[1] A number of these overlap, suggesting that at least some are superfluous. Wildly varied metaphors are used to describe aspects of estoppel's operation.[2] It is not entirely clear whether estoppel in equity is in its infancy[3] or already dead.[4] In a doctrine ostensibly concerned with inconsistency,[5] there is one inconsistency that cannot be ignored: non-proprietary estoppel is not recognised as giving rise to a cause of action, while proprietary estoppel is.[6] There is a general sense that the doctrine is confusing, which can explain why it is misunderstood as jurists will understandably be more reluctant to engage with areas of the law that appear to be less settled. While the metaphors and the inconsistency might not in themselves spell the end of the doctrine, their existence alongside confusion does not portend an auspicious

[1] It is submitted that the unfortunate effect of this varied nomenclature is confusion. In *Re JR* [1993] ILRM 657 (HC), Costello J spoke as if promissory estoppel applied when a more appropriate term (if one had to be chosen rather than the overall 'equitable estoppel' term) might have been proprietary estoppel. It may also be argued that the use of older terms could lead to preventing development, as Oliver J foresaw in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch). A recent example of this occurring is in the English Court of Appeal decision of *NRAM Plc v McAdam* [2015] EWCA Civ 751 [10] remarking that, if the claimant's desired result could not be achieved in the interpretation of the contract, 'the same result could be reached by relying on the doctrines of contractual estoppel, estoppel by convention, estoppel by representation or promissory estoppel'; or at [56] mentioning that the trial judge had held that the claimant was estopped 'on the basis of some sort of contractual estoppel, estoppel by convention or estoppel by representation.' See Chapter 7 below for a discussion of *NRAM Plc v McAdam* and how the model of equitable estoppel proposed in this thesis would apply to it.

[2] See Chapter 4.

[3] *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023 [80]: 'developing'; *Aquavita International SA v Ashapura Minechem Ltd* [2015] EWHC 2807 (QB) [66]: 'evolving.'

[4] See Andrew Robertson and Ben McFarlane, 'The death of proprietary estoppel' [2008] 4 Lloyd's Maritime and Commercial Law Quarterly 449; Jane Taylor, 'The Role of Estoppel as a Defence to Claims in Unjust Enrichment' (2003) 9(4) Auckland University Law Review 1208, 1211: 'yet another nail in the estoppel coffin.'

[5] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 32: 'estoppel is about inconsistency, rather than about misleading or telling lies.'

[6] See Chapter 3.

existence for equitable estoppel. The occasional use of the doctrine in English cases which not only involve commercial contracts relating to significant amounts of money[7] or large estates from which disputed gifts have been made,[8] but in which estoppel was actually central to the result, would suggest that the imprecision attached to estoppel should come to an end. Two surveys undertaken in this chapter will in fact show that, in the majority of cases in which estoppel has been invoked in recent years, it is an unsuccessful attempt to obtain through *some* estoppel doctrine (which one does not seem to be clear, since several are often invoked) what might not be available under better-recognised sources of remedies. However, in view of recent statements made by English courts that estoppel is still developing,[9] it would appear to be particularly important at this juncture to bring together in one place the range of scholarship on the essential points of the doctrine, and to answer the most pertinent questions surrounding it.

1.2 Formulation and categories

A simple definition will suffice to introduce the terms being used in the recent cases surveyed in this Chapter, although a fuller treatment of the development of equitable estoppel will be provided below. The example provided by Cooke[10] of Lord Denning MR's description is a good starting-point: estoppel is 'a principle of justice and of equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.'[11]

The general principle has been expressed more specifically. Thus, Lord Denning MR in a different case also stated that

when a creditor and a debtor enter upon a course of negotiation, which leads the debtor to suppose that, on payment of the lesser sum, the creditor will not enforce payment of

[7] See *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 (in which the presence or otherwise of an estoppel would have meant a difference of €5.7m in respect of the appellant's fees: see the discussion of this case in section 3.4.1 below).
[8] See *Davies v Davies* [2014] EWCA Civ 568 (in which the respondent was held to be entitled to an award of £1.3m in respect of her equity arising from proprietary estoppel).
[9] *Aquavita International SA v Ashapura Minechem Ltd* [2015] EWHC 2807 (QB) [66]: '[o]f course, promissory estoppel is an ever evolving area of the law'; *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023 [80] discussed estoppel by convention's 'modern (and developing) principles.'
[10] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 2.
[11] *Moorgate Mercantile Co Ltd v Twitchings* [1976] 1 QB 225 (CA) 241 (the decision was reversed [1977] AC 89 (HL) but Lord Wilberforce's dissenting speech has been influential: see section 3.4.1).

the balance, and on the faith thereof the debtor pays the lesser sum and the creditor accepts it as satisfaction: then the creditor will not be allowed to enforce payment of the balance when it would be inequitable to do so.[12]

This was in turn based on his dicta in *Central London Property Trust Ltd v High Trees House Ltd*,[13] which he noted 'caused at the time some eyebrows to be raised in high places. But they have been lowered since.'[14] Meanwhile, the general formulation chosen by McFarlane for proprietary estoppel[15] is that it is 'based on three main elements… a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.'[16] It has also been said of proprietary estoppel, in a case involving what could also be characterised as an estoppel by convention, that it

> requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.[17]

A fuller treatment of the origins of equitable estoppel and the different categories that exist will be made below in section 1.5.

1.3 Background: the law and the literature

1.3.1 Academic commentary

There are five works that comprehensively treat the English law of equitable estoppel. A new edition of *Spencer Bower's The Law Relating to Estoppel by Representation*[18] has appeared in 2017 with the title *Reliance-Based Estoppel*.[19] In

[12] *D & C Builders Ltd v Rees* [1966] 2 QB 617 (CA) 624.
[13] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB) 134.
[14] *D & C Builders Ltd v Rees* [1966] 2 QB 617 (CA) 624.
[15] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 1.04.
[16] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [29] (Lord Walker).
[17] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch) 151-152.
[18] The 2004 title: George Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham, Daniel Hochberg and Tom Leech eds, 4th edn, Bloomsbury Professional 2004).

reverse chronological order, the remaining four are *The Law of Proprietary Estoppel*,[20] by Professor Ben McFarlane, published in 2014, *Wilken's Waiver and Estoppel* published in 2012 and authored by Sean Wilken with Karim Ghaly, while Professor Elizabeth Cooke published the 176-page *The Modern Law of Estoppel*[21] in 2000.

Michael Spence's *Protecting Reliance: the Emerging Doctrine of Equitable Estoppel* [22] and DYK Fung's *Pre-contractual Rights and Remedies: Restitution and Promissory Estoppel*[23] are shorter works which were published respectively in Australia and Malaysia, but which incorporate some English law. Spence's work is notable, first, in that it frames equitable estoppel (promissory and proprietary) as a duty to ensure the reliability of an induced assumption and, secondly, it divides the requirements for this duty into fourteen distinct elements.[24]

Textbooks on contract law, property law, and equity usually feature a section on estoppel.[25] Specialist private law works such *Contract Theory* by Stephen Smith[26] also address estoppel.

A wave of articles greeted the House of Lords decisions of *Cobbe*[27] and *Thorner*[28] in 2008 and 2009, but since then there have been few major cases in the area, and thus not a large amount of commentary.

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[19] Spencer Bower, *Reliance-Based Estoppel* (P Feltham, T Leech, P Crampin, J Winfield eds, 5th edn, Bloomsbury Professional 2017).
[20] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014).
[21] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000).
[22] Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999).
[23] D Y K Fung, *Precontractual Rights and Remedies: Restitution and Promissory Estoppel* (Sweet & Maxwell Asia 1999).
[24] As will be seen, this test is longer and establishes a different burden of proof than that proposed in this thesis. Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999) 25: '(a) Equitable estoppel is a single doctrine of common law and equity, (b) able to be used as either a cause of action or defence, (c) between two parties not necessarily in any kind of pre-existing relationship. (d) To establish an estoppel, one party, A, (or his privy?), (e) must show that he has held an assumption (f) regarding the present or the future, of fact or of law, (g) and that he has acted or refrained from acting, (h) in reliance upon that assumption, (i) to his detriment. The detriment which A must show is that he is in a worse position, because the assumption upon which he has relied has proved unjustified, than he would have been had he never held it. (j) A must also show that the other party, B (or his privy?), (k) induced the relevant assumption (l) and, having regard to a number of specified considerations, it would be unconscionable for B not to remedy the detriment that A has suffered by relying upon the assumption. (m) When these things are established, the court may award a remedy sufficient to reverse the detriment that A has shown. (n) Defences.'
[25] For example, Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) paras 3-076-3-101, 3-112-3-152; Snell, *Equity* (John McGee ed, 33rd edn, Thomson Reuters 2015) Chapter 12; Hilary Biehler, *Equity and the Law of Trusts in Ireland* (6th edn, Round Hall 2016) Chapter 28; Hanbury and Martin, *Modern Equity* (Jamie Glister and James Lee eds, 20th edn, Sweet & Maxwell 2015) paras 30-018–30-034.
[26] Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 233-244.

1.3.2 Case law

Case law is an indispensable part of an estoppel study. The origins of the doctrine are in the English courts and thus, the academic focus has often been on black letter law from England which is usually contrasted with developments in Australia, where there has been a divergent approach.

It is submitted that the existence of different kinds of estoppel which are either not actually distinct, or which alternatively should not be considered to be part of estoppel, as well as the piecemeal nature of the development of the doctrine, have led to an unfocused treatment of the case law. The commentary seeking to ground and classify estoppel in private law is as yet tentative and suggestive. Smith has suggested the following three possible purposes: first, 'to protect detrimental reliance' and, '[m]ore specifically, …to protect persons who reasonably and detrimentally rely on the representations of others, promissory or otherwise';[29] secondly, to enforce promises while avoiding the limitations of consideration;[30] thirdly, a third-way option in which the aim is to enforce promises detrimentally relied on.[31] Meanwhile, McKendrick has put forward six possible bases for estoppel: an alternative to consideration in contract, a cause of action to enforce promises outside contract, a wrong based on unconscionability and which, however, does not lie in tort, a way of reversing unjust benefits, a cause of action in equity with a flexible remedy, and, finally, the duty to ensure the reliability of induced assumptions that was described by Spence.[32] Further to these ideas about the conceptual role of estoppel, Robertson has put forward three possible purposes for estoppel which most pertinently concern its remedial aim: these are 'protecting against detrimental reliance; preventing unconscionable conduct; and fulfilling assumptions.'[33] While it is possible to envision estoppel as a doctrine to which limited recourse will be had and which has limited effect, it is not necessary for this that the doctrine be surrounded by a lack of certainty and a relatively piecemeal development.

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[27] *Cobbe v Yeoman's Row Management* [2008] UKHL 55, [2008] 1 WLR 1752.
[28] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.
[29] Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 234.
[30] Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 234.
[31] Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 235.
[32] Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2014) 239-243.
[33] Andrew Robertson, 'Towards a Unifying Purpose for Estoppel' (1996) 22 Monash University Law Review 1, 9 (and see further 9-13).

Two significant English cases from 2008 (*Cobbe*) and 2009 (*Thorner*) were decided in the House of Lords. They create a contradiction, in that the decision in *Cobbe* restricted the reach, and in fact indicated a lack of acceptance for, a general equitable estoppel doctrine, while the decision in *Thorner* gave authoritative support for a powerful doctrine of *proprietary* estoppel.

Studies of English case law from two discrete periods in the past decade will be discussed next to illustrate some of the key problems in equitable estoppel. The reason for focusing on the final six months of 2009 is that it was hoped that this would offer a chance to see the emerging influence of *Cobbe* and *Thorner* already permeating arguments and, thus, decisions in the lower courts. An additional survey of cases from the second half of 2015 was also carried out in order to show the presence of any subsequent evolution, and to bring to bear any more recent concerns of the English courts when dealing with estoppel.

1.3.2.1 The 2009 survey: the immediate aftermath

The 2009 survey adds legitimacy to any assertion that estoppel is used as a less-important fallback claim. Additionally, estoppel is often seen to be part of a defence, which can at least be the basis of an assertion that its primary usefulness lies in its defensive power. Most of the 2009 cases studied were High Court decisions or otherwise first-instance decisions, in which estoppel (of one or another kind) was briefly rejected,[34] was part of a secondary ground of defence[35] or was otherwise a secondary or alternative

[34] *Computer Software Group Ltd v Sanderson* [2009] EWHC 3827 (QB); *Hodgson v Lipson* [2009] EWHC 3111 (QBD), in which equitable forbearance was dealt with 'only out of respect for counsel's submissions' (para 24); *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB); *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm); *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch), in which the estoppel claim was said to be advanced in a 'very terse' manner; *Braceforce Warehousing Ltd v Mediterranean Shipping Company Ltd* [2009] EWHC 3839 (QB), in which estoppel was an alternative submission that did not need to be considered; *Workspace Management Ltd v YJL London Ltd* [2009] EWHC 2017 (TCC), in which estoppel was said to be considered for the avoidance of doubt; *The Flat Roof Company Ltd v Bowden* [2009] EWHC 2894 (Ch), in which the estoppel argument was said not to advance the claimant's case and was disposed of in one sentence; and *Kaye v Nu Skin UK Ltd* [2009] EWHC 3509 (Ch), in which estoppel by representation of a legal point was the second ground of appeal and was dealt with 'very shortly.' *Armstrong v American Express Services Europe Ltd* [2009] EWHC 3556 (QB) is not a first-instance decision but is another example of a very short decision on an estoppel argument.

[35] *Bovis Lend Lease Ltd v Cofely Engineering Services* [2009] EWHC 1120 (TCC) (the estoppel argument was 'irrelevant'); *Prudential Assurance Co Ltd v Exel* [2009] EWHC 1350 (both estoppel by convention and promissory estoppel were advanced as defences in respect of the same set of facts); *Kazeminy v Siddiqi* [2009] EWHC 3207 (Comm); *R (Malcolm Grange) v Harrogate Borough Council* [2009] EWHC 1997 (Admin) (estoppel was the fifth ground of defence); *Capewell v Boulton* [2009] EWHC 2695 (Ch) (the defendant pleaded 'defences of the usual variety; namely, delay, laches, acquiescence and estoppel'); *Bello v Ideal*

claim, [36] or was not seriously taken into consideration.[37] The sole House of Lords decision was only significant in that it added to the case law on the admissibility of parol evidence, which it was held may include a convention that can give rise to an estoppel.[38] In addition to the High Court cases which constituted the majority, there were also three Court of Appeal decisions,[39] while the remaining cases were decided in less authoritative courts.[40] Several of the cases in which estoppel formed part of the claimant's action, whether or not it was the primary claim, concerned proprietary estoppel.[41] The survey shows that some attention was already paid to the *Thorner* decision and to *Cobbe*,[42] and that some

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View [2009] EWHC 2808 (QB) (an additional defence was 'on abandonment, estoppel, acquiescence and laches' but the trial judge had held that there was insufficient evidence for estoppel); *FR Luerssen Werft GmbH & Co KG v Halle* [2009] EWHC 2607 (Comm) (it was held that the claimant had put forward serious issues to be tried); *Caps (Hatherden) Ltd v Western Arable Services Ltd* [2009] EWHC 3065 (QB).

[36] *Investec Bank (UK) Ltd v Zulman* [2009] EWHC 1590 (Comm); *Dornoch Ltd v Westminster International BV* [2009] EWHC 1782 (Admiralty) (estoppel was part of the claimant's answer to a defence, but it was not necessary to make a decision on the issue); *Oak Investment Partners XII LLP v Boughtwood* [2009] EWHC 641 (Ch); *CEP Holdings Ltd v Steni AS* [2009] EWHC 2447 (QB) (estoppel by representation and estoppel by convention were part of the same claim, which was ancillary to the main claim in assignment and novation); *Stallion v Albert Stallion (Holdings) plc* [2009] EWHC 1950 (Ch) (the proprietary estoppel claim was in addition to a claim for possession); *Re Ritchie* [2009] EWHC 709 (Ch) (probate action); *Petroplus Marketing AG v Shell Trading International Ltd* [2009] EWHC 1024 (Comm); *Jim Ennis Construction Ltd v Premier Asphalt Ltd* [2009] EWHC 2017 (TCC) (estoppel was the claimant's 'fallback argument'); *Sharma v Farlam Ltd* [2009] EWHC 1622 (Ch); *Baines Clarke v Corless* [2009] EWHC 1636 (Ch) (the case was ultimately decided on the basis of constructive trust) – see also *Amin v Amin* [2009] EWHC 3356 (Ch); *Lloyds TSB Bank plc v Howe* [2009] EWHC 1937 (QB) (estoppel was used to support a claim of breach of contract but was ultimately not the basis for the decision).

[37] *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm) (the 'so-called "estoppel" argument' was said to be considered only because it took up time in argument); *Capewell v Boulton* [2009] EWHC 2695 (Ch); *Re Z* [2009] EWHC 3621 (Fam) (divorce proceedings in which the arguments in estoppel and waiver were 'sensibly subsumed' in a submission that the relief sought was discretionary and should be refused on the grounds that the husband had stood back on his rights and allowed the wife to incur substantial costs as a result); *Natl Amusements (UK) Ltd v White City (Shepherds Bush) LP* [2010] 1 WLR 1181; *Lexi Holdings (in administration) v Pannone* [2009] EWHC 2590 (Ch) (an application for summary judgment in which estoppel was mentioned only in respect of a waiver/variation question which, it was held, would not go to trial).

[38] *Chartbrook Ltd v Persimmon Homes* [2009] 1 AC 1101.

[39] *Scinto v Newham LBC* [2009] EWCA Civ 837; *Hameed v Qayyum* [2009] EWCA Civ 352; *Budejovicky Budvar Narodni Podnik v Anheuser-Busch Inc* [2009] EWCA Civ 1022.

[40] *Treacy v Down District Council* (Lands Tribunal NI, 19 August 2009); *Solartrack plc v London Development Agency* [2009] UKUT 242 (LC); *Jones v HMRC* [2009] UKFTT 312 (TC).

[41] *Sinclair v Sinclair* [2009] EWHC 926 (Ch) (proprietary estoppel was a counter-claim); *Mulholland v Kane* [2009] NICh 9; *MacDonald v Brannigan* [2009] EWHC 1176 (Ch); *Gill v Woodall* [2009] EWHC B34 (Ch); *Brightlingsea Haven v Morris* [2009] EWHC 3061 (QB).

[42] *Bye v Colvin-Scott* [2010] WLTR 1; *Stallion v Albert Stallion (Holdings) plc* [2009] EWHC 1950 (Ch) (the language used was very similar to that in *Gillett v Holt*); *Re Ritchie* [2009] EWHC 709 (Ch) (it was remarked that *Cobbe* was very different from *Thorner* as the former case hinged on contract and a commercial relationship, but it was noted that the decision of the House of Lords in *Thorner* had yet to appear); *Hameed v Qayyum* [2009] EWCA Civ 352 (the principles applied were said to derive from *Gillett v Holt* as well as *Cobbe*); *Sinclair v Sinclair* [2009] EWHC 929 (Ch) (*Cobbe* and *Thorner* were both relied on for technical points); *Baines Clarke v Corless* [2009] EWHC 1636 (Ch) (*Cobbe* and *Thorner* were referred to, although the case was decided on a constructive trust basis). However, in *The Zenovia* [2009] EWHC 739 (Comm), only *High Trees* and the *Spencer Bower* treatise were referred to. Similarly, in *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm), *Cobbe* was not referred to.

estoppel claims failed on the basis that there was an absence of a legal relationship existing at the time of the conduct which led to the alleged estoppel. Not only this restriction, but doubts about the usefulness of categorising estoppel at all, were in evidence.[43] However, there was a handful of interesting uses of, or comments on, estoppel. Thus, in *Seadrill*[44] it appeared that the effect of an estoppel was equated to that of an agreement, while in *A v B* there was an attempt to use estoppel 'as a concept to help shape the court's purposive approach.' *Fisher v Brooker*[45] is a particularly noteworthy case in that it was decided in the House of Lords and, additionally, that its principal (albeit not novel[46]) contribution was the use of proprietary estoppel in an intellectual property dispute, as well as providing, in McFarlane's view, a reiteration of the 'demanding criteria' to which acquiescence estoppel cases are subject.[47] Finally, in *Jones v HMRC*,[48] an attempt to use estoppel was rejected due to the application of the rule that there can be no estoppel binding the Crown in direct tax matters.

Two interesting results of the 2009 survey are, first, that estoppel is often conflated with equitable claims which operate in a similar fashion, and, secondly, that restrictive and expansive approaches unhelpfully co-exist. The doctrine is relied upon, albeit inconsistently, which indicates at least an impression that it may be useful as a way of bolstering a claim for something which may not be obtainable using common-law claims.

[43] In *Brightlingsea Haven v Morris* [2009] EWHC 3061 (QB) [1], the principle under which the court had to satisfy the equity was said to be 'promissory estoppel, or proprietary estoppel – as it is also called.' In *Amin v Amin* [2009] EWHC 3356 (Ch), it was said that '[i]n a very real way, proprietary estoppel and constructive trusts overlap to a considerable degree' (para 281).

[44] *Seadrill Management Services Ltd v OAO Gazprom* [2009] EWHC 1530 (Comm).

[45] *Fisher v Brooker* [2009] 1 WLR 1764.

[46] In *Rhone-Poulenc Rorer International Holdings Inc v Yeda Research and Development Co Ltd* [2007] UKHL 43, [2007] Bus L R 1796 [22], Lord Hoffmann said that '[t]here is no reason why the equitable rules of proprietary estoppel should not apply to a patent in the same way as to any other property.' Estoppel had also arisen in intellectual property disputes in *Dyson v Qualtex (UK) Ltd* [2004] EWHC 2981 (Ch) and earlier in *Farmers Build v Carier Bulk Materials Handling Ltd* [2000] ECDR 42. In those cases, estoppel was claimed, respectively, as a bar to an action for infringement of an unregistered design right (which bar was based 'on estoppel, or on waiver or acquiescence'), and as a defence based on acquiescence in delaying proceedings for infringement of design rights. Thus, these claims based on estoppels were orthodox preclusive defences which arguably did not require a 'proprietary' label. In any event, the court in *Dyson* referred at [317] to *Taylor Fashions*, indicating a preference for a broad equitable estoppel.

[47] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 1.08.

[48] *Jones v HMRC* [2009] UKFTT 312 (TC).

1.3.2.2 The 2015 survey: some willingness to engage equitable estoppel

One result of the 2015 survey is that there is still some doubt over what exactly promissory estoppel means. This echoes a case cited above in the 2009 survey in which the applicable principle was said to be 'promissory estoppel – or proprietary estoppel – as it is also called.'[49] In one of the 2015 cases, the High Court relied on a statement of Neuberger LJ in *Steria v Hutchison*[50] which referred both to promissory estoppel and to estoppel by representation, and applied it to a proposition based on 'presumably a waiver by estoppel.'[51] In another case, it was stated that, if the desired result could not be achieved applying contract law principles, 'the same result could be reached by relying on the doctrines of contractual estoppel, estoppel by convention, estoppel by representation or promissory estoppel,'[52] later referring to the estoppel occurring 'on the basis of some sort of contractual estoppel, estoppel by convention or estoppel by representation,'[53] while ultimately estoppel by representation was applied. This may indicate that courts are still willing to overlook narrow categories where this is unhelpful, as was first suggested in *Taylor Fashions*[54] and *Amalgamated Investment & Property*.[55] That would suggest that those categories are slowly becoming accepted as being illegitimate, giving credence to the idea of a single cause of action. On the other hand, it may also indicate a continuing lack of a clear understanding of what the differences may be between different estoppels.

Unfortunately, it is still decidedly unclear which of these two paths is being taken by the English courts. Evidence of a restrictive approach can be found in the decision in *Dudley Muslim Association v Dudley MBC*.[56] This case raised the difficulty posed for the purposes of English estoppel law by Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989,[57] and it was suggested there that *Cobbe* may have eliminated the

[49] *Brightlingsea Haven v Morris* [2009] EWHC 3061 (QB) [1].
[50] *Steria v Hutchison* [2006] EWCA Civ 1551, [93]-[94].
[51] *Molton Street Capital LLP v Shooters Hill Capital Partners LLP, Odeon Capital Group LLC* [2015] EWHC 3419 (Comm), [123]. This was said to be in contrast to a waiver by election, which it was held did not arise.
[52] *NRAM Plc v McAdam* [2015] EWCA Civ 751, [10(iii)].
[53] *NRAM Plc v McAdam* [2015] EWCA Civ 751, [56].
[54] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch).
[55] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] QB 84 (QB, CA).
[56] *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123.
[57] Law of Property (Miscellaneous Provisions) Act 1989, s 2(1): 'A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.'

possibility that a key exception[58] could continue to engage proprietary estoppel. If this is true, it would create insuperable difficulties for the doctrine. The comment was obiter because no estoppel claim was asserted and, regardless, the kind of estoppel which would have been relevant in this case (and which the court said was promissory estoppel) had in any event never been subject to the legislative exception,[59] the Court of Appeal commenting that 'it would be surprising if one could do by promissory estoppel what one could not do by informal contract.'[60] This can be compared with the more positive comments made in other cases from the same period. Unusually, in *Dixon v Blindley Health Investments*, the Court of Appeal stated obiter that a cause of action lies in promissory as well as proprietary estoppel,[61] whereas typically this is only said of the latter.

The same decision also referred to 'the modern (and developing) principles' of estoppel by convention, while in another High Court case[62] it was said that '[o]f course, promissory estoppel is an ever evolving area of the law,' following a comparison made between waiver and promissory estoppel (indicating some acknowledgement that these two are separate doctrines). Finally, some regret may be noted in the statement of the Privy Council in *Mungalsingh v Juman* that the respondent 'would have had a powerful argument on the basis of promissory estoppel.'[63]

On balance, the 2015 survey produces no definite results: it is still evidence that the doctrine is little-understood, while references to the idea of a single equitable estoppel are in very general terms, indicating that an overarching doctrine of equitable estoppel is at an early developmental stage.[64] It also shows that there may be two

[58] Law of Property (Miscellaneous Provisions) Act 1989, s 2(5): '…nothing in this section affects the creation or operation of resulting, implied or constructive trusts.'

[59] The distinction made between promissory and proprietary estoppel in this case would, it is submitted, be unaffected by the recognition of a general equitable estoppel doctrine. The exception in s 2(5), which may apply in cases in which an estoppel gives rise to a constructive trust, has the same meaning regardless of the name given to the estoppel. This is the exception which the court acknowledged had been extended to (proprietary) estoppel in *Yaxley v Gotts* [2000] Ch 162 and which it doubted would still apply after *Cobbe v Yeoman's Row Management* [2008] UKHL 55, [2008] 1 WLR 1752.

[60] *Dudley Muslim Association v Dudley MBC* [2015] EWCA Civ 1123 [33].

[61] *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023 [73].

[62] *Aquavita International SA v Ashapura Minechem Ltd* [2015] EWHC 2807 (QB) [66].

[63] *Mungalsingh v Juman* [2015] UKPC 38 [25].

[64] In *Dixon v Blindley Health Investments* [2015] EWCA Civ 1023, Hildyard J stated at [72] that estoppel by convention was 'another variant of equitable estoppel.' Similarly, in *Clacy v Sanchez* [2015] UKUT 0387 (LC), the argument of the appellants was (at [33]) that 'an equitable estoppel ha[d] arisen in the nature of an estoppel by convention' and Judge Edward Cousins then held at [36] that there was either an equitable estoppel or a waiver by estoppel. Again by way of characterizing estoppel by convention as an equitable

current trends in equitable estoppel. The first is that there remains a cautious view which prefers formality over flexibility and tends to have the effect of declaring equitable estoppel too flawed to be workable. The second is that there is the occasional display of willingness by some members of the judiciary to engage with these avowedly evolving and developing principles in an appropriate case. The 2015 survey shows that that case has not yet emerged.

1.4 The basic concepts

A description of the main estoppels will illustrate the problems for which this thesis seeks to provide guidance. This subsection is intended to clarify the following preliminary ideas: first, a definition of equitable estoppel will be provided; and, secondly, the subcategories commonly known as proprietary estoppel, promissory estoppel, and estoppel by convention and representation will be distinguished from each other, with brief reference being made to other subcategories (and, often, subsubcategories).

1.4.1 Historical background

Estoppel originated as a rule of evidence preventing the denial of that which has been held out to be true by one party to litigation, or has otherwise been accepted by the parties. Thus, what was held out or accepted as true becomes the 'new truth' for evidentiary purposes pertaining to the litigation in question, even if it contradicts the actual events which took place. As Bowen LJ put it in *Low v Bouverie*:

> [e]stoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.[65]

Equitable estoppel is a general term for a number of equitable doctrines to which the term estoppel has been applied throughout the decades. It is, however, not possible

estoppel, reference was made in *C v D1* [2015] EWHC 2126 (Comm), [153] to *The Kachenjunga* [1990] 1 Lloyd's Rep 391, in which Lord Goff was said to 'contras[t] the doctrine of election of equitable estoppel.' In *Glencore International AG v MSC Mediterranean Shipping Company SA* [2015] EWHC 1989 (Comm) [33], counsel for the defendant submitted that its estoppel pleading 'might be characterised as an estoppel by representation or an equitable estoppel.' The 2016 case *Merck KGaA v Merck Sharp & Dohme Corp* [2016] EWHC 49 (Pat) contains one reference to equitable estoppel, with Norris J stating at [128] that it 'bears some resemblance' to the German law doctrine of forfeiture.

[65] *Low v Bouverie* [1891] 3 Ch 82 (CA) 105 (Bowen LJ).

to define equitable estoppel without acknowledging that it is a difficult term, even that it 'verges on the oxymoronic.'[66] 'Estoppel' is probably the term because there was no better alternative.[67] The newer estoppels are not rules of evidence: they now have effects beyond changing what is true for evidentiary purposes. The effect of equitable estoppel is that one can claim relief in the form of an equity. In the Irish High Court, Kenny J has said that an equity is 'a right against persons and is enforceable against those who were parties to the transaction which created it.'[68] The point at which the old estoppel turned into the new estoppel arrived when the prohibition of a denial of facts was eventually argued to be applicable to the denial of intentions, or of what one has expressly or implicitly promised, which is in itself a truth, hence the only result that would vindicate the truth of the promise or promise-like behaviour was a change in legal rights and, in effect, their enforcement.

Equitable estoppel thus includes the disparate subdoctrines of proprietary estoppel, promissory estoppel, estoppel by convention and, it is possible to argue, estoppel by representation, which has its origins in equity and may have acquired the idea that conscience requires limiting the available remedy. However, it remains understood as a 'preclusive doctrine' in the sense outlined in this section, and references to the 'preclusive doctrine' in the thesis should be understood in this sense.

Three of these estoppels describe a certain conduct which can constitute the assurance element. The other – proprietary estoppel – is unique in that the term describes the subject-matter to which the estoppel relates. Further, less important, kinds of estoppel also refer to conduct: estoppel by silence, estoppel by acquiescence, estoppel by encouragement, and, predictably enough, estoppel by conduct.

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[66] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 273.

[67] 'Promissory estoppel' appears to be an imported term from the US. Sidney W DeLong, 'The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22' [1997] Wisconsin Law Review 943, 968 n 79: '[i]t is also pertinent that Williston named the new doctrine "promissory estoppel" after the tort doctrine of equitable estoppel.' The reference to Williston is to the 'Discussion of the Tentative Draft, Contracts Restatement No 2' *4 ALI Proceedings Appendix* 61, 94 (1926). See also Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) paras 3-081, 3-084 and 3-088 on the relationship between estoppel by representation and promissory estoppel, suggesting that the latter developed by analogy with the former. Although it is not stated that this is why the term 'estoppel' is used, it could certainly be implied. The term preferred by Peel for promissory estoppel is 'the equitable doctrine' as opposed to common law waiver. Proprietary estoppel, on the other hand, is referred to as proprietary estoppel: paras 3-118–3-152.

[68] *Allied Irish Banks v Glynn* [1973] IR 188 (HC) 192 (Kenny J).

1.4.2 Comparing proprietary with promissory estoppel

Proprietary estoppel has been labelled 'an amalgam of doubtful utility.' [69] It includes within its reach a wide variety of legal problems[70] and is sometimes stated to encompass two different kinds of estoppel.[71] Apart from those features which enable it to be an estoppel in the first place, the only common requirement of this amalgam is that it must concern an interest in land. [72] However, a distinctive feature of proprietary estoppel is that it can be pleaded as a cause of action in itself.

A proprietary estoppel, though dependent for its existence on other factors, has as its foundation either a promise or passive conduct capable of creating a certain belief in the party seeking the protection of the estoppel. The remaining factors – reliance, detriment and an inequitable or unconscionable attempt to act contrary to what was indicated by the earlier behaviour – must then be specifically pleaded and proved. As with the other types of estoppel, the act must be done as a consequence of the earlier behaviour; the unfairness that the estoppel tries to prevent must be linked to the proven elements. Proprietary estoppel is only capable of being used when the representation relates to a proprietary interest, though what the term 'proprietary interest' encompasses has been broadly interpreted.[73] Secondly, the conditions for the doctrine's

[69] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] 1 QB 84 (QB, CA).

[70] Kevin Grey and Susan Francis Grey, *Elements of Land Law* (7th edn, Oxford University Press 2011) 1202 adopted in Hilary Biehler, *Equity and the Law of Trusts in Ireland* (6th edn, Round Hall 2016) 838-845, classifies proprietary estoppel into three groups: imperfect gift, common expectation and unilateral mistake.

[71] These are estoppel by encouragement and estoppel by acquiescence. See George Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham, Daniel Hochberg and Tom Leech eds, 4th edn, Bloomsbury Professional 2004).

[72] See the following note.

[73] In *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, [14] Lord Scott says that proprietary estoppel applies to 'a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action.' In *Western Fish Products v Penwith District Council* (1979) 38 P & CR 7 (CA) 27, Megaw LJ said: 'We know of no case, and no case has been cited to us, in which the principle set out in *Ramsden v Dyson* and *Crabb v Arun District Council* has been applied otherwise than to rights and interests created in and over land,' and emphasized that this needed to be 'any other person's land,' not one's own. A claim was rejected by Sir Robert Megarry VC in *Haslemere Estates Ltd v Baker* [1982] 1 WLR 1109, 1119 for not relating 'to land or to any interest in or charge on land', but instead relating 'to money, and to a charge on the land which does not exist but which the plaintiffs hope the court will create if the money claim succeeds.' An arrangement to sell an old site that was '[i]nextricably woven' with a purchase of another side was held to be a valid subject-matter for a proprietary estoppel in *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1981) 41 P & CR 179. Meanwhile, in *Vernon & Company (Pulp Products) Ltd v Universal Pulp Containers Ltd* [1980] FSR 179, 188, a 'right to sell their goods on the market' was held not to be a valid interest for the purposes of proprietary estoppel.

application are liberally applied by the courts,[74] thereby making it likely to be the most advantageous type of estoppel to plead.[75]

As for promissory estoppel, its early cases concerned promises or arrangements to forego an existing contractual entitlement for the benefit of the other party to the contract. Neither of *Hughes v Metropolitan Railway Authority*[76] nor *Birmingham District Land Company v London & North Western Railway Company*[77] actually mentions the word 'estoppel.' Then, in *High Trees*,[78] a head lessor of a building arranged with the landlord to pay half the required rent when the Second World War was ongoing because it was not possible to find enough tenants to allow the full rent to be paid. In *Tool Metal Manufacturing Company Co Ltd v Tungsten Electric Co Ltd*,[79] the parties had a wartime arrangement according to which the defendant, normally liable for royalty payments and other compensation to the plaintiff for the use of its patents, did not have to pay while wartime persisted. It is sometimes said in judgments relating to estoppel that one party has made a 'promise or representation' to another.[80]

In the United States, the principles relating to 'promissory estoppel' part from the *Restatement (Second) of Contracts*, Section (§) 90, which reads:

> …a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by

[74] This was made evident in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co* [1982] QB 133 (Ch), in which Oliver J dispensed with the need to fulfil the strict 'five probanda' in *Willmott v Barber* (1880) 18 Ch D 96.
[75] Evans, 'Choosing the right estoppel' [1998] Conv 346, 350 (also discussing estoppel by representation).
[76] *Hughes v Metropolitan Railway Authority* (1876-77) LR 2 App Cas 439 (HL). Cairns LC made a confident statement of principle for those situations in which a person's best judicial recourse was the equitable enforcement of a suspension of a contract. That is, if parties enter 'a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place within the parties.'
[77] *Birmingham & District Land Company v London & North Western Railway Company* (1889) LR 40 Ch D 268. The plaintiff company, which had a lease to build on land within two deadlines, had been advised by the freeholder before the first deadline passed not to build, as an Act of Parliament that would affect the land was forthcoming. It was held that this raised an equity against the freeholder, so that the plaintiff could not be ejected even when the Act had been passed and the defendant thereby gained a right over the land.
[78] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB)
[79] *Tool Metal Manufacturing Company Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761 (HL).
[80] *James v Heim Gallery* (1981) 41 P & CR 269 (CA) 274; *Hodgson v Lipson* [2009] EWHC 3111 (QB) [25].

enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The inclusion of promises relating to land within proprietary estoppel creates a possible overlap with promissory estoppel.[81] As long as the promise is calculated to affect a legal relationship between the parties, and as long as the promisee acts to his detriment in reliance on the promise, it is possible that both doctrines could apply.[82] Indeed, the Irish High Court in *Re JR*[83] and *Carter v Ross*[84] and the English Court of Appeal in *JT Developments v Quinn*[85] said in their decisions that what was being applied was 'promissory estoppel', despite the fact that they were cases where proprietary estoppel clearly applied or cases in which the term was used in conjunction with 'proprietary estoppel.'[86] Meanwhile, Lord Scott in *Cobbe v Yeoman's Row Management Ltd* stated that proprietary estoppel was a sub-species of its promissory counterpart.[87] Such comments could pose problems in a case in which the main concern is whether estoppel might be pleaded offensively.[88] Promissory estoppel is often stated to be incapable of independently grounding a cause of action[89] while proprietary estoppel usually can,[90] but a confusion of terminology can erase even this fundamental distinction and make it more difficult to plead a proprietary estoppel, as appeared to be the risk in *Smyth v Halpin*.[91] While proprietary estoppel covers a wider area of the law, promissory estoppel has an unduly complex nature considering its relative lack of relevance.

[81] See Snell, *Equity* (John McGee ed, 33rd edn, Thomson Reuters 2015) para 12-036.
[82] See Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) para 3-148; Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267.
[83] *In the matter of JR, a ward of court* [1993] ILRM 657 (HC).
[84] *Carter v Ross* (HC, 8 December 2000).
[85] *JT Developments Ltd v Quinn* (1991) 62 P & CR 33 (CA).
[86] Hilary Biehler, *Equity and the Law of Trusts in Ireland* (6th edn, Round Hall 2016) 881 says that the courts in Ireland have occasionally applied both terms indiscriminately.
[87] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [14].
[88] Or when determining whether the effect of the estoppel is to be permanent, as it can be if it is proprietary, or temporary, as it must be if it is promissory: see *Sledmore v Dalby* (1996) 72 P & CR 196 (CA) 203.
[89] *Combe v Combe* [1951] 2 KB 215 (CA).
[90] *Crabb v Arun District Council* [1976] Ch 179 (CA).
[91] *Smyth v Halpin* [1997] 1 ILRM 38 (HC).

1.4.3 The equitable nature of estoppel by convention and estoppel by representation

Another branch of the family is estoppel by convention. It arises when two parties have 'established… a conventional basis upon which they have regulated their subsequent dealings'[92] and one of them seeks later to adopt a contradictory position to that conventional basis. In the House of Lords, it was said to be 'settled that an estoppel by convention may arise when parties to a transaction act on an assumed state of facts or law, the assumption either being shared by them both or made by one and acquiesced in by the other.'[93] This kind of assumption has also been accepted as being capable of grounding an estoppel by convention in *Bank of Scotland v Wright*,[94] in which Brooke J stated that the party sought to be estopped must have contributed in some way towards the creation or continuance of the assumption. Thus, the rule that the assumption must be communicated between the parties is also important for this kind of assumption. Any convention for which the only proof is 'silence, inactivity or failure to take a point' alone will fail to give rise to an estoppel,[95] and so this can be distinguished from estoppel by silence.

Again, these factors arguably do no more than inform the contextual background for the purposes of determining whether the behaviour of the party to be estopped has been unconscionable.

While estoppel by convention may potentially overlap with any other kind of estoppel, such is its flexibility, it should also be highlighted that it is possible to find an

[92] *Keen v Holland* [1984] 1 WLR 251 (CA) 261.
[93] *Republic of India v India Steamship Co Ltd. (The Indian Grace) (No 2)* [1998] AC 878 (HL) 913.
[94] *Bank of Scotland v Wright* [1990] BCC 663 (QB) 676. Brooke J there approved a statement of the law to similar effect by Dixon J in *Grundt v Great Boulder Pty Gold Mines* [1937] HCA 58, (1937) 59 CLR 641, 675-676, quoting in turn his earlier statement of principle in *Thompson v Palmer* (1933) 49 CLR 547, which read: 'Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct…or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption.'
[95] *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions* [2002] EWCA Civ 1253 [32] (Tuckey LJ); *DRL Ltd v Wincanton Group Ltd* [2010] EWHC 2896 (QB) (Davies J).

estoppel by convention where it is not possible to establish other kinds of estoppel.[96] Its requirements will thus be particularly useful in the future in informing the application of equitable estoppels to conventions.

Estoppel by convention seems to have been understood to be a common-law estoppel but this appears to be inaccurate[97] as it requires inequitability or unconscionability (at the point of resiling) in order to exist. Lord Steyn counselled in 1997 against an elision of the 'necessarily separate requirements, and distinct terrain of application,' of estoppel by convention and estoppel by acquiescence.[98]

Estoppel by representation is one of the most generally applicable and misunderstood estoppels. It hinges, of course, on the presence of a representation, which has usually been interpreted as being a representation of positive fact.[99] Eventually, it was also recognised that it could include a representation of law.[100] It originated in equity as Handley has pointed out,[101] although Birks has noted that

[96] *Kenneth Allison Ltd v AE Limehouse & Co* [1992] 2 AC 105 (HL). It was held that the lack of any representation or promise that a writ had been validly served precluded the operation of a promissory estoppel or estoppel by representation that prevented denying the validity of the service, but Lord Goff held in the House of Lords that there had been a 'common but mistaken assumption' that service could be made to the defendant's agent rather than personally to the defendant and, so, the plaintiff was entitled to succeed on the basis of estoppel by convention. The other Lords held for plaintiffs also but on the basis that there had been an ad hoc agreement. Lord Goff said that service pursuant to agreement or otherwise than as provided by Rules could not be valid.

[97] See Snell, *Equity* (John McGee ed, 33rd edn, Thomson Reuters 2015) para 12-011, where it is said to be similar to estoppel by representation which 'is applicable both at common law and in equity and so might also be seen as a form of equitable estoppel.'

[98] *Republic of India v India Steamship Co Ltd (The Indian Grace No 2)* [1997] 2 WLR 538 (CA) affd [1998] AC 878 (HL) 914. Interestingly, though in this case both estoppels were considered using separate tests, the result was the same. The question was whether the defendants were estopped from relying on a statutory bar to bringing proceedings in an English court that applied since the plaintiffs had already brought proceedings in India. The defendants had not done anything to prevent this happening. Lord Steyn said that to find estoppel by acquiescence, using the statement in Lord Wilberforce's dissent in *Moorgate Mercantile Co v Twitchings* [1977] AC 890 (HL) 903, would involve the acquiescing party being 'on guard' that it had to communicate to the other party the lack of availability of proceedings in England if Indian proceedings were first taken, which it could not have been 'on guard' to do since it did not appreciate this possibility at the relevant stage. Meanwhile, estoppel by convention required the defendants to communicate that they were content, or assumed, that the first proceedings would not prejudice the second. The first consisted of knowledge of the legal position and silence; the second of a misunderstanding as to the position and communication thereof. The analysis of the facts using separate kinds of estoppel is to be welcomed because of the evident possibility that they will be mixed together. In *Lillis v North West Water Ltd* (Lands Tribunal, 10 September 1998), it was said that what needed to be found for estoppel by convention was a communicated assumption and acquiescence in it by the party against which the estoppel is claimed.

[99] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185.

[100] *Robertson v Minister for Pensions* [1949] 1 KB 227 (KB).

[101] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-002: '[e]stoppel by representation originated in equity in the 17th century, and was adopted, without acknowledgement, by the common law by a process which culminated in 1837 in *Pickard v Sears*.'

'estoppel' is a word of common law origin.[102] The doctrine is termed 'equitable estoppel' in the US.[103] The use of 'estoppel' in promissory estoppel has been said to arise by analogy with estoppel by representation, which is its exact counterpart as applied to representations of the existing fact instead of the intended fact. Estoppel by representation can arise in the same context as proprietary estoppel. In addition, it is often pleaded as a semi-alternative to promissory estoppel or estoppel by convention, an exercise which appears to give away an insecurity about adequately framing the initial conduct as being capable of giving rise to an estoppel.

This analysis has sought to clarify what is meant by the various estoppel terms used in this thesis. However, at the same time it demonstrates the difficulties inherent in defining and distinguishing the subcategories of estoppel, thus bolstering the argument of the thesis in favour of recognising one equitable estoppel.

1.4.4 Definitions to be used in the thesis

The thesis proposes a model of equitable estoppel. Here, some important terms used throughout the thesis will be outlined in order to assist with establishing the scope of the model.

The doctrine of estoppel by representation, often referred to as common-law estoppel (by representation), is too different in nature and effect from the other types of equitable estoppel and, as a result, the proposed model, to be included within it (it may, however, arise concurrently with it[104] provided its separate elements have been separately established, for example if the claimant proves a *clear* representation). Despite its similarity in some ways (notably, the adoption in other equitable estoppels of the three-part test[105]) and its equitable origins, ultimately it will be considered that it needs to be maintained, for the sake of orthodoxy and the important effects that the doctrine can have. This doctrine will be referred to as the 'preclusive doctrine.'

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[102] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 University of Western Australia Law Review 1, 21.

[103] W David Slawson, 'The Role of Reliance in Contract Damages' (1990) 76 Cornell Law Review 197, 199: 'Prior to 1932, consideration was both the necessary and the sufficient condition for enforcement of a promise. The doctrine of estoppel was confined to statements of fact, and it sounded in tort'; 202: '[e]quitable estoppel is the factual estoppel that existed in the law of tort before the *Restatement (First)* was published.'

[104] See Chapter 7 for the effect this would have on the application of the proposed model.

[105] See Chapter 5.

The principle identified by McFarlane as the 'promise-detriment' principle[106] is not unlike the proposed model, with a few notable differences; for example, the model does not emphasise finding a promise. This principle will be referred to as the '*Thorner* principle.' It contains the worthy argument that estoppels[107] based on promises unrelated to the grant of specific property[108] on which one has detrimentally, and reasonably, relied be treated in the same way as promises concerning the grant of specific property on which one has detrimentally, and reasonably, relied. This, however, is different from two principles identified by McFarlane which are often said to concern promissory estoppel.[109] In the thesis, the term 'promissory estoppel' and consequent terms such as 'promisor' if they arise in discussing 'promissory estoppel' will be used in their orthodox sense, while acknowledging the difficulty attached to the term 'promissory estoppel.'[110] Similarly and despite its own difficulties,[111] the term 'equitable estoppel' will be used to refer to the concept of one or several estoppels arising in equity, based on the description above of their history and nature. Bearing in mind the proviso noted above in relation to the preclusive doctrine, the proposed model will be based on equitable estoppel(s) other than the preclusive doctrine.

The terms 'claimant' and 'defendant' will be used to refer respectively to the person claiming in equitable estoppel and the person he claims against. Where commentators use capital letters to distinguish the two, this will be maintained in the limited section discussing such commentary, unless the use is inconsistent with the use of another commentator.

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[106] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 286-295.

[107] Albeit that the word 'estoppel' ought not to be used in this context, according to McFarlane: 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 273, 301.

[108] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 621-623.

[109] Based on *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 and *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL). Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 281-282, 282-286. See further Chapter 3.

[110] The commentary on 'promissory estoppel' is, often, more concerned with what it cannot do than what it is capable of doing, but on rare occasions a claim arises and succeeds in an appropriate case such as *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643. Cases in which 'promissory estoppel' is pleaded alongside other equitable estoppels, and which succeed on some general equitable estoppel basis, are well-placed to come within the proposed model's remit. The model is understood to incorporate cases such as *Collier* and allow for the minimum equity to be a suspension of contractual duties.

[111] See Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 273, 301.

1.5 The thesis question

The thesis will seek to build a unified model of equitable estoppel in order to simplify irregularities that exist in the English version of the doctrine. In particular, this will enable some inconsistencies, identified throughout the thesis, to be jettisoned. The exercise may assist with interpreting, or solving, the issues identified in the recent English cases. The author suspects that the surveys highlight some perceptions about estoppel that a simple unified model may be well-placed to solve. Building and defending such a model will at least assist with a critical evaluation of those perceptions. The surveys showed four key issues: an imprecision of terminology, a perception that estoppel is a fallback claim, a possible lack of development of the doctrine, and some welcoming attitudes towards a possible unified doctrine and of fulfilling such missing development. In particular, it can be questioned whether these concerns were more broadly indicative of the existence of doctrinal inconsistencies, and whether a unified model can be proposed which would address those inconsistencies.

In carrying out this wide-ranging exercise, positions will be taken on discrete points, such as the role of unconscionability, which seek to justify a unified model, but can equally serve alone as wider points to guide the development of estoppel generally.

The model will be incrementally built through chapters 2-6, and fully outlined in chapter 7 based upon the justifications offered in chapters 2-6. It will also be tested in chapter 7 to enable scrutiny of some of its limitations.[112] It will finally be discussed in chapter 8 against the key questions identified in the surveys in section 1.3.2.

1.6 Methodology

A study of this kind requires for the most part a black-letter methodology, supplemented by key authors in this specific area of the law as well as, more broadly, in private law. The model will be developed with a view to being generally applicable in common-law systems. The surveys studied above describe English cases, and mostly English cases will be used in the thesis: while the origins of the doctrine(s) are in England, so too seem to be many of the perceived difficulties. Australian cases using a divergent approach will be used for contrast, while the smaller range of Irish cases will also receive

[112] One of the cases identified in the surveys, *NRAM Plc v McAdam* [2015] EWCA Civ 751, is among those that will receive in-depth analysis.

some attention. It will be found eventually that the model would be particularly acceptable in Ireland, if only because of the small range of cases.

Chapter 2: The nature of the obligation in equitable estoppel

2.1 Introduction

Equitable estoppel provides the potential for redress when a claimant is facing significant financial or (more broadly) welfare consequences from not having formalised her legal position. But, considering that it is the expectation which is most often enforced,[1] it must be asked whether equitable estoppel is the most appropriate doctrine for this general purpose. Is the apparent imprecision in the case law surveyed in the introductory chapter a warning sign that there are wider problems of finding a role for equitable estoppel?

This chapter will explore, first, the perceived status of equitable estoppel within the wider law as described by a range of commentators, and, secondly, the possible conceptual ideas driving a model of estoppel based on detriment and unconscionability.

The chapter will thus seek to define something which only vaguely emerges from the cases following *Cobbe* and *Thorner*, and which were examined in the preceding chapter. What one can take from those two cases, together with the later reaction to them examined in Chapter 1, is at the very least that there is a willingness to clarify equitable estoppel. While Lord Neuberger subsequently cautioned against the tempting of the lower courts in *Cobbe* by the power of 'emotion,'[2] allowing for estoppel to be used as a 'fifth cavalry riding to the rescue.'[3] He also suggested that the categorisation of estoppel is a 'game.'[4] Both the advantages and disadvantages of the current approach to equitable estoppel are evident: its helpfulness as a 'fallback' claim means that it is equally too flexible and too capable of meaning several things. While being wary of oversimplification, this chapter will discuss a possible obligation in a hypothetical unified equitable estoppel.

[1] See section 6.2.1.
[2] Lord Neuberger, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity' (2009) 68(3) Cambridge Law Journal 537, 541.
[3] Lord Neuberger, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity' (2009) 68(3) Cambridge Law Journal 537, 541.
[4] Lord Neuberger, 'The stuffing of Minerva's owl? Taxonomy and taxidermy in equity' (2009) 68(3) Cambridge Law Journal 537, 547.

2.2 Finding a purpose

Gordley wrote of promissory estoppel that '[s]upposedly, the doctrine arose when legal scholars realized that courts were protecting reliance despite the rule that contracts require consideration' and that 'its applications seem to be the logical result of a single underlying concept: that the promisee who changes his position in reliance on a promise should be protected.'[5] He adds that 'the development of promissory estoppel marks the failure of traditional bargain conceptions.'[6]

An obstacle to a coherent explanation for the existence of varying remedies across the jurisdictions, and the possibility of granting flexible or proportionate remedies, within the same law of estoppel is the difference in views among academics as to whether there is one or there are several estoppels; thus, Bant and Bryan, and Spence, have sought to analyse estoppel as a single doctrine, rather than as a collection of independent doctrines as McFarlane has done.[7]

At one stage, Robertson argued that the 'fundamental duty'[8] underlying deceit, negligent misstatement, *Nocton v Lord Ashburton*, equitable estoppel and related doctrines is simply a duty to prevent harm being suffered by those who rely on one's conduct.'[9] A number of propositions have been suggested for the fulfilment of a deterrence aim. Spence argues for a duty which has been described as being 'more in keeping with a duty to prevent harm by informing another that he should not rely on an induced assumption, than with a duty to 'ensure the reliability' of such an assumption, ie act in such a way as to ensure that the assumption is or remains a sound basis upon which that other may conduct his affairs.'[10] There may be a broad overlap between the conceptual purpose of equitable estoppel and those of other doctrines, some of which arise in tort or are otherwise wrongs. For instance, there seems to be a general idea of

[5] James Gordley, 'Enforcing Promises' (1995) 83 California Law Review 547, 562.
[6] Peter A Alces, 'Contract Reconceived' (2001) 96 Northwestern University Law Review 39, 88 n 172.
[7] This is the view taken by Bant and Bryan of McFarlane's work: Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) Oxford Journal of Legal Studies 427, 428.
[8] This must be read in light of his later comments, referred to below.
[9] Andrew Robertson, 'Protecting Reliance: The Emergent Doctrine of Equitable Estoppel by Michael Spence; Reliance, Conscience and the New Equitable Estoppel' (2000) 24(1) Melbourne University Law Review 218.
[10] J E Penner, 'Michael Spence: Protecting reliance: the emergent doctrine of equitable estoppel' [2000] Conv 360, 361.

deterring unreliable behaviour,[11] which has on some occasions been expressed as being part of preventing reliance-based harm. As will be seen later in this chapter, commentators have related this to a duty or a wrong, but also to something other than a wrong.

We begin from the premise that equitable estoppel is ultimately concerned with detrimental reliance.[12] While commentators have occasionally preferred a promissory analysis of some area of equitable estoppel,[13] it is submitted that a unified doctrine ought to hinge on detrimental reliance.[14] A further basis in unconscionability alone may be identified; [15] however, it is submitted that unconscionability grants an initial jurisdictional permission as well as forming an operative part of the doctrine, yet does not fundamentally address what the claimant seeks. Equitable estoppel has been further linked to the doctrine of unjust enrichment, as well as the general principle of unjustified enrichment. It has been said that 'an aggrieved party's detrimental reliance may be protected on the basis of either unjust enrichment to the promisor or the idea that the promisor who caused the detrimental reliance owes damages to the promisee for his fault.'[16] While detrimental reliance is certainly more associated with equitable estoppel than with unjust enrichment, it is sometimes said that equitable estoppel is concerned with unjustified benefits. Further, it could be said that to provide reliance compensation in equitable estoppel is analogous to the role played by unjust enrichment in reversing undue benefits.

[11] On the basis of a study of Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) Oxford Journal of Legal Studies 427; Andrew Robertson, 'Protecting Reliance: The Emergent Doctrine of Equitable Estoppel by Michael Spence; Reliance, Conscience and the New Equitable Estoppel' (2000) 24(1) Melbourne University Law Review 218; David Charny, 'Nonlegal sanctions in commercial relationships' (1990) 104 Harvard Law Review 373, 455; Richard Craswell, 'Against Fuller and Perdue' (2000) 67 University of Chicago Law Review 99, 126-127.

[12] Doctrinally justified, it is submitted, in the analysis in Chapter 5 generally.

[13] Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 233-244; Patrick S Atiyah, 'Misrepresentation, Warranty and Estoppel' (1971) 9 Alta L Rev 347; Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181.

[14] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003); Michael Spence, *Protecting Reliance* (Hart Publishing 1999); Andrew Robertson, 'Reasonable reliance in estoppel by conduct' (2000) 23(2) University of New South Wales Law Journal 87; Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000).

[15] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985). See, however, McKendrick's fifth suggestions, a cause of action in equity with a flexible remedy, which of his six suggestions matches the thesis idea best: Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2014) 239-243.

[16] Shael Herman, 'Detrimental Reliance in Louisiana Law -- Past, Present, and Future: The Code Drafter's Perspective' (1984) 58(3) Tulane Law Review 707, 745.

Certainly, some similarities may be identified. First, the two doctrines can arise where there is an element of legal imprecision in dealings between parties: as we will see, McFarlane, Hopkins, Fung, and McKendrick have discussed the overlap between the two doctrines in the context of extra-contractual dealings. Charny writes that '[c]ourts have approached informal commitments through doctrines of promissory estoppel, restitution, and tort.'[17] Likewise, Australian developments in both restitution and promissory estoppel have been said to 'operate in areas left open by contract.'[18] Secondly, the two doctrines are at a relatively early stage of development.[19] McFarlane and Sales have described two further ways in which the two doctrines are similar: so, thirdly 'each of unjust enrichment and the promise-detriment principle'[20] is of a 'residual or secondary nature' such that they do not enforce a pre-existing duty but are to be seen 'instead, as recognising a liability.'[21] Fourthly, unconscionability 'has a residual role in *limiting* [the defendant's] liability.'[22]

These four propositions will be discussed in turn. It will also be seen that differences of opinion have emerged as to the conceptual accuracy, and the desirability, of considering the two doctrines alongside each other. This section will conclude by considering the question of the relative usefulness of equitable estoppel at this stage in its development.

2.2.1 Imprecision

It can be concluded from the foregoing that the injustice of an imbalance associated with both equitable estoppel and unjust enrichment is stated in very general yet ambitious terms. The courts have not yet reached a point of maturity in dealing, in particular, with equitable estoppel, despite the earlier emergence of its modern version when compared with unjust enrichment. This imprecision leads to problems further

[17] David Charny, 'Nonlegal sanctions in commercial relationships' (1990) 104 Harvard Law Review 373, 382.
[18] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 31.
[19] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632 have pointed out that both doctrines grew over a similar period of time.
[20] As to the promise-detriment principle, see Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 286-288; Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610.
[21] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632.
[22] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632.

afield.

Wangerin notes the imprecision[23] shown by the Supreme Court of Connecticut in its decision in *Hebrew University Association v Nye*,[24] in which it upheld a claim to relief based on §90 while also holding that the imposition of a constructive trust was justified by employing §90.[25] Crucially, he criticised the court's 'intuitive sense that the two ideas directly overlap', while admitting that such conflation is 'exceptional.'[26] In that case, the University had sought relief against the estate of a Mrs Ethel Yahuda, who in life had orally promised to devise to the University a collection of rare books, of which she had been the owner since the death of her husband, who had been a distinguished Hebrew scholar.[27] She had expressed her intention to devise the books to the University on several occasions[28] and had even catalogued and crated the books, but she died 'during the long preparation necessary to make the transfer.'[29] At the initial trial, the court held that there was a declaration of trust, which was overruled on appeal:[30] the present case before the Supreme Court arose from a retrial.[31] Before Mrs Yahuda's death, the University had set aside a room in its library to house the collection, 'thus depriv[ing] itself of the opportunity of using that room's designated space to raise other contributions'[32] and thereby incurring detriment, upon which the Supreme Court closed the circle in holding that there was a constructive trust in respect of the books, based on §90.[33] Wangerin notes that the relevant lost value of the room was $21,600, but that the

[23] Paul T Wangerin, 'Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants' (1986-1987) 72 Iowa Law Review 47, 87.
[24] *Hebrew University Association v Nye* 26 Conn Supp 342, 223 A 2d 397 (1966).
[25] Paul T Wangerin, 'Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants' (1986-1987) 72 Iowa Law Review 47, 88.
[26] Paul T Wangerin, 'Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants' (1986-1987) 72 Iowa Law Review 47, 88.
[27] Sarajane Love, 'Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly' (1978-1979) 67 Kentucky Law Journal 309, 357.
[28] Sarajane Love, 'Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly' (1978-1979) 67 Kentucky Law Journal 309, 310, 357.
[29] Sarajane Love, 'Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly' (1978-1979) 67 Kentucky Law Journal 309, 310.
[30] Sarajane Love, 'Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly' (1978-1979) 67 Kentucky Law Journal 309, 360 n 186.
[31] Sarajane Love, 'Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly' (1978-1979) 67 Kentucky Law Journal 309, 360 n 186: it seems that the retrial was ordered on the basis of new evidence, which was a memorandum delivered by Mrs Yahuda to the University.
[32] Paul T Wangerin, 'Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants' (1986-1987) 72 Iowa Law Review 47, 87-88.
[33] Sarajane Love, 'Imperfect Gifts as Declarations of Trust: An Unapologetic Anomaly' (1978-1979) 67 Kentucky Law Journal 309, 358: the author argued for an entirely different resolution of this case, in which she rejects the application to this type of case of the rule in *Richards v Delbridge* (1874) LR 18 Eq 11 that an

value of the books subject to the trust may have been a different figure, so that an entirely different result was possible had §90 been properly employed.[34] There seems to be, even while maintaining the distinct labels for equitable estoppel, unjust enrichment, and constructive trusts, an impression that they might be the same thing.

2.2.2 Early stages of development

A number of cases in Chancery of some antiquity were understood later to ground forms of equitable estoppel,[35] while unjust enrichment equally has roots that are more obscure than is immediately apparent.[36] However, neither doctrine began to take shape until, in the case of equitable estoppel, the 1920s in the US[37] and probably the mid-20th century in England,[38] and, in the case of unjust enrichment and following some notable appearances,[39] at least the 1990s.[40] McFarlane and Sales have noted the development of the two doctrines over a similar period of time, albeit unjust enrichment did so 'at an even greater pace.'[41] It is argued that this is the reason for their latter-day and, in the case of an overarching equitable estoppel, stunted emergence. The surveys in the preceding chapter show that this is still being played out. Cases referred to by Charny 'illustrate the anomalous position of promissory estoppel, and of tort and restitution theories generally, in modern contract law.'[42] Unjust enrichment in the US has also had an 'often residual and limited role'[43] and has there been compared unfavourably with

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imperfect gift cannot be rendered valid by construing it as a declaration of trust, and argues that Mrs Yahuda's words and actions were compatible with a declaration of trust.

[34] Paul T Wangerin, 'Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants' (1986-1987) 72 Iowa Law Review 47, 88.

[35] *Dunn v Spurrier* (1802) 7 Ves Jr 231; *Montefiori v Montefiori* (1762) 1 Wm Bl 363 (the principle in which is either defunct since *Jorden v Money* (1854) 5 HL Cas 185, or is moribund with an unsatisfactory attempt to revive it in *High Trees* [1947] KB 130), *Ramsden v Dyson* (1866) LR 1 HL 129.

[36] *Moses v Macferlan* (1760) 2 Burr 1005.

[37] Williston coined the term 'promissory estoppel' as is noted by Kevin M Teeven, 'Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty before Williston's Restatement' (2004) 34(3) University of Memphis Law Review 499, 523.

[38] *Beauchamp v Winn* (1873) LR 6 HL 223, 235 refers to 'equitable estoppel' but, arguably, the first modern mention of the term in England is in *Inwards v Baker* [1965] 2 QB 29 (CA) 38, not by Lord Denning MR who also sat on the case but by Danckwerts LJ. *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 explicitly spoke of estoppel lying in equity.

[39] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL).

[40] *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL),

[41] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632.

[42] David Charny, 'Nonlegal sanctions in commercial relationships' (1990) 104 Harvard Law Review 373, 383.

[43] Eyal Zamir, 'Loss Aversion and the Law' (2012) 65 Vanderbilt Law Review 829, 843 n 54. Andrew Kull, 'Rationalizing Restitution' (1995) 83 California Law Review 1191, 1241 notes that the 'technical competence of judicial opinions' in the area is 'strikingly low.'

tort law as a 'virtual backwater.'[44] Samek has said of the Canadian equivalent of unjust enrichment that to admit its residual role is to 'turn it into a poor relation and make it dependent on the established family of the common law and equity.'[45]

2.2.3 A residual or secondary nature

The subordination of the two doctrines, highlighted above by McFarlane and Sales, arguably indicates that the need for the two arises from the lack of any formalisation of a juridical relationship: thus equitable estoppel is necessarily a secondary, ancillary doctrine in the sense that it gives rise to a liability rather than a duty.[46] The doctrine's blending of ideas which may be considered to properly belong to contract, equitable remedies, and tort (and, it is also argued, unjust enrichment and trusts) has equally been acknowledged in other quarters. Edelman, in a phrase cited by Robertson, has stated that equitable estoppel is a 'creature which defies taxonomy.'[47] Eric Mills Holmes has said that, at least in New York law, promissory estoppel 'is protean and defies traditional classification as contract, tort, or equity, because it synergistically combines all those classifications – so much so, it might be fitting to classify it as 'conequitort.''[48] Carter stated in 1989 that 'to a large extent the recent developments in restitution and promissory estoppel operate in areas left open by contract.'[49] Expanding on Holmes' point that '[b]order wars between contract and tort are inevitable because the contours and boundaries of our legal classifications are illusory, without bright lines,'[50] another writer has stated that such border wars also arise where 'the goals

[44] Wendy J Gordon, 'Of Harms and Benefits: Torts, Restitution, and Intellectual Property' (1992) 21 Journal of Legal Studies 449, 450, referenced in Eyal Zamir, 'Loss Aversion and the Law' (2012) 65 Vanderbilt Law Review 829, 843 n 54.

[45] R A Samek, 'The Synthetic Approach and Unjustifiable Enrichment' (1977) 27 University of Toronto Law Journal 335, 345.

[46] See Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632.

[47] James Edelman, 'Remedial Certainty or Remedial Discretion in Estoppel After *Giumelli*?' (1999) 15 Journal of Contract Law 179, cited in Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 211.

[48] Eric Mills Holmes, 'A Restatement of Promissory Estoppel' (1996) 32 Willamette Law Review 263, 426.

[49] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 31.

[50] Eric Mills Holmes, 'A Restatement of Promissory Estoppel' (1996) 32 Willamette Law Review 263, 290 n 65. Holmes continues: 'The doctrine of promissory estoppel is but one doctrine subject to the tort/contract turf battles.'

become less distinct, as in promissory estoppel.'[51]

2.2.4 A basis in fairness and justice

The apparent role of unconscionability in limiting[52] liability in both doctrines can be seen as a particular instance of equity's application. In Chapter 4, views about the meaning of conscience in equity will be provided, for the purpose of showing what it means as a reason for intervention as well as for inspiring the relevant principle to be applied.

It seems that the ultimate purpose of these two doctrines is one of doing justice in a way that the principal level of law cannot. As McFarlane and Sales highlight,[53] Henry Smith has explained equity as a 'safety valve' in the law. Expanding on this, Smith says that:

> …law is the starting point and the default mode, and equity is a 'safety valve.' Equity applies in a smaller domain with an eye to deterring opportunism, but where it applies it is vague and ex post. Most of all, equity is a second order type of law – law about law.[54]

There is still no final answer to the adage that 'the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters'[55] and it is perhaps useful to consider the role that equity has to play in the law, as the forebear of an unconscionability concept. The High Court of Australia have decried that adage in *Australian Financial Services v Hills Industries Ltd*,[56] saying that it 'seems at odds not only with commonsense, but also with the reality of equity's influence on the common law.' Smith has said that 'the term "equity" might seem to be an etymological curiosity.'[57] Klimchuk separates 'the doctrines that descend from the courts of Equity'

[51] Jean Fleming Powers, 'Promissory Estoppel and Wagging the Dog' (2006-2007) 59(4) Arkansas Law Review 841, 847.
[52] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632.
[53] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 633.
[54] Henry Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 59 <http://ssrn.com/abstract=2617413>accessed 20 March 2017.
[55] D Brown (ed), *Ashburner's Principles of Equity* (2nd edn, London Butterworths 1933) 18.
[56] *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14.
[57] Henry Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 1 <http://ssrn.com/abstract=2617413>accessed 20 March 2017.

from the broader 'principles or ideals that they are said to distinctively embody.'[58] On the basis that the estoppel doctrines all doctrines all 'merge into one,'[59] it is clear that *equitable* estoppel is a 'doctrin[e] that descend[s] from the courts of Equity.'

The task here is to draw clues from the second type of equity, the higher 'principles or ideals,' in order to discern what kind of obligation we are concerned with in equitable estoppel. These higher principles and ideals are concerned with amending the generality and universality of the law, according to Aristotle.[60] Similarly, Klimchuk has said that equity 'prevents someone from being a stickler in a bad way, by exploiting the generality of a legal rule.'[61] Parting from a law-and-economics analysis, Henry Smith has argued that equity represents a control mechanism against the opportunistic misuse of the law, which he alternatively calls 'disproportionate hardship.' Smith adds that the standard for equitable intervention is 'absurdity or (manifest) unreasonableness.'[62] With regard to the former, ex post rules are necessary to deal with opportunistic use by those with the information to do so of legal rules, and thus they are 'necessarily ex post because if it were spelled out ex ante or even fully predictable ex ante, opportunists with this information could treat equity as a narrow and avoidable ex ante rule.'[63] It is apparent that these statements see equity not as part of the initial body of rules in a legal system but a second quasi-system that ensures the proper use and application of those first rules (possibly, or possibly not, because it antedates the first rules by virtue of belonging to natural law[64]) and that it is 'exceptional'[65] and 'presupposes the law.'[66] What should be avoided, Smith says, is an understanding of equity as 'both broad and ex

[58] Dennis Klimchuk, 'Equity and the Rule of Law' in L Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014) 248.
[59] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133.
[60] Aristotle, *The Nicomachean Ethics* (J A K Thomson tr, Penguin) para 1132a (particularly) at 14-18.
[61] Dennis Klimchuk, 'Equity and the Rule of Law' in L Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014) 257.
[62] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 10 <http://ssrn.com/abstract=2617413> accessed 20 March 2017
[63] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 26, 32 <http://ssrn.com/abstract=2617413> accessed 20 March 2017.
[64] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 27-28 n 114 <http://ssrn.com/abstract=2617413> accessed 20 March 2017.
[65] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) <http://ssrn.com/abstract=2617413> 34.
[66] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) <http://ssrn.com/abstract=2617413> 35.

post.'[67]

While Fung states that, of the three interests, restitution 'probably appeals to our sense of justice most' (because there are elements of both loss and gain),[68] Rakoff criticises the fact that Fuller and Perdue[69] did not provide much authority for the proposition that restitution is the most 'deserving' of the interests as a matter of justice.[70] However, the idea has had plenty of academic support. In the context of what Gordley termed 'promissory reliance,' jurists' response to why certain promises should be enforced has been (pre-nineteenth century) that 'what matters is the effect of a transaction on the wealth of the parties.'[71] Even more strongly, it was said that promissory estoppel 'is applied, as most writers admit, to avoid unjust enrichment and the opportunistic[72] manipulation of legal rules and ambiguous contract language.'[73] Here, 'unjust enrichment' appears to mean the wider principle of unjustified benefits as opposed to the specific doctrine, while the reference to 'manipulation' does not explicitly reference reliance but, rather, some idea of exploitation.

2.2.4.1 A possible common basis in corrective justice for equitable estoppel and unjust enrichment?

The links to a basic justice can be taken even further back in time: Pomponius stated: 'it is only right, as a matter of natural law, that no one should become richer to the injury of another.'[74] This has also been referred to by EW Thomas as the conscience of the common law. In his version, this conscience 'is the law's ultimate abhorrence of exploitation: no person may exploit another in the sense of taking or obtaining an unfair

[67] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) <http://ssrn.com/abstract=2617413> 26.
[68] D Y K Fung, Pre-contractual Rights and Remedies: Restitution and Promissory Estoppel (Sweet & Maxwell Asia 1999) 163.
[69] LL Fuller and R Perdue, 'The Reliance Interest in Contract Damages' parts 1 and 2 (1936-1937) 46(1) Yale Law Journal 52; (1936-1937) 46(3) Yale Law Journal 373.
[70] Todd D Rakoff, 'Fuller and Perdue's *The Reliance Interest* as a Work of Legal Scholarship' [1991] Wisconsin Law Review 203.
[71] James Gordley, 'Enforcing Promises' (1995) 83 California Law Review 547, 570.
[72] See Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 4 <http://ssrn.com/abstract=2617413> arguing that 'equity in private law as a coherent package of features' has the function of targetting actions that take opportunistic advantage of legal rules.
[73] David Cohen and Jack L Knetsch, 'Judicial Choice and Disparities Between Measures of Economic Values' (1992) 30 Osgoode Hall Law Journal 737, 763, referring eg (n 97) to J A Manwaring, 'Promissory Estoppel in the Supreme Court of Canada' (1987) 10 Dalhousie Law Journal 43, 51.
[74] As quoted by R A Samek, 'The Synthetic Approach and Unjustifiable Enrichment' (1977) 27 University of Toronto Law Journal 335, 342.

advantage at the other's expense' and that such advantages as precluded by the law's conception of equality.[75] This notion, he states, is based on corrective justice.[76]

Corrective justice has been elevated by Weinrib to the status of the source of all private law.[77] It is famously one of two kinds of 'particular' justice described by Aristotle. Beginning from the basic idea that 'injustice' means taking more than one's fair and lawful share of goods,[78] one kind of particular justice demands a proportionate distribution of valuable assets among the community while the other refers to the proportionality of individual transactions. The first is geometric in that it refers to ratios, which must be equal amongst themselves; the second is arithmetic in that it refers to subtractions (and corresponding additions) along a line, in which the equality is to be found in the medium point.[79] The first is, of course, distributive justice and is associated with political justice; the second is 'traditional[ly]' referred to as corrective[80] justice, which term can be understood to be due to the need to 'correct' the subtraction along the transactional line. As Gordley put it, '[i]t is the mathematics of addition and subtraction, of balancing accounts.'[81] Because gain and loss in Aristotle's sense mean moral gains and losses and therefore include the imbalance caused by, for example, an assault causing injury,[82] they are easily reconciled with an ideal of justice inherent in many torts and in fairness-based private law rights as well as those strictly dealing with transfers of property or value.

Smith states that the duty to make restitution, as with compensatory duties, is

[75] E W Thomas, 'The Harkness Henry Lecture: The Conscience of the Law' (2000) 8 Waikato Law Review 1, 3.
[76] E W Thomas, 'The Harkness Henry Lecture: The Conscience of the Law' (2000) 8 Waikato Law Review 1, 3.
[77] See generally Ernest Weinrib, *The Idea of Private Law* (1995 Oxford University Press).
[78] The terms 'lawful' and 'fair' are defined throughout this part of the *Ethics* by reference to each other and to justice or equality: thus, 'it is clear that all lawful things are in some sense just', and 'everything that is unfair is unlawful, but not everything that is unlawful is unfair.' These are then linked with equality: 'if what is unjust is unequal, what is just is equal; as is universally accepted even without the support of argument.' The 'goods' referred to in the text are 'those that make up the field of good and bad fortune.'
[79] Aristotle, *The Nicomachean Ethics* (J A K Thomson tr, Penguin) para 1132a (particularly) at 14-18.
[80] The translator of the *Ethics* prefers the term 'rectificatory,' stating that 'corrective' is 'unfortunate, because it suggests moral correction, whereas the object of this kind of justice is merely adjustment.' Another term often used, for example by James Gordley, is 'commutative' (see, for instance, James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1589).
[81] James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1589.
[82] Aristotle, *The Nicomachean Ethics* (J A K Thomson tr, Penguin) para 1132a8.

based on corrective justice.[83] Given the necessarily practical orientation of their treatise, it is perhaps unsurprising that the editors of Goff and Jones say that 'theories of corrective justice are ultimately too abstract, and in any event, too disputed, to generate clear-cut answers to the sorts of concrete questions that the courts must face, when identifying the boundaries of the law of unjust enrichment.'[84] According to Gordley, 'the injustice seems to lie rather in a violation of the principle of equality.'[85] At the same time, other commentators have sought alternative normative bases for unjust enrichment.[86] The concern of corrective justice with rectifying unjust gains and losses appears at first glance to provide support outside the positive law for providing a remedy for unjust enrichment as well as any other unfair imbalance of resources between two parties.[87] Gordley's statement that '[t]o generalize a bit, when it is clear that wealth has been transferred from one person to another, the law seems to expect that there be a reason'[88] would easily apply to equitable estoppel if only the term 'unfairly transferred' had been included.

2.2.5 Boundaries between the two doctrines

The idea that the two doctrines arise in similar areas of the law gives rise to a possible overlap. An exploration of the commentary surrounding this overlap, and the uncertainty surrounding its boundaries, will show that there is support for the view that further development of equitable estoppel would be welcome.

Although overlap between equitable estoppel and unjust enrichment is sometimes alluded to, such allusion 'often does not go beyond an acknowledgment that the principles are related.'[89] It has been said of the doctrines of promissory estoppel and unjust enrichment (in Australia) that '[w]hat is uncertain is whether the two concepts merely overlap – through the element of unconscionability – or whether promissory

[83] Stephen A Smith, 'Unjust Enrichment: Nearer to Tort than Contract' in Robert Chambers, Charles Mitchell, and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press 2009) 194.
[84] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Thomson 2011) para 6-24.
[85] James Gordley, 'Enforcing Promises' (1995) 83 California Law Review 547.
[86] See, for example, J M Nadler, 'What Right Does Unjust Enrichment Protect?' (2008) 28(2) Oxford Journal of Legal Studies 245.
[87] Weinrib has, of course, stated that corrective justice functions in a necessarily bipolar way.
[88] James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1592.
[89] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 146.

estoppel is in reality the key to a remedy which has the effect of reversing an unjust enrichment.'[90] Similarly, it was stated in the *Austotel* case that the boundary between estoppel and restitution is 'ill-defined.'[91]

Cohen and Knetsch say that the purpose of applying 'promissory estoppel' is 'to avoid unjust enrichment and the opportunistic manipulation of legal rules and ambiguous contract language',[92] which they base on both Canadian and US academic writing.[93] Thus, they say of a British Columbia case, *Dukes*, which involved promissory estoppel,[94] that 'the motive for the termination of the negotiations consisted of an attempt to obtain unexpected gains at the expense of the tenant.'[95] The *Dukes* case centred on a declaration, sought by Dukes Cookies to the effect that it was entitled to renew its lease with the Alma Mater Society of the University of British Columbia. The effect of the sought declaration was also described as that the lease would remain in force for a further two years,[96] and that the Society was to be restrained from enforcing a written provision as to notice.[97] Under the lease, Dukes was entitled to give notice within a prescribed two-month period if it wished to renew the lease for a further two years, and it did not do so.[98] The Society then asked Dukes to vacate the premises.[99] The estoppel claim appeared to be based upon conversations with the Society's manager, in which he indicated that Dukes' expansion proposal could not yet be implemented, and that it would not be known whether additional space would be available until September 1986

[90] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 48.
[91] *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 621, cited in John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30.
[92] David Cohen and Jack L Knetsch, 'Judicial Choice and Disparities between Measures of Economic Values' (1992) 30 Osgoode Hall Law Journal 737, 763.
[93] David Cohen and Jack L Knetsch, 'Judicial Choice and Disparities between Measures of Economic Values' (1992) 30 Osgoode Hall Law Journal 737, 763 n 97.
[94] *Re 6781427 Holdings Ltd and Alma Mater Society of University of British Columbia* (1987) 44 DLR (4th) 257.
[95] David Cohen and Jack L Knetsch, 'Judicial Choice and Disparities between Measures of Economic Values' (1992) 30 Osgoode Hall Law Journal 737, 764-765.
[96] *Re 6781427 Holdings Ltd and Alma Mater Society of University of British Columbia* (1987) 44 DLR (4th) 257 [1].
[97] David Cohen and Jack L Knetsch, 'Judicial Choice and Disparities between Measures of Economic Values' (1992) 30 Osgoode Hall Law Journal 737, 763.
[98] *Re 6781427 Holdings Ltd and Alma Mater Society of University of British Columbia* (1987) 44 DLR (4th) 257 [3].
[99] *Re 6781427 Holdings Ltd and Alma Mater Society of University of British Columbia* (1987) 44 DLR (4th) 257 [7].

– which was after the end of the two-month notice period.[100] He later indicated that this would be known even later, at Christmas.[101]

The Supreme Court of British Columbia based its decision 'upon a form of promissory estoppel' and referred to the decision of Denning LJ in *Charles Rickards Ltd v Oppenheim*,[102] citing his Lordship's statement that the defendant had led the plaintiffs 'to believe that he would not insist on the stipulation as to time'[103] and emphasising his remark that '[b]y his conduct he evinced an intention to affect their legal relations.'[104] The Court decided that Dukes 'could be and were reasonably led to believe that the respondent was not insisting upon strict compliance with the lease' and held that it was entitled to renew the lease.[105] Interestingly, although it referred to the need for 'detriment',[106] the Court made no comment on whether any detriment was discernible.

Cohen and Knetsch view the decision on promissory estoppel as ultimately based on a perception of unfairness: thus, they say, the fact that the landlord's profit would be 'substantially less' than the tenant's losses 'gives rise to strong perceptions of unfairness consistent with the empirical evidence indicating that when one person gains at the expense of another – a zero-sum game – the transaction is overwhelmingly seen as unfair.'[107]

At a conceptual level, there are both compressed and dispersed views on the potential overlap between equitable estoppel and unjust enrichment. While Gordley has showed a desire to reduce everything to one 'simple principle', others have been more circumspect about an evident court imprecision that attempts to blend together different doctrines on the basis of intuition. Thus, Gordley has said that 'most of the American cases dealing with contract formation', in which the courts have used 'the doctrines of

[100] *Re 6781427 Holdings Ltd and Alma Mater Society of University of British Columbia* (1987) 44 DLR (4th) 257 [5].
[101] *Re 6781427 Holdings Ltd and Alma Mater Society of University of British Columbia* (1987) 44 DLR (4th) 257 [6].
[102] *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616.
[103] *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, 623.
[104] *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, 623.
[105] *Re 6781427 Holdings Ltd and Alma Mater Society of University of British Columbia* (1987) 44 DLR (4th) 257 [13].
[106] *Re 6781427 Holdings Ltd and Alma Mater Society of University of British Columbia* (1987) 44 DLR (4th) 257 [9].
[107] David Cohen and Jack L Knetsch, 'Judicial Choice and Disparities between Measures of Economic Values' (1992) 30 Osgoode Hall Law Journal 737, 765.

consideration, promissory reliance, and offer and acceptance', are in fact based on the following 'simple principle': '[a] promise will not be enforced that enriches the promisee at the promisor's expense unless the promisor is likely to have made a prudent decision to enrich him.'[108]

Difficulties attend the overlapping features identified here. Farber and Matheson speak of the social value of trust (in the adjectival, reliant sense) as justifying their suggestion 'that a party who has obtained a benefit by making a commitment should be, *as a matter of justice*, required to adhere to that commitment.'[109] It may be the case that unjust enrichment suffers from a lack of principle in that the claimant often recovers 'because the court has concluded that, on the facts, he deserves to do so.'[110] Similarly, unconscionability in estoppel has been said to 'tel[l] us very little, save that the court thought that [the claimant] *deserved* to win.'[111]

Both doctrines can be seen as fulfilling principles that the more pragmatic contract-law rules (and the commercial world to which they attend) have no time for, yet the broader law could not countenance ignoring:

> [p]romissory estoppel and the related concept of unjust enrichment are not forward-looking constitutive tools whereby private parties may implement solutions to their individual problems. Instead, they represent backward-looking, regulative solutions to the public problem of how a court should respond when the equities surrounding a private interaction indicate that a remedy should be available but no enforceable agreement to that effect has been reached. Thus, they are part of contract's regulative penumbra, not its constitutive core.[112]

It could be said that this 'regulative penumbra' is concerned with fairness. Gergen refers to an earlier debate in which one view was that 'in striving to do what is *fair* in

[108] James Gordley, 'Enforcing Promises' (1995) 83 California Law Review 547, 613.
[109] David Charny, 'Nonlegal sanctions in commercial relationships' (1990) 104 Harvard Law Review 373, 380 (emphasis added), referring to Farber and Matheson, 'Beyond Promissory Estoppel: Contract Law and the 'Invisible Handshake'' (1985) 52 University of Chicago Law Review 903.
[110] Ewan McKendrick, 'Work Done in Anticipation of a Contract Which Does Not Materialise' in W R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo (eds), *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (Hart Publishing 1998) 163.
[111] Martin Dixon, 'Estoppel, unconscionability and formalities in land law' [2000] Conv 453, 454.
[112] James A Henderson Jr, 'Contract's Constitutive Core: Solving Problems by Making Deals' [2012] University of Illinois Law Review 127, 128.

particular cases, courts have cast a pall of potential litigation over informal agreements generally, making people less inclined to be trusting, to each trust by acting fairly, or to rely on informal agreements, with a net harmful effect on human welfare.'[113] Again, Gordley states 'these promises raise neither the fear that the promisor acted foolishly to his detriment, nor that the exchange was unfair.'[114] This echoes both the fairness idea explored here and the risk-taking analysis referred to in the previous sub-section. The two can be linked: based on Gordley's quotation, it can be argued that to bear the risk of reliance on a non-contractual promise is associated with the unfair allocation of benefit and of loss.

It has been seen in section 1.3.2[115] that estoppel claims have quite often briefly discarded in the English courts, and yet dicta have recently appeared in commercial cases about estoppel's developing principles.[116] In circumstances in which one has detrimentally relied, by performing services, upon an assumption that such services would form part of a contract (and so would be compensated), one can also rely on quantum meruit, which is a claim for the value of the work done which may[117] be based on unjust enrichment. The discussion of the preferable principle of recovery in pre-contractual situations highlights the possibility that academia may welcome a detrimental reliance-based, rather than an unjust enrichment-based, theory. There is some uncertainty surrounding the use of quantum meruit in this context: thus, in *Cobbe* Lord Scott indicated that the recovery in quantum meruit could also be analysed under either restitution for unjust enrichment or restitution for a total failure of consideration.[118] It could even be said that the reliance loss was equally compensated here: thus, McFarlane notes that 'A was required to pay a reasonable sum for B's work,

[113] Mark P Gergen, 'A Theory of Self-Help Remedies in Contract' (2009) 89(5) Boston University Law Review 1397, 1442 (emphasis added).
[114] James Gordley, 'Enforcing Promises' (1995) 83 California Law Review 547, 582.
[115] In n 34-36.
[116] *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023 [73]; *Aquavita International SA v Ashapura Minechem Ltd* [2015] EWHC 2807 (QB) [66].
[117] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 33 cites Deane J in *Pavey* to the effect that quantum meruit was available in two types of pre-Judicature Act claims: either recovery of debt under a contract, or recovery under 'a fictional implied contract or assumpsit' which is now more correctly 'based on unjust enrichment' without having recourse to the fiction of a contract.
[118] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [42]-[45], and as is pointed out by Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 113: 'the House of Lords did not precisely identify the reason for which it would be unjust for A to retain the benefit of B's services.'

and to meet B's expenses: A could thus meet his duty to ensure that B did not suffer a detriment.'[119] Fung has remarked that, typically, an award said to be in quantum meruit 'does not indicate unequivocally what type of a remedy it represents,'[120] whether it is restitution of unjust enrichment or a reversal of detrimental reliance (or what Fung calls 'unconscionability (linked to justifiable detrimental reliance)'[121]). This is interesting because of the refusal of the House of Lords in *Cobbe* to recognise a valid claim in equitable estoppel. Again, we see a certain imprecision and a possible failure by courts to identify what principle is at stake.

Fung has analysed a range of pre-contractual cases in which it is possible to say that both unjust enrichment and equitable estoppel were available explanations for the results. Acknowledging the potential overlap, he prefers however to view recovery as based on a hybrid of the two doctrines. Hopkins has said that the pre-contractual expenditure claims remain a 'particularly notable' area of overlap between equitable estoppel and unjust enrichment,[122] and acknowledges[123] the work of Spence who has stated a preference for an estoppel basis. [124]

Hopkins argued that such overlap as may occur will largely be in the shape of parallel claims, in which the reasoning underlying the availability of each claim differs, rather than coinciding claims, in which the reasoning is the same.[125] Within the first of these, 'the most likely overlap is one that does not appear to cause difficulties: that where alternative claims to estoppel and restitution arising from the same facts lead to different results.'[126] This, he says, will occur because of the tendency in successful estoppel claims to grant an expectation-based remedy, and the existence of remedial

[119] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 98.
[120] D Y K Fung, Pre-contractual Rights and Remedies: Restitution and Promissory Estoppel (Sweet & Maxwell Asia 1999) 113.
[121] D Y K Fung, Pre-contractual Rights and Remedies: Restitution and Promissory Estoppel (Sweet & Maxwell Asia 1999) 116.
[122] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 157.
[123] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 157.
[124] Michael Spence, Protecting Reliance: The Emergent Doctrine of Equitable Estoppel (Hart Publishing 1999) 67, 69.
[125] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 152-153.
[126] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 154.

discretion which itself means that a choice between a personal or proprietary remedy is possible, whereas the latter is only available in restitution in more circumscribed fashion.[127] Even when there is an overlapping claim in equitable estoppel and restitution, Hopkins urges care in saying that this 'may often be coincidental.'[128] Thus, in the pre-contractual context, in which he says there can be either parallel or coinciding claims,[129] he states that, since the same approach to remedies is adopted here as in other estoppel cases, an expectation remedy remains theoretically possible which indicates an estoppel reasoning.[130]

A number of difficulties have been highlighted with respect to the applicability of restitutionary principles to the justification of the recovery. Thus, as Carter points out, if only 'pure services' are performed that do not result in any benefit to the person for whom the work was done, the element of benefit or enrichment to that person is missing.[131] Equally, McFarlane has highlighted, 'if, for example, A accepts work on the understanding that he will pay for it *if A and B enter into a contract*, then it is unclear that A is necessarily unjustly enriched if he refuses to pay for that benefit when no contract results.'[132] One might, Carter says, justify restitutionary recovery on the basis that a request for the work has been made.[133] However, this will not always be relevant: so McFarlane has noted that a case such as *Crabb*, in which the detriment was incurred without any request, would not be susceptible of an unjust enrichment analysis.[134] Thus, even in such cases in which there is a request, 'the parties' eventual failure to conclude a contract may make it impossible to regard A as retaining a benefit from B's work.'[135]

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[127] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 150-152, see also the summary at 154.
[128] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 155.
[129] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 157.
[130] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 158.
[131] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 39, 44.
[132] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 113.
[133] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 44.
[134] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 114.
[135] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 114, citing the California Supreme Court case of *Coleman Engineering Co v North American Aviation* 420 P 2d 713 (1966) 729.

Hopkins has argued that the only scenario in which there is overlap between equitable estoppel and restitution on the basis that the reasoning is the same[136] - and not just that they are alternative claims arising on the same facts[137] - is one in which 'a defendant acquiesces in a claimant's misprediction.'[138] He describes free acceptance as 'a ground of restitution applied where a benefit is accepted (despite an opportunity to reject) in the knowledge that the claimant is not acting gratuitously',[139] and in which restitution is awarded because to refuse to pay would be unconscionable.[140] In the misprediction scenario, he says, 'the ground of restitution is necessarily free acceptance'[141] and a restitution rather than an equitable estoppel analysis ought to be preferred in order to further remedial certainty on the one hand, and greater cohesion within the law of restitution on the other.[142]

However, McFarlane has described the idea that the concept might be a valid ground for an unjust enrichment claim as 'controversial', adding that 'it can hardly be taken as well-established that A comes under a duty to pay B if A simply stands back and allows B to perform an act, knowing that B *hopes* to be paid.'[143] Burrows has referred[144] to a dictum of Pollock CB to the effect that '[o]ne cleans another's shoes; what can the other do but put them on?'[145] Meanwhile, McFarlane has said that 'it can hardly be taken

[136] See Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 158.
[137] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 154. He says this explains most cases in which both claims simultaneously arise: '[c]laims are more likely to arise in parallel than to coincide.'
[138] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 162.
[139] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 149.
[140] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 149.
[141] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 162.
[142] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 158-159.
[143] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 113.
[144] Andrew Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2010) 383.
[145] *Taylor v Laird* (1856) 25 LJ Ex 329, 332. This phrase is cited in *Benedetti v Sawiris* [2013] UKSC 50, [2014] AC 938 [26] and is compared there with Graham Virgo's example of cleaning windows. Burrows also stated at 383 in relation to the case of *Pavey and Matthews Pty Ltd v Paul* (1986) 162 CLR 221 that the defendant there could not be said to have accepted the claimant's work on the cottage 'by allowing it to carry on when in all conscience she ought to have rejected it: as she was perfectly willing to pay what she thought was a reasonably sum for the work there was no 'unconscientiousness' in her allowing it to continue.' This was contrary to the views of Mason and Wilson JJ in that case at 263 that the unjust enrichment was based on free acceptance.

as well-established that A comes under a duty to pay B if A simply stands back and allows B to perform an act, knowing that B *hopes* to be paid.'[146]

Where does all of this lead? Essentially what is being argued is that some form of compensation for reliance loss is needed, and this question often arises in discussing the overlap between unjust enrichment and equitable estoppel. This in turn indicates that there may be a preference for compensating the reliance rather than the route unjust enrichment permits, which is to reverse benefit. However, for this to happen, we need to explain subtractive loss and its reversal in terms of equitable estoppel.

The relatively stringent conditions attached to unjust enrichment indicate that an effective doctrine of equitable estoppel may come to be preferred as providing a claim for extracontractual loss. The editors of the latest edition of *Goff and Jones* have said of the *Queen's Gardens* case that, while the denial of an agreement was not unconscionable, there had nonetheless been benefits conferred by way of expedited performance which were recoverable, and thus they say that unjust enrichment has a distinct role to play in this context which equitable estoppel does not cover.[147] Burrows has suggested that, as promissory estoppel becomes recognised 'as a sword,' the doctrine will become more widely used in this context.[148] Similarly, Carter has argued on the basis of mostly Australian cases that, in situations in which a restitutionary claim and a claim in promissory estoppel may both lie for work done in anticipation of a contract, the use of estoppel would be preferable as, first, this would emphasise the true basis for the claim – 'unconscionable conduct' – and '[t]here would be no need to fudge the element of benefit under restitution';[149] and, secondly, promissory estoppel is more flexible than quantum meruit since, when applying the former, '[t]he plaintiff's equity

[146] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 113. Note the possible link between free acceptance and acquiescence: see by Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 159-160 to perform a role similar to acquiescence, in that an obligation is imposed upon a defendant who has allowed work to be performed and then seeks not to compensate the person who has done the work.

[147] R Goff and G Jones, *The Law of Unjust Enrichment* (Charles Mitchell, Paul Mitchell and Stephen Watterson eds, 8th edn, Thomson 2011) para 16-16.

[148] Andrew Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2010) 372.

[149] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 45.

must be satisfied, but this need not be to the extent of a full quantum meruit.'[150] More recently, McFarlane has said that, if one seeks to define a pre-contractual reliance-based doctrine, the 'principle of English law which most closely resembles that model is currently applied in some cases of proprietary estoppel'[151] and that this involves a commitment and reasonable reliance thereon, which would result in detriment were the commitment to be reneged upon. Since, he says, to extend the English doctrine of promissory estoppel is in part impermissible[152] and in any event dangerous,[153] the solution is to extend proprietary estoppel instead to situations which do not concern land.[154]

While Carter highlights a doctrinal advantage of equitable estoppel in that it may more successfully fill the gap left by the lack of a good faith principle,[155] he also indicates that the advantage of equitable estoppel may lie in its remedial flexibility, an element which would be lost if a default minimum remedy were to be required.[156] Interestingly, however, he says that this flexibility means that 'the plaintiff's equity must be satisfied, but this need not be to the extent of a full quantum meruit.'[157] Hopkins has similarly said that, in cases in which the courts reject an expectation-based remedy and thus turn to proportionality, it is an 'advantage' of their discretion in this regard that they can provide a remedy that 'does ensure proportionality or that provides an appropriate balance

[150] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 45.
[151] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 116: this is the *Thorner* principle. He describes it here as a principle that 'seems to impose a duty on A to ensure that B does not suffer such a detriment'; that is, a detriment based on B's reasonable reliance on a commitment by A, which detriment occurs 'as a result of that reliance, if A fails to honour his commitment.'
[152] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 118-119.
[153] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 120
[154] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 122.
[155] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 43: 'some independent principle of good faith in negotiating' was possibly the basis of the decision in favour of granting 'compensation or restitution' (in Sheppard J's words) for pre-contractual work in *Sabemo*, and he notes that this decision pre-dated the High Court's recognition of unjust enrichment in *Pavey*.
[156] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 45.
[157] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 45.

between the competing needs of the parties.'[158]

2.2.6 Purpose: summary

It may therefore be said at this stage that there is a role in the wider law for equitable estoppel, which overlaps with the perceived proper role for unjust enrichment. It has been seen that the boundaries between, and of, the doctrines have not been fully developed. Yet there is some acceptance of the idea of a wider application of equitable estoppel that it has not yet had, becoming mired in an area of fallback legal claims. Having outlined the academic acceptance of equitable estoppel as well as – in section 1.3.2 – the perception from the case law that it needs development, the next section will explore some views on the category of obligation to which equitable estoppel corresponds.

2.3 Category

This section will explore some conceptual views of private law, and, more specifically, arguments about the way in which equitable estoppel fits into those views. It will conclude that the better view is that the obligation in equitable estoppel is in the nature of a liability. The section is a brief conceptual sketch, which will occasionally pinpoint forward to the model proposed in section 7.3.1, before turning to the doctrinal analysis in the remainder of the thesis.

2.3.1 A wrong?

The word 'wrong' has two possible meanings. One is in other words the root of a cause of action: it is a wrong in the general sense that would entitle one to redress. An alternative meaning is somewhat synonymous with a tort.[159] This meaning is defined thus by Birks:[160] 'A wrong is an infringement of a right or, which is ultimately synonymous, a

[158] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 156.

[159] See P Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1995), in which the etymology of the word 'tort' is explained. In French, from which the word is directly imported, it means 'wrong.' The root of the French word, then, is Latin, in which language the word 'torgere' means 'to twist' and is to be contrasted with straightness, rectitude: with 'right.'

[160] P Birks, 'The Concept of a Civil Wrong' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1995) 24, introducing Austin's primary-secondary obligation classification. He also uses the word 'wrongs' in this sense at 14.

breach of a duty.' A wrong is therefore not a metaphysical idea of bad behaviour in the abstract, but something which has the parallel effect of infringing an existing right. A wrong is thus an infringement of a primary right or right per se, which gives rise to a secondary right to the redress of the wrong.[161]

Some commentators associate equitable estoppel with the causing, and curing, of wrongs. Virgo has classified proprietary estoppel, or rather his preferred term 'equitable estoppel' as an equitable wrong capable of giving rise to a right to restitution.[162] The view of equitable estoppel as an equitable wrong is not universal: Hopkins has commented that 'unlike the other forms of equitable wrongdoing (for example, breach of fiduciary duties and breach of confidence) unconscionability does not involve the breach of a primary duty.'[163]

Conversely, Spence identifies equitable estoppel as involving a breach of a primary 'duty to ensure the reliability of induced assumptions,'[164] which he locates in 'the general duty not to cause preventible harm.'[165] He outlines the conceptual nature of his model as follows:

> [t]he 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.[166]

This is supported by Liew, who terms this a 'plausible account of why the elements [of estoppel] are required: only when these are fulfilled will B have breached

[161] John Austin, *Lectures on Jurisprudence* (5th edn London 1885).
[162] Graham Virgo, *The Principles of the Law of Restitution* (1st edn, Oxford University Press 2006) 530.
[163] Nicholas Hopkins, 'Estoppel and Restitution: Drawing a Divide' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2003) 152.
[164] Michael Spence, Protecting Reliance: The Emergent Doctrine of Equitable Estoppel (Hart Publishing 1999) 2.
[165] Michael Spence, Protecting Reliance: The Emergent Doctrine of Equitable Estoppel (Hart Publishing 1999) 4.
[166] Michael Spence, Protecting Reliance: The Emergent Doctrine of Equitable Estoppel (Hart Publishing 1999) 2.

his or her primary duty, giving A cause of action in proprietary estoppel.'[167] Liew's own definition reads:

> [w]hen B induces A to assume that A will obtain an interest in B's property and A relies on that assumption, B incurs a primary duty to prevent harm to A by making good B's expectation. If, however, B refuses to do so, B breaches his primary duty, causing A to suffer detriment.[168]

Similarly, at one stage, Robertson argued that the 'fundamental duty underlying deceit, negligent misstatement, *Nocton v Lord Ashburton*, equitable estoppel and related doctrines is simply a duty to prevent harm being suffered by those who rely on one's conduct.'[169] However, he has subsequently stated that his previous view understanding equitable estoppel as a wrong was incorrect[170] and that the view has emerged that 'no identifiable rights arise by way of estoppel until there has been unconscionable conduct,'[171] thus, 'without threatened or actual inconsistent conduct causing harm, no rights arise by way of estoppel.'[172] On the other hand, he maintains that the claimant's 'entitlement to protection from harm resulting from any inconsistent conduct by the defendant' means that the defendant 'commits a wrong by infringing the claimant's right not to be harmed by the defendant's inconsistent conduct.'[173] McFarlane does not define the obligation as a wrong but as a liability, in contrast with a contractual duty, saying that concluding a contract 'can be seen as imposing an immediate duty on A to comply with A's promise to B; this is reflected in the fact that, if that duty is breached, A will be ordered to ensure that B is in the same position that B would have been in if the promise

[167] Ying Khai Liew, 'The secondary-rights approach to the 'common intention constructive trust'' [2015] Conv 210, 213.
[168] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 540.
[169] Andrew Robertson, 'Protecting Reliance: The Emergent Doctrine of Equitable Estoppel by Michael Spence; Reliance, Conscience and the New Equitable Estoppel' (2000) 24(1) Melbourne University Law Review 218.
[170] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 203.
[171] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 203.
[172] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 204.
[173] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 210. At 209 he clarifies that, 'while equitable estoppel cases often require the court to respond to a wrong, the wrong is not itself the rights-creating event.'

had been performed.'[174] He contrasts the position in equitable estoppel[175] by noting that 'A instead comes under a liability to ensure that B suffers no detriment as a result of B's reasonable reliance on A's promise.'[176] With Sales, he likened the *Thorner* principle to unjust enrichment on this basis. The authors said that both doctrines are 'secondary in the sense that the occurrence of the triggering facts does not, by itself, give B a vested claim-right against A, but rather exposes A to a liability, the precise content of which may be fixed only at a later point when a court determines if, and to what extent, it would be unconscionable for A to retain a benefit acquired at B's expense, or to leave B to suffer a detriment arising from B's reasonable reliance on A's promise.'[177]

2.3.2 Isolating and categorising the remedy

Zakrzewski has proposed two models of remedies, in the sense of 'judgment[s] or order[s] of the court'[178] rather than the general sense of some medicine or repair,[179] which Birks has shown is capable of more than one meaning when applied specifically to law.[180] Adopted by Liew in his study of institutional and remedial constructive trusts, and proprietary estoppel,[181] it is submitted that Zakrzewski's classification is a useful basis on which to analyse the justification for retaining discretion within the remedy, but that it is less illuminating of the process leading to the requirement that a remedy be given by the court. It ought to be noted at the outset that Zakrzewski's concept of remedy corresponds strictly to the court order – he says that 'a court order, and hence a remedy,

[174] More accurately in his view, the principle in *Walton v Walton* (CA, 14 April 1994) or *Thorner*.
[175] Again, the *Thorner* principle.
[176] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 346.
[177] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632-633.
[178] Rafal Zakrzewski, 'The classification of judicial remedies' [2003] Lloyd's Maritime and Commercial Law Quarterly 477, 480.
[179] Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 University of Western Australia Law Review 1, 3 cites the Oxford English Dictionary for the comparison: the root is said to be 'medeor', 'mederi' from the Latin 'to heal.' He adds in 'Rights, Wrongs and Remedies' (2000) 20(1) Oxford Journal of Legal Studies 1, 9 that the common feature of his various definitions of remedy is that they are 'a cure for something nasty. To remedy is to cure or make better.' Rafal Zakrzewski, 'The classification of judicial remedies' [2003] Lloyd's Maritime and Commercial Law Quarterly 477, 480 cites the OED to the effect that a remedy is a 'means of counteracting or removing an outward evil of any kind; reparation, redress, relief.'
[180] Peter Birks, 'Rights, Wrongs and Remedies' (2000) 20(1) Oxford Journal of Legal Studies 1, 10-17; 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 University of Western Australia Law Review 1, 4-6.
[181] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, using the more extensive analysis in Zakrzewski's monograph: Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005).

may be said to comprise the rights that arise from the event that is the judge's utterance or the issue of the court document'[182] – and he views the domain of primary and secondary rights as being strictly concerned with substantive rights, anteceding any 'remedy' which is required by the court order.[183]

It will be seen that Zakrzewski's classification allows for remedies that require discretion in the determination of their content, but that something else mandates the court's ability to decide whether or not a remedy is due. This ability is required to give effect to the idea that it has the discretion in equitable estoppel to decide whether the conduct is sufficiently unconscionable to mandate a remedy, and the discretion to decide what that remedy should be. It will be argued that this should be McFarlane's idea of a liability, to which a court may or may not give effect. [184]

Zakrzewski's classification will now be outlined. He describes two types of remedies: replicative and transformative. Replicative remedies 'restate or replicate substantive rights'[185] and hence involve no discretion, while transformative remedies create 'a legal relation that significantly differs from any legal relation that existed before the court order was made' and 'transform or modify the legal relations between the claimant and defendant which existed before trial.' [186]

Liew finds a further type of remedy in the 'middle ground,'[187] which he says applies to proprietary estoppel. This is a 'reflective' remedy, which 'respond[s] to secondary rights' and 'give[s] effect to [the claimant]'s substantive right but nevertheless provide[s] for the exercise of discretion as to content.'[188] He finds this despite the court's retention of discretion, the fact-sensitive nature[189] of the 'various degrees of detriment

[182] See Rafal Zakrzewski, 'The classification of judicial remedies' [2003] Lloyd's Maritime and Commercial Law Quarterly 477, 481.
[183] See Rafal Zakrzewski, 'The classification of judicial remedies' [2003] Lloyd's Maritime and Commercial Law Quarterly 477, 481.
[184] See eg Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 347, building upon the definition of a liability by Stephen A Smith, 'Duties, Liabilities and Damages' (2012) 125 Harvard Law Review 1727.
[185] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 78-79.
[186] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 203.
[187] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 536.
[188] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 536.
[189] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 546 n 135 citing *Aspden v Elvy* [2012] EWHC 1387 (Ch) [99].

suffered and expectations formed,' and despite the vagueness of the phrase 'minimum equity to do justice.' This is because the remedial goal is not itself subject to discretion: the goal is the 'correction of reliance losses.'[190] Zakrzewski, however, noting that the relevant principles in equitable estoppel are insufficiently settled,[191] suggests that the remedy in equitable estoppel could be either replicative[192] or transformative.[193]

Liew says that a breach of the primary right in his model of estoppel gives rise to a secondary duty, to which a court gives effect by determining the content of the minimum equity. Thus there is discretion as to the content, but not as to the goal, which, as he notes, corresponds with a reflective remedy.[194] If we accept that the minimum equity could be determined at zero, conceptually this is still reflective under Liew's model (to make this point, it is not necessary to determine whether the remedy is for a breach of a secondary right). It is a decision that the conditions which in every case must precede the minimum equity have been fulfilled, but that a further decision based on the requirements of the minimum equity itself mandates that its content be zero. Of course, where the minimum equity is zero, a view that the remedy is transformative would make no difference on a practical level.

As Liew has pointed out, the court's remedial goal of the minimum equity to do justice 'says nothing about what goal ought to be achieved.' [195] We must now analyse what would happen on the view that, a liability having arisen, the court retains discretion, first, to decide whether unconscionability requires a minimum equity,[196] and, secondly, whether the remedy ought to be varied.[197]

There is some uncertainty about the exact point at which a liability is incurred,

[190] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 546.
[191] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 132.
[192] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 132.
[193] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 133.
[194] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 536.
[195] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 547.
[196] Step (C)(ii) under the model: see further section 7.1.4.
[197] Step (C)(iii) under the model: see further section 7.1.4.

what nature it has, and what the status is of the respective rights of the parties.[198] For example, it could be asked whether a right is created for one party because the counterparty is now restrained from insisting upon a pre-existing, or perhaps future at the time of promising,[199] right. Or it could be asked whether 'new' rights are formed instead, although this could be characterised as a modification of other pre-existing rights. For instance, if one party can no longer act[200] in a way contrary to the other's expectation without potentially being exposed to litigation and an obligation to pay compensation, then could be understood as a modification of the parties' rights in respect of one another.

There are difficulties in attempting to classify estoppel remedies as transformative. Transformative in this sense means that there is no right-obligation relationship in the absence of, and preceding, a court order. Smith would say that this is true of all remedies.[201] McFarlane argues that, in equitable estoppel, the court is being asked to (decide whether to) give effect to a liability rather than confirming a right to redress for breach of a secondary right.[202] However, McFarlane has also said that A is no longer entirely free to act once the detriment begins to be incurred.[203] It could be argued on this basis that a transformative remedy, with which a court creates a new legal relation significantly differing from any pre-existing legal relation, is not the appropriate kind of remedy in equitable estoppel. Zakrzewski suggests on the one hand that a transformative remedy might arise in equitable estoppel: 'one may take the view that the law in this area is concerned with remedial discretion, not rights, and that it will never be

[198] Similar to Zakrzewski's view that the substantive law has not fully resolved important questions surrounding the nature, timing, and content of the respective rights: Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 132.

[199] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 75. He says that subsequently acquired rights will not fall foul of the rule, provided there is a prior mutual supposition as to the manner in which representor E will deal with representee R as regards such rights.

[200] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 205, citing Ben McFarlane, 'Blue Haven Enterprises Ltd v Tully & Another' (2006) 1 Journal of Equity 156, 159: 'proprietary estoppel is not best seen as a doctrine reacting to the wrong of A. It is at the moment when A fails to fulfil a belief as to his own future action, on which B has relied, that A might be said to commit a wrong: but it seems clear that proprietary estoppel allows B to acquire a right against A at this point.' See also Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 4.51.

[201] Stephen A Smith, 'Duties, Liabilities and Damages' (2012) 125 Harvard Law Review 1727.

[202] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 335.

[203] Ben McFarlane, 'Blue Haven Enterprises Ltd v Tully & Another' (2006) 1 Journal of Equity 156, 159 cited in Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 205.

possible to say in estoppel cases that a person comes under a duty to do a particular act before an order of the court is made.'[204]

On the other hand, Zakrzewski's alternative suggestion, based on the principles in *Crabb*, was that an order for a conveyance of land, obtained following improvements on that land on the faith of a promise of a gift, seemed clearly to be a replicative remedy.[205] He adds that, as the substantive law of equitable estoppel 'settl[es] down, it should be possible to say with more certainty when primary rights arise from events such as induced detrimental reliance, what the content of such primary rights is, and when and what secondary rights arise from their infringement,' additionally noting that this is consistent with Spence's work.[206] It seems therefore that this suggestion of Zakrzewski that estoppel may produce replicative remedies is informed by his agreement with Spence that the remedy in estoppel gives effect to secondary rights.

Can a remedy to which equitable estoppel gives rise be characterised as a replicative remedy of a primary right, arising either as soon as the claimant acts detrimentally, or the defendant insists upon his rights? This cannot be the case: the defendant does not have to give effect to any remedy (for example, pay compensation for detriment) before the court makes any determination. In any event, the defendant would not necessarily know to what remedy he must give effect at this point;[207] for example, if the applicable remedial rule is the minimum equity to do justice, it will often be unknown how much compensation is the minimum. Even if the claimant provides a detailed list to the defendant, the court still retains some discretion on every view of the court's remedial jurisdiction in equitable estoppel.[208]

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[204] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 132-133. See also 216, where he further suggests that remedies in estoppel may be an example of 'enforceable transformative remedies,' which (204-205, using the definition of FH Lawson, *Remedies of English Law* (2nd edn, London Butterworth & Co 1980) 13) 'require the defendant to do or abstain from doing something and the claimant may execute them or seek enforcement of them upon non-compliance without a prior court application.' A 'constitutive' remedy can be distinguished in that it is 'self-executing' according to Lawson (13).

[205] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 132.

[206] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 132.

[207] See Stephen A Smith, 'Duties, Liabilities and Damages' (2012) 125 Harvard Law Review 1727, 1742-1743; Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 535-6. Liew says that 'it is doubtful whether it is ever possible for B properly to discharge his secondary duty prior to a court order, since B would not be in a position to determine what the appropriate liquidated sum of damages would be.'

[208] As Zakrzewski notes in *Remedies Reclassified* (Oxford 2005) 87, 'discretion may be guided in the sense that the matters which may or must be taken into account in its exercise may be specified.' Building upon Dworkin's ideas of strong and weak discretion (*Taking Rights Seriously* (London Duckworth 1977) 31-32),

It may be that an intermediate position can be found in equitable estoppel between the notion of a liability (preferred by McFarlane and Sales over a duty, saying that it is a liability that gives rise to a secondary right to redress) and the notion of a transformative remedy, as Zakrzewski suggested and Liew rejected. Yet transformative remedies create rights: they do not give effect to existing rights,[209] so can it be said that there is a right of some sort (as opposed to a duty to make redress) before the trial? McFarlane has argued that the defendant is constrained following the first incurring of detriment in that he may now either adhere to the expectation or face a claim by the claimant.[210]

Smith has said of duties to pay damages that there is no 'ordinary duty to pay damages,' arguing that 'it would normally be impossible for wrongdoers to satisfy such a duty (or at least impossible for them to know that they had satisfied it) because the duty's content could not be determined prior to a judicial decision.'[211] Liew responds that '[t]he fact that a secondary right is *created* when B breaches A's primary right is not inconsistent with the view that that right already in existence requires *liquidation* by a court to determine the extent of the remedy, taking into account the criterion of

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Zakrzewski says that '[i]t is impossible to pinpoint where weak discretion ends and strong discretion begins. It is a matter of degree.' Nonetheless, it would appear that equitable estoppel is capable of giving rise to (and the model proposed in this thesis more likely to fit within the idea of) strong discretion, where a judge is 'simply not bound by standards set by the authority in question' (Dworkin, 32). Zakrzewski gives an example of strong discretion arising where a judge 'is only guided by very open-ended textures' and 'is required to make a choice having regard merely to what is fair, just, and reasonable in the circumstances.' As equitable estoppel currently exists, and as the model proposes, a judge can decide that a liability which has arisen can be extinguished because conscience does not require it to be given effect. Thus, weak discretion, which 'greatly circumscrib[es]' (Zakrzewski, 87) the scope for the choice to be exercised by the judge, would seem less applicable, having regard however to the mentioned argument that this is a matter of degree. Building upon Chapter 4, the view is maintained in the thesis that, while the content of unconscionability concerns vague ideas of wrongdoing, there is certainty in its procedural effects (ie conscience triggers the jurisdiction, which is certain, to decide whether conscience dictates a remedy, a value judgment based on few, if any, criteria). Thus the content, which is what is relevant to this discussion, is relatively open-ended. In terms of what such an obligation ought to look like, there is little support for a fully discretionary option and a larger number of cases and commentators lean towards the view that at least one measure ought to be the benchmark, even if liability for a remedy in respect of that measure is only triggered by a court order. Henry Smith has said that 'it is in the nature of opportunism and the equitable intervention to be keyed to lack of foreseeability' but later affirms that these problems eventually 'can become subject to rules… Equity is left over for new hard-to-foresee variants on the theme and is reserved for as-yet-undreamed-of opportunism.'[208] In other words, purely discretionary intervention tied to the lack of foreseeability of unconscionable conduct may have once sufficed, but it can eventually solidify into more predictable rules.

[209] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 215 arguing that remedial constructive trusts are transformative remedies.

[210] Ben McFarlane, 'Blue Haven Enterprises Ltd v Tully & Another' (2006) 1 Journal of Equity 156, 159 cited in Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 205.

[211] See Stephen A Smith, 'Duties, Liabilities and Damages' (2012) 125 Harvard Law Review 1727, 1742-1743.

remoteness.'[212] This right that *requires* liquidation of a remedy can be contrasted with a mere liability to ensure that the possible detriment does not become detriment, which (if this is not ensured) gives rise to a power to bring a claim.[213] Transformative remedies 'differ extensively' from the pre-existing rights[214] but, if a remedy in estoppel were to correspond to the detriment loss, then there is a position prior to the trial on which it can fix an order.[215]

It is therefore tentatively suggested (before turning to the doctrinal analysis in the remainder of the thesis) that the remedy in equitable estoppel[216] ought to be characterised as *reflecting* a primary right not to be induced into incurring detriment. The existence of the liability, even if only recognised by the court at trial, can most appropriately be characterised as allowing the court to fashion a reflective remedy: it is recognising, and reflecting, a feature in the world which already exists, which is the overall reliance (detrimental) loss.[217] That liability may be satisfied if the court considers that the conditions for the liability exist at the time of trial,[218] allowing the court to make a determination which may lead to a reflective remedy, in the fashion of an order requiring the defendant to pay the compensation decided by the court.[219]

[212] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 536 (emphasis in the original).
[213] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 4.51, referring to the power (n 94) as a Hohfeldian power rather than a claim-right.
[214] Rafal Zakrzewski, *Remedies Reclassified* (Oxford 2005) 79.
[215] This must be true under the proposed model: the court must be satisfied that conditions (A) and (B) are fulfilled, which gives rise to (C)(i): the court is satisfied that the elements of liability have been established. This is a separate question from (C)(ii), whether the court will grant a minimum equity remedy.
[216] Assuming that a unified doctrine exists, or is to be recognised.
[217] In the model, outlined in section 7.1.4, it will be seen that a liability arises when detriment is incurred – but that, for a court to give it effect, it must recognise that the liability has been established (step (C)(i)). The court retains discretion at this point, first, to decide whether unconscionability requires a minimum equity (step (C)(ii)), and, secondly, what the minimum equity ought to be (step (C)(iii)). Step (C)(i) is considered independently, for clarity's sake and on the basis that it stands as an equivalent of the question whether the court considers it unconscionable to insist upon rights. It may be, under this initial conceptual assessment, that step (C)(ii) is redundant, or it may alternatively be that this means that the remedy is transformative. However, the fact that the remedy will correspond to the detriment loss (section 6.3.2) is suggestive of a reflective analysis. See sections 6.4 and 7.3.1 for more on the significance of (C)(ii).
[218] Step (C)(i), considered independently for clarity's sake.
[219] See Rafal Zakrzewski, 'The classification of judicial remedies' [2003] Lloyd's Maritime and Commercial Law Quarterly 477, 480-481: ''court order' often refers to rights. We are referring to a right or set of rights (a jural relationship) when we speak of a court order being granted, breached, enforced, suspended or discharged. More precisely, a court order, and hence a remedy, may be said to comprise the rights that arise from the event that is the judge's utterance or the issue of the court document.'

2.4 Conclusions

The chapter has analysed the status and the conceptual nature of equitable estoppel. In relation to the former, it has explored the role of equitable estoppel in the wider law and the sense that there is some doubt at its intersection with its closest comparator, unjust enrichment. This, it is argued, is part of a wider perception of the doctrine's merely *potential* usefulness. Thus, academia in this chapter confirms the doubt that was suggested to arise in the case surveys in 1.3.2. The questions of the existence or otherwise of a wrong in equitable estoppel, and of the conceptualisation of a minimum equity-based remedy, have also been addressed.

Detriment will be defined in section 5.3.2 and its relationship to the understanding of unconscionability in this thesis will be addressed in sections 4.2.1.3, 4.3, and 5.3.2.2. It will be sought to shape the remedy in section 6.3.

The essential conclusion is that all of this enables a flexible remedial approach. A proposition for a unified model that, it is hoped, will address the issues identified in section 1.3.2, will be incrementally built in the chapters that follow. In view of certain elements of a model which will be proposed,[220] a flexible remedial approach will be required, and with this initial sketch it has been sought to enable such an approach.

In doing this, we have brought to bear the first element of a sequence which will be complete by the final chapter: this element is that a liability must be found by the court.

[220] Step (B), the presumption of inducement. Added to the need for a flexible approach, it is considered to be important to separate the required steps to indicate clearly what the court is doing, why, and, crucially, to indicate at what stages unconscionability does arise: steps (C)(ii) and (C)(iii).

Chapter 3: A single cause of action in equitable estoppel

3.1 Introduction

A single doctrine of equitable estoppel will either support, or not support, its own cause of action, and will do so in a principled way. The manner in which some estoppels can give rise to an independent cause of action while others cannot seems somewhat unprincipled and haphazard. On this basis alone, it cannot be claimed that a single – abstract, hypothetical – doctrine of equitable estoppel requires an independent cause of action. However, it may be claimed that a cause of action in the estoppels in which it is excluded ought not to be excluded. The reality is that any equitable estoppel can lead to consequences as significant for litigants as those resulting from rules of law that are more widely recognised as being substantive. However, it remains the case[1] that estoppel in England can only be a cause of action if it concerns the creation, transfer or enforcement of an interest in land.[2] This position is eminently worthy of criticism.

This chapter challenges the adage that estoppel is a shield, but not a sword. The use of metaphor abounds in this area of the law. McFarlane comments that a stage has been reached whereby one speaks of a 'metaphor about a metaphor.'[3] One used by counsel in the case of *Combe v Combe* has become somewhat enshrined[4] as a useful shorthand for estoppel's operation: as Birkett LJ put it, 'I think that the description given by Mr. Kee of the doctrine enunciated in the two cases to which Denning LJ has referred, as one to be used as a shield and not as a sword, is very vivid.'[5] However, the shield-or-sword debate, 'yet another arid exercise' in the opinion of Sir Anthony Mason writing extrajudicially,[6] has also been criticised as being a 'misleading aphorism'[7] that is not entirely clear or helpful, since it is not a point of contention that estoppel can function in

[1] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000); Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] Lloyd's Maritime and Commercial Law Quarterly 256.
[2] Kelvin K Low, 'Nonfeasance in Equity' (2012) 128 Law Quarterly Review 63. For a general discussion of the enforceability of proprietary estoppel compared with the lack of enforceability of other estoppels, see PT Evans, 'Choosing the right estoppel' [1988] Conv 346.
[3] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 275.
[4] *Ajayi (t/a Colony Carrier Co) v RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (PC); counsel's argument in Crabb v Arun District Council [1976] Ch 179 (CA).
[5] *Combe v Combe* [1951] 2 KB 215 (CA) 224.
[6] Sir Anthony Mason, 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 Law Quarterly Review 238, 255.
[7] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999, 1012.

more ways than merely as a defence.[8] The discussion in this chapter will agree with this point and will also criticise the notion that only proprietary estoppel may be used as a 'sword' on the basis that it is a coincidental distinction that must be discarded for lack of principle.

Recognising the lack of coherence in this area of the law, there have been repeated calls for a unified estoppel doctrine which openly acknowledges the ability of estoppel to create significant rights and eliminates irrelevant distinctions between the doctrines. There is equally a widely-held view that to unite the equitable estoppels is dangerous.

The two questions will, in this chapter, be considered separately.

3.2 A cause of action in estoppel?

3.2.1 The definition of a cause of action

A definition of a cause of action is not a standard feature of legal textbooks: it appears that jurists should simply understand what it is by using intuition. Maitland, without explicitly defining the cause of action, refers to it as a 'Right' and then as a 'wrong.' This sparse definition was intended to contrast a cause of action with a form of action, which was once the cause of action's remedial counterpart.[9] What this contrast meant was that 'Right becomes before Remedy' which he said derived from Bracton's statement '*tot erant formulae brevium quot sunt genera actionum*.' Diplock LJ also describes the cause of action as the precursor to a remedy, adding the explanation that '[a] cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.'[10] In a way that appears to fit within that definition, Atiyah warns against seeing the cause of action solely as the ground of complaint. He provides a bipartite definition, with proof of damage suffered being the first point, and the second being 'that the damage was the result of some facts giving rise to a ground of complaint in law.'[11] Thus, a cause of action may be defined as

[8] Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] LMCLQ 256.
[9] FW Maitland, *Equity: Also the Forms of Action at Common Law: Two Courses of Lectures* (Cambridge University Press 1929) 300.
[10] *Letang v Cooper* [1965] 1 QB 232 (CA) 242-3. The quotation is also cited in Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000).
[11] Patrick S Atiyah, 'Misrepresentation, Warranty and Estoppel' (1971) 9 Alta L Rev 347, 370.

the coincidence of fact and legal rule that gives rise to a right in law. Metzger and Phillips, parting from the Black's Law Dictionary definitions of 'averment of facts sufficient to justify a court in rendering a judgment' and 'concurrence of the facts giving rise to enforceable claim,'[12] conclude that 'a cause of action involves a listing of factual elements which, when occurring together, will enable the plaintiff to obtain some sort of legal relief' which, 'typically,' would 'have a distinctive label of some sort: for example, "battery," "contract," and so forth.'[13] They note, however, a number of further issues that fall to be considered when asserting that something is a cause of action independent of other causes of action: the need to further define a truly independent cause of action by asking whether relief could be granted even in the absence of a pleading or of the granting of relief under the more 'established' cause of action; whether the two causes of action could be pleaded and discussed separately by the court; 'even more useful[ly],' whether the court could dispose of each claim in a different way; and, additionally, whether the application of the cause of action must 'depend on the plaintiff's inability to triumph under a different theory.'[14]

3.2.2 A basis for a substantive equitable estoppel that addresses reliance

Mills Holmes had said from a United States perspective that

> the doctrine now labeled promissory estoppel is not a modern twentieth-century development arising from opinions based on Section 90 of the Restatements of Contracts. Rather, it is a venerable, ancient form of relief with historical origins in both the common law action of assumpsit and ancient equity decisions.[15]

The reference to equity will prove to be the more significant one, despite the assertion that 'by the sixteenth century, assumpsit at common law prevailed over equity as the primary judicial method for rectifying and redressing detrimental reliance on informal contracts,' apparently due to '[j]ealousy of the chancellors' growing jurisdiction.[16] The equitable dimension of estoppel by representation is well known:[17] so,

[12] *Black's Law Dictionary* (4th edn 1968) 279.
[13] Michael B Metzger and Michael J Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 Rutgers Law Review 472, 510.
[14] Michael B Metzger and Michael J Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 Rutgers Law Review 472, 510-11.
[15] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45, 51-52.
[16] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45 n 14.
[17] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-002: '[e]stoppel by representation originated in equity in the 17th century, and was adopted, without acknowledgement, by

while Cooke says that '[t]he principle known as common law estoppel' developed from the earlier evidentiary rule of estoppel in pais, she refers to estoppel by representation as an equitable doctrine that is said[18] to have been introduced to the common-law courts by *Montefiori v Montefiori*.[19] This was the first of a series of English decisions which concerned entering into marriages in reliance on a promise and which culminated[20] with *Jorden v Money*, a mid-nineteenth-century decision of the House of Lords which is discussed below. In that case, estoppel by representation was described as 'well known in the law, founded upon good faith and equity' and yet 'a principle equally of law and of equity.'[21]

Lunney has stated that it was 'clear' from a series of estoppel cases (including *Freeman v Cooke*[22]) decided in the law courts in the middle of the nineteenth century that 'the doctrine was emerging from its historical antecedent, estoppel by record, towards a different, more substantive role.'[23] Ames refers to a different equity that aided 'a plaintiff who had incurred detriment on the faith of the defendant's promise,'[24] which bears a great similarity to the equity which might have applied in *Jorden v Money* had the policy behind contract law not already suffered significant changes. First, the wording of this analysis is interesting as Ames describes the ground of relief as being detrimental reliance. Secondly, however, Ames appears to say that this equity disappeared by 1500, by which time only three cases had been reported. Nonetheless, an elision between such an equity and the understanding of consideration that prevailed before the freedom-of-contract era has been acknowledged in writings from the United States,[25] and it is also evident from *Jorden*. In *Jorden*, as we will see, an equitable doctrine of 'making representations good' was put to rest.

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the common law by a process which culminated in 1837 in *Pickard v Sears*.' See, also, the comment of Deane J in *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7, (1988) 164 CLR 387 [17]-[18], where he said that the law-equity dichotomy in estoppel is a mistaken perception of this doctrine.

[18] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 20 n 27 cites WS Holdsworth, *A History of English Law*, vol ix (3rd edn, Metheusen & Co 1944) 161, which in turn refers to Walter Ashburner, *Principles of Equity* (Butterworth & Co 1933) 629.

[19] WS Holdsworth, *A History of English Law*, vol ix (3rd edn, Metheusen & Co 1944) refers to Lord Mansfield's decision in *Montefiori v Montefiori* (1762) 1 Black W 363, 96 ER 203 as being ahead of its time yet 'fundamentally in harmony with the principle underlying the rules as to estoppel by matter in pais.'

[20] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 19-25 and Mark Lunney, '*Jorden v Money: A Time for Reappraisal?*' (1994) 68 ALJ 559, 560.

[21] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185, 210.

[22] *Freeman v Cooke* (1848) 2 Exch 654.

[23] Mark Lunney, '*Jorden v Money* – A Time for Reappraisal?' (1994) 68 ALJ 559, 564.

[24] James Barr Ames, *The History of Assumpsit* (1888) 2 Harv L Rev 1, 14-15.

[25] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45, 53-56.

Estoppel in equity thus provided the possibility of obtaining relief for induced reliance that led to detrimental actions, and it did so by means of both offensive and defensive actions. The line between the two estoppels coincides with that drawn in *Jorden* between reliance on a statement of fact and reliance on a promise, which is a flawed distinction.

3.2.3 Inconsistent ideas about estoppel

The process of recognising equitable estoppel's additional substantial role has not been an easy one. Leading texts that surfaced after the disappearance of nineteenth-century equitable estoppel refer only to estoppel by representation (even while acknowledging its equitable nature) as a rule of evidence. Winfield, who devoted a chapter of his 1933 book about torts to quasi-contracts, said equitable estoppel 'from the English point of view is merely a rule of evidence.'[26] Holdsworth used very similar terms in describing contemporary (1944) estoppel as 'simply a rule of evidence.'[27] This view is maintained in *Spencer Bower*'s latest edition from 2003, even in respect of the promissory and proprietary varieties of estoppel.[28] These statements, particularly the last, ignore the evolution of the law, probably because it is still possible to view estoppel as denying the opposing party a competing claim.

The judicial refusal to acknowledge estoppel as giving rise to a substantive obligation can produce absurd results. In the High Court decision in *Amalgamated Investment & Property*,[29] Robert Goff J said that 'estoppel is not, as a contract is, a source of legal obligation,' despite the possibility, acknowledged by him, that estoppel may be the only instrument available to enforce a legal obligation.[30] However, the learned judge later intimated that an estoppel might concern a 'contractual right'[31] and thus be an acceptable cause of action, which somewhat contradicts his previous denial that an estoppel can be a source of legal obligation. With respect, it shows a reluctance (which is

[26] Percy H Winfield, *The Province of the Law of Tort* (Cambridge 1931) 147.
[27] Percy H Winfield, *The Province of the Law of Tort* (Cambridge 1931) 147. This was, however, by way of contrast with the position in the twelfth and thirteenth centuries, when estoppel was one of various modes of proof which determined the outcome of a case.
[28] Though they are described with other terms: respectively, quasi-estoppel and estoppel by encouragement.
[29] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] 1 QB 84 (QB, CA).
[30] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] 1 QB 84 (QB) 106. See Halson's fourth category of estoppel: Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] LMCLQ 256.
[31] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] 1 QB 84 (QB) 106.

not exclusive to this case) to engage with the question of the true nature of an estoppel and a tendency to confuse the issue. If the content of an estoppel is a 'contractual right,' what this means is that the right cannot be claimed unless the estoppel operates. This appears to place the estoppel at a remove from the obligation that it creates, which appears to be the meaning of Robert Goff J's words. However, recognition of the substantive role of estoppel, though perhaps doctrinally possible for longer than it may seem, has been slow to appear. It will be seen below that the *Waltons Stores* decision allowed a cause of action to be brought for damages for detrimental reliance loss. Handley has said of the pre-*Waltons Stores* decisions in Australia in which promissory estoppel 'succeeded were negative in substance, and prevented the defendant enforcing a legal or equitable right or cause of action.'[32]

The potential of promissory estoppel to be a powerful alternative to contract, which appeared to emerge in *High Trees*,[33] was truncated by the decision in *Combe v Combe*[34] and so promissory estoppel was relegated to the status of a sub-doctrine within consideration of narrow application. While several commentators[35] have put forward reasons why this need not be the position, others[36] maintain that it is proper to restrict the reach of promissory estoppel. The cases of *Jorden v Money* and *High Trees*, both of which are milestones for present purposes, will next be considered, together with this critical commentary.

3.2.4 Jorden v Money

The dispute in *Jorden v Money*[37] centred on a declaration made by the respondent's aunt that she would not seek the return of a debt that the respondent owed her. This debt was alleged by the respondent to be an operative reason for his obtaining approval to marry. His aunt, the appellant, retracted her declaration, apparently at her own husband's request and after the respondent had married on the understanding that the debt was forgotten. The respondent had sought a declaration in

[32] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-008.
[33] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB).
[34] *Combe v Combe* [1951] 2 KB 215 (CA).
[35] Mark Lunney, '*Jorden v Money* – A Time for Reappraisal?' (1994) 68 ALJ 559; Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000).
[36] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985); K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006); and, to the extent that 'promissory estoppel' overlaps with the principles in *High Trees* and *Hughes*, Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267.
[37] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185.

the Court of Chancery that the debt no longer existed in law. In the House of Lords, the majority held that the court could not give such a declaration. The Lord Chancellor, after discussing cases of estoppel by representation both at law and at equity, held that the case did not come within what he stated to be the rule: 'if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other.'[38] The reason it fell outside the rule, he said, was that the appellant had made a promise not to enforce the debt rather than a statement that she had executed a release of the debt.[39] Thus, there was what Finn has described as an 'idiosyncratic insistence'[40] upon the need for the representation to be one of fact.

Lord St Leonards, the sole dissenter, saw the relevant principle as being that

> you shall not be allowed, either in a court of equity or in a court of law, to misrepresent the state of circumstances in which property exists, so as to deceive parties and induce them to rely upon your statement, and to deal with matters of the utmost importance; for example, as in this case, with a marriage settlement, or in the purchase of property, which is a very common case.[41]

The semantics problem that lies at the heart of the fact-or-intention question was highlighted with reference to Lord Mansfield's wording in *Montefiori* of representing something in a light different from the truth: 'Is it not different from the truth to represent that you have abandoned a thing; that you never will attempt to enforce it; and then subsequently to come forward and say you have *not* abandoned it, and never did; and that you are going to enforce the right, even to the extreme of throwing into jail the man who is so much the object of your affection?'[42] Independently of whether one can misrepresent what he intends to do, he said, '[b]ut if you declare your intention with reference, for example, to a marriage, not to enforce a given right, and the marriage takes place on that declaration, I submit that, in point of law, that is a binding undertaking.'[43]

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[38] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185, 210.
[39] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185, 214-15.
[40] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 64.
[41] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185, 249.
[42] *Montefiori v Montefiori* (1762) 1 Black W 363, 96 ER 203.
[43] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185, 251-52.

Lunney has said that the majority's rule against statements of intention, while 'open on the authorities,' was not the necessary one to draw, as none of the cases at law dealt with representations as to future conduct and Lord Cranworth mentioned only two cases at equity.[44] Lunney states that *Jorden* was a contractual case.[45] Meanwhile, Lord St Leonards believed it was 'utterly immaterial whether it is a misrepresentation of fact, as it actually existed, or a misrepresentation of an intention to do, or to abstain from doing, an act which would lead to the damage of the party whom you thereby induced to deal in marriage or in purchase, or in anything of that sort, upon the faith of that representation.'[46]

On the other hand, Lord St Leonards considered that 'a representation by one party of an intention to do an act which he refrains from doing in consideration of another party giving up a right to something else, and refraining from doing another act' was 'perfectly good in law, and can be enforced without any legal contract at all,'[47] and he then asserted that he had shown the debt was abandoned 'for a valid consideration, namely the intended marriage.'[48] Handley has pointed out[49] that *Jorden v Money* does not contradict later cases on promissory estoppel[50] because of the House of Lords' reliance on the fact that Mrs Jorden made her statements while refusing to deliver up the bond. He notes[51] that Denning J was correct in *High Trees* when he distinguished *Jorden* from the case at hand on the basis that 'the promisor made it clear that she did not intend to be legally bound.'[52] McFarlane comments that the result in *Jorden v Money* was unsurprising as it was a failed attempt to apply 'true' estoppel (ie estoppel by representation, which is to preclude the assertion of certain facts at trial because of the other party's detrimental reliance on the alternative, represented facts being true) where it could not apply on the facts.[53] For his part, Finn has said that the 'seeds of destruction' for making representations good were sown by the insistence of cases decided within

[44] Mark Lunney, '*Jorden v Money* – A Time for Reappraisal?' (1994) 68 ALJ 559, 564.
[45] Mark Lunney, '*Jorden v Money* – A Time for Reappraisal?' (1994) 68 ALJ 559.
[46] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185, 248.
[47] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185, 240.
[48] *Jorden v Money* (1854) 5 HL Cas (Clark's) 185, 248.
[49] Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-005.
[50] He referred to *Hughes* and *Birmingham Land*.
[51] Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-005.
[52] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134.
[53] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267.

that principle (one of which, he says,[54] is *Dillwyn v Llewellyn*,[55] which is also considered to be a decision on proprietary estoppel) on using the language of contractual principles. McFarlane and Sales equally speak of the doctrine of making representations good as being 'defunct.'[56] Following *Jorden v Money*, Finn says, any earlier cases which could not be newly interpreted as resting upon contract were overruled,[57] while *Derry v Peek* took over (at common law) in only allowing compensation for fraudulently-made representations.[58]

The backdrop at least to the contractual element may be, as noted by Lunney, that consideration had a less technical meaning in the early nineteenth century, before the advent of classical contract theory: thus, to act on a promise was to supply sufficient consideration and was also a valid reason for avoiding the operation of the Statute of Frauds.[59] Consideration thus meant 'the reason for the enforcement of the promise,'[60] a reason which, Lunney says, 'is clear from the cases – because it would have been inequitable for one party to resile from the representation or promise.'[61]

Cooke also refers to the absence of a bargain in such cases, which made it difficult for the courts to enforce 'contracts.'[62] Remarking that it was unusual on the part of the House of Lords not to refer to a series of cases[63] that involved this idea of consideration, Lunney says: '[i]t was the failure to recognise this alternative ground for these decisions together with the difficulty of attempting to justify them ex post facto on contractual grounds that was one reason for the decision in *Jorden v Money*.'[64] Cooke remarks on the lost opportunity that the case represented:

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[54] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 64.
[55] *Dillwyn v Llewellyn* (1862) 4 De GF & J 517, 45 ER 1285.
[56] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 631. See also Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 291 discussing one of the 'very last' cases to be decided under the doctrine before its 'collapse': *Loffus v Maw* (1862) 3 Giff 592, 66 ER 544.
[57] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 65.
[58] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 65.
[59] Mark Lunney, '*Jorden v Money* – A Time for Reappraisal?' (1994) 68 ALJ 559, 566.
[60] Mark Lunney, '*Jorden v Money* – A Time for Reappraisal?' (1994) 68 ALJ 559, 566.
[61] Mark Lunney, '*Jorden v Money* – A Time for Reappraisal?' (1994) 68 ALJ 559, 566.
[62] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 19.
[63] The five cases other than *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL) that were used to support the rule in *High Trees* were, in chronological order, *Birmingham & District Land Company v London & North Western Railway Company* (1889) LR 40 Ch D 268; *Fenner v Blake* [1900] 1 QB 426 (QB); *Re William Porter* [1937] 2 All ER 361; *Marquess of Salisbury v Gilmore* [1942] 2 KB 38 (CA) and *Buttery v Pickard* (1946) 174 LT 144. They were said in *High Trees* not to concern 'estoppel as such' but a promise capable of enforcement due to other conditions, those in *Hughes*, being fulfilled (*High Trees*, 134) They were also said to be 'a natural result of the fusion of law and equity' (*High Trees*, 134).
[64] Mark Lunney, '*Jorden v Money* – A Time for Reappraisal?' (1994) 68 ALJ 559, 566.

> [t]he law of estoppel could have emerged from the nineteenth century side by side with contract as a key component of the law of obligations, contract being the law of bargains and estoppel (perhaps so called, perhaps under another label) the principle for enforcing relied-on statements or promises. But the two decisions *Jorden v Money* and *Low v Bouverie*[65] ensured that it did not, and common law estoppel was regarded as a point of pleading, not a cause of action.[66]

Thus, the views of Cooke, Finn, and Lunney indicate that a different route was at this stage still possible. However, Finn has pointed out that the wider jurisdiction which included cases such as *Hammersley v De Biel*[67] – one of the 'marriage settlement cases' to which Cooke referred [68] – a jurisdiction permitting 'the making good of representations',[69] 'was never blessed with a comprehensive and coherent doctrinal justification.'[70]

On the other hand, detrimental reliance as a substitute for consideration or a basis for the enforcement of agreements 'already had long and venerable antecedents before the Norman Conquest.'[71] Indeed, it is a much older principle than promissory estoppel.[72] It is a basis for the enforcement of promises in Louisiana, even if judicial treatment there is 'uneven.'[73] It exists in a nebulous idea of justice, as is clear when Fung states that the basis of promissory estoppel is 'unconscionability (linked to justifiable detrimental reliance).'[74] While it has been said that '[t]he concept of detrimental

[65] *Low v Bouverie* [1891] 3 Ch 82 (CA) 105 in which Bowen LJ said that '[e]stoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said' and again he referred to it as 'filling up the gap in the evidence which, when so filled up, would produce this right to relief.'

[66] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 25.

[67] *Hammersley v De Biel* (1845) 12 Cl & F 45.

[68] And to which *Montefiori v Montefiori* (1762) 1 Black W 363, 96 ER 203 also belongs.

[69] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 62.

[70] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 63.

[71] Shael Herman, 'Detrimental Reliance in Louisiana Law -- Past, Present, and Future: The Code Drafter's Perspective' (1984) 58(3) Tulane Law Review 707, 714.

[72] Shael Herman, 'Detrimental Reliance in Louisiana Law -- Past, Present, and Future: The Code Drafter's Perspective' (1984) 58(3) Tulane Law Review 707, 720. The term 'promissory estoppel' was probably coined by Williston in the 1920s.

[73] Shael Herman, 'Detrimental Reliance in Louisiana Law -- Past, Present, and Future: The Code Drafter's Perspective' (1984) 58(3) Tulane Law Review 707, 715-716.

[74] D Y K Fung, Precontractual Rights and Remedies: Restitution and Promissory Estoppel (Sweet & Maxwell Asia 1999) 116.

reliance, like any other legal idea, is practically meaningless in a vacuum,'[75] the attempts made to give it a foothold in the law have unfortunately been too varied to be credible.

The other problem has been policy in contract law. Feinman notes, referring to research that emerged in the late 1970s, that 'the rise of the bargain principle pushed benefit-based recovery to the peripheral field of quasi-contract and drove reliance-based recovery underground.'[76] The main reason is that the development of contract law, which surged in the nineteenth century, means that the rules today remain guided by objectivity. As Gordley points out, autonomy became in the nineteenth century the usual starting point of definitions of contract.[77]

It may therefore be necessary to the development of equitable estoppel to recognise that it serves a purpose outside contract.[78] Thus, it was written of the *Waltons Stores* decision (and in contrast with the US position: although, there, the influence of promissory estoppel varies according to state[79]) that it did not reinforce the death of contract because, first, the High Court did not see reliance as a substitute for consideration and, secondly, the essence of promissory estoppel is different from a contractual obligation in that Waltons' unconscionable conduct created an equity, precluding them from contradicting their promise.[80]

3.2.5 Central London Property Trust Ltd v High Trees House Ltd

The excited response to certain comments (which were obiter) made in the course of this decision, a decision that was handed down by a then-recently appointed High Court judge, indicates that there may have been[81] a lacuna in the law and a demand for a solution. The solution was not ultimately delivered, and the cause lies partly with the eager response to the decision. In this case, of course, a tenant of a building of flats in London arranged with the landlord company to pay a reduced amount of rent, as war

[75] Shael Herman, 'Detrimental Reliance in Louisiana Law -- Past, Present, and Future: The Code Drafter's Perspective' (1984) 58(3) Tulane Law Review 707, 710.
[76] Jay M Feinman, 'Promissory Estoppel and Judicial Method' (1983-4) 97 Harv L Rev 678, 679.
[77] James Gordley, 'Equality in Exchange' (1981) 69 California Law Review 1587, 1624.
[78] See the discussion of the views of McFarlane and Collins in Chapter 6.
[79] See generally Eric Mills Holmes, 'A Restatement of Promissory Estoppel' (1996) 32(2) Willamette Law Review 263.
[80] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 41-42.
[81] See Jay M Feinman, 'Promissory Estoppel and Judicial Method' (1983-4) 97 Harv L Rev 678, 696: 'Critics have granted promissory estoppel overt recognition as a legitímate contract law doctrine because of several perceived deficiencies in classical contract law.'

conditions in the 1940s had led to a loss of sub-tenants and thus of the income coming from them. After the war ended, the plaintiff landlord claimed for arrears amounting to the difference between the old rent and the agreed amount, but only from the quarter-year period ending in September, 1945, which was not only after the end of the war but also several months after all the flats had been let again in early 1945. Denning J discussed the position that would have applied had the plaintiffs claimed for all of the arrears since the beginning of the arrangement and said that, while they would have succeeded under *Jorden v Money*, later (and seemingly obscure) cases[82] would have defeated such a claim on the basis that 'a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on.'[83] Turning to the issue before him, Denning J interpreted the parties' arrangement as applying while the flats were not fully let, which ceased to be the case early in 1945 and at which point the rent from the sub-tenants actually increased, and thus he held for the plaintiffs (who nonetheless were not claiming arrears from early 1945 but from June of that year). The dicta in this case has since been characterised as resurrecting the principle in the cases to which Denning J referred.[84]

However, two main difficulties attend the value of the dicta in *High Trees*. First, the opportunity presented by these comments for a promise to create legal relations was deflated by the decision in *Combe v Combe*,[85] in which the Court of Appeal (of which Denning LJ was a part) restricted the application of the principle to situations in which there was a pre-existing contractual relationship. Secondly, although *High Trees* appears to have extended the remit of estoppel to statements of intention, the difficulty of distinguishing between fact and intention, clear from the divergent approaches in *Jorden v Money*,[86] has not had an opportunity to be resolved judicially. The protection of consideration from encroachment by promissory estoppel, said in *Combe v Combe* to be

[82] *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL); *Birmingham & District Land Company v London & North Western Railway Company* (1889) LR 40 Ch D 268; Fenner v Blake [1900] 1 QB 426 (QB); *Re William Porter* [1937] 2 All ER 361; *Marquess of Salisbury v Gilmore* [1942] 2 KB 38 (CA) and *Buttery v Pickard* (1946) 174 LT 144.
[83] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB) 134.
[84] *Moroney v Revenue Commissioners* [1972] IR 372 (SC) 379 (Kenny J): '[t]he doctrine got little attention in the textbooks until it was revived in striking fashion' in *High Trees*.
[85] *Combe v Combe* [1951] 2 KB 215 (CA).
[86] It was also mentioned in *Marquess of Salisbury v Gilmore* [1942] 2 KB 38 (CA), one of the cases to which Denning J referred in *High Trees*.

necessary, has arguably obviated the need to inquire more profoundly into the foundations of estoppel.

3.2.6 The Irish position

Certain dicta, and the commentary which resulted, suggest that the Irish position on the enforceability of non-proprietary estoppel may differ from that in England. This proposition is not on very stable ground, but the suggestions are sufficiently significant to warrant separate attention. Keane's view is that '[i]t may be said with reasonable confidence that the doctrine of promissory estoppel is not necessarily confined to cases where there is an existing contractual relationship' but that 'how much further it extends remains to be defined.'[87] The most important authority remains the High Court decision of Kenny J in *Revenue Commissioners v Moroney*,[88] despite a number of factors that render this decision of doubtful value: first, the comment on promissory estoppel was obiter; secondly, it was a comment with which the Supreme Court in any event disagreed; and, thirdly, it runs counter to the then-contemporary English authority, which had moved away from *High Trees*, and it does not adequately explain why this was being done and why it was prudent to return to the *High Trees* position.[89]

[87] Ronan Keane, *Equity and the Law of Trusts in the Republic of Ireland* (2nd edn, Bloomsbury Professional 2012) para 27.22. The second edition omits a point made in the equivalent section in the first edition to the effect that 'the law cannot be regarded as authoritatively settled in this jurisdiction': Ronan Keane, *Equity and the Law of Trusts in the Republic of Ireland* (1st edn, Butterworths 1988).

[88] *Revenue Commissioners v Moroney* [1972] IR 372 (HC, SC) applying *Ajayi (t/a Colony Carrier Co) v R T Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (PC). However, see the discussion in John Mee, 'Lost in the big house: where stands Irish law on equitable estoppel?' (1998) 33 Ir Jur 187 of *Webb v Ireland* [1988] IR 353 (SC), which may have been, he says, an attempt to use promissory estoppel as a sword. On the other hand, this is a difficult point as the principle at work in that decision was legitimate expectations.

[89] *Revenue Commissioners v Moroney* [1972] IR 372 (HC) 376. The facts of that case are peculiar: the owner of a licensed premises in Dublin had transferred the premises to his two sons, one of whom was about to be married. Their solicitor was anxious to avoid the stamp duty which is imposed on voluntary transfers in life, so he opted to create a deed with a false sale of the property. As Kenny J put it, '[n]o money was ever paid nor did any of the parties to the transaction expect that this would be done.' After the father died, the Revenue Commissioners claimed estate duty on two-thirds of the so-called purchase price, clearly assuming that the sons had paid the father for the property. Kenny J's main holding, with which Walsh J in the Supreme Court agreed (at 384-385), did not concern promissory estoppel: this was that there could be no basis for the Revenue's claim and thus no liability to estate duty as the father, had he been alive at that moment, would not have succeeded in a hypothetical action against the sons for payment of the purchase price. However, Kenny J, noting at 381 that counsel had not engaged with this point, went on to note that he believed the sons would have succeeded in the hypothetical action on the basis of promissory estoppel. He stated that the doctrine applied 'where there is a representation by one person to another that rights *which will come into existence* under a contract to be entered into will not be enforced, and that the father's subsequent signing of the deed was what created the legal relations necessary for a promissory estoppel.

The Supreme Court upheld the orthodox view that the doctrine could only arise in this type of case when the estoppel sought to preclude the enforcement of an obligation.[90] As there was no (valid) contract in existence, there could be no claim for existing contractual rights, nor could the father be estopped from asserting rights that he never had. Indeed, this was the English position at the time. In *Ajayi*,[91] which, as it happens, was referred to by Kenny J in *Moroney*, the Privy Council had approved this principle. On the other hand, Kenny J had relied for his decision on the definition of the doctrine in the then-current edition of *Snell*, the first part of which requires someone to make 'to the other a promise or assurance which is intended to affect the legal relations between them.'[92] Other than *Moroney*, the purported requirement of a pre-existing legal relationship has been referred to in the later case of *Doran v Thompson*[93] at the High Court level. However, the problems identified here with it remain and its authority for promissory estoppel purposes must, with respect, be of dubious value, even considering Clark's description of Kenny J's dicta as being as 'of greater importance'[94] than the decision of the High Court in the later case of *Folens*. This would all appear to dispose of the ability of estoppel to be a cause of action in Ireland.

On the other hand, Kenny J's position is consistent with one view of *High Trees*, put forward by Hogg, that there is nothing to suggest in Denning J's dicta 'that what is created is merely a defence, but rather a full blown right which can be enforced by the promisee under the conditions stipulated for its creation.' [95] This comment will be analysed in the next section.

The subsequent restatements of the principle in England include additions that it must be 'inequitable' for the promisor to resile from the promise,[96] although this seems to be more an explanation for the principle rather than a true addition, and that the doctrine does not extinguish legal rights but operates suspensively. [97] The later clarifications of promissory estoppel have thus had the effect that the doctrine has

[90] *Revenue Commissioners v Moroney* [1972] IR 372 (SC) 387.
[91] *Ajayi (t/a Colony Carrier Co) v R T Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326 (PC). It was also not a disputed issue in the contemporary cases of *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co* [1955] 1 WLR 761 and *D & C Builders Ltd v Rees* [1966] 2 WLR 288.
[92] Snell, *Principles of Equity* (R E Megarry and P V Baker eds, 26th edn, Sweet & Maxwell Ltd 1966) 627.
[93] *Doran v Thompson* [1978] 1 IR 233 (HC, SC).
[94] Robert Clark, *Contract Law in Ireland* (8th edn, Round Hall 2016) para 2.65.
[95] Martin Hogg, *Promises and Contract Law* (Oxford University Press 2010) 183.
[96] *D & C Builders v Rees* [1966] QB 617 (CA).
[97] *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761.

become of very specific application as it can only operate as an alternative to contractual forbearance. Nonetheless, its obvious overlap with estoppel by convention or representation means that it is capable of being pleaded in conjunction with, and ultimately to the same effect as, these doctrines.

3.2.7 Should some estoppels not give rise to a cause of action?

3.2.7.1 Support

3.2.7.1 (a) The distinct character of proprietary estoppel

Cooke's treatment of equitable estoppel proposes a unified model which encompasses most of the estoppels that come within the equitable bracket, yet she holds the orthodox position that only estoppels relating to an interest in land may be independently enforced.[98] Such an objection seems to be concerned to a greater degree with conserving the existing position than with convincingly characterising proprietary estoppel as somehow distinct from other estoppels to the extent that an independent cause of action is especially required here.

It has been said that 'merely to describe the development of estoppel law is to offer no account of the law's particular treatment of proprietary estoppel.'[99] The historic reasons for the difference in treatment can, however, be useful as part of an illumination exercise. McFarlane has suggested that the ability to enforce an informally-arising duty relating to particular land[100] is because 'each piece of land is regarded as unique.'[101] Cooke argues that two factors led to this 'peculiar treatment': the first is that '[i]nvestment in land was something to which the courts were very sympathetic in the nineteenth century; they would not have wished to see either investment or housing lost;' the second is that the claimant 'is likely to be the economically weaker party' and thus more attractive to the courts in these cases.[102] Meanwhile, Low has suggested that

[98] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 124-25.
[99] P T Evans, 'Choosing the right estoppel' [1988] Conv 346, 350.
[100] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 9.32
[101] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 9.33.
[102] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 128. The second factor may still be the rationale behind the domestic line of proprietary estoppel cases, such as *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776, to be contrasted with the commercial kind, represented by *Cobbe v Yeoman's*

proprietary estoppel's protection of expectations as well as its relative freedom from being regarded as a threat to consideration are due to its origins as a version of part performance.[103] This suggestion was made on the basis of an earlier study by Bently and Coughlan which focused on the doctrine's originating cases.[104] Thus, the reasoning in cases such as *Plimmer v Mayor of Wellington*[105] is that something that is akin to an agreement, and deserving to be treated as such, has come into existence because of one party's request that another party make improvements on the former's property, and of the former's permission for the latter to occupy and use the property. Proprietary estoppel was, by 1916, accepted as a kind of estoppel in pais, ie estoppel by representation.[106] According to Cooke, however, proprietary estoppel was unaffected by the laissez-faire approach to regulation that prevailed in the nineteenth century as it concerned requirements in property rather than contract law, which was the usual subject of this trend.[107] What is striking then is the effect of the courts' policy priorities on the recognition of a cause of action in estoppel, although this should not be overstated given the significant doctrinal objections to a cause of action in non-proprietary estoppels.

3.2.7.1 (b) The distinct character of the various estoppels generally

Detractors of a substantive cause of action in promissory estoppel do not consider the operation of the doctrine as limited to the purely defensive. Instead, promissory estoppel in this school of thought is viewed as changing rights with the effect that they are enforceable in a limited way. A traditional starting-point for this debate is the decision of Denning LJ in *Combe v Combe*, which qualifies his earlier statements in *High Trees*. In *Combe*, a promise had been made by a husband to his wife that he would pay

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Row Management [2008] UKHL 55, [2008] 1 WLR 1752. Cooke dispels the notion that the complex formalities involved in disposing of land, and consequent likelihood that people would overlook them, had the same effect of allowing a cause of action in proprietary estoppel, since the court had a discretionary jurisdiction and the cases sometimes concerned assets other than land.

[103] Kelvin K Low, 'Nonfeasance in Equity' (2012) 128 LQR 63, 77-79, citing Lionel Bently and Paul Coughlan, 'Informal dealings with land after section 2' (1990) 10 Legal Studies 325.

[104] Lionel Bently and Paul Coughlan, 'Informal dealings with land after section 2' (1990) 10 Legal Studies 325. Atiyah had previously made the same point in relation to estoppel by representation, arguing that *Jorden v Money* was an attempt to prevent the equitable doctrine from continuing to circumvent the Statute of Frauds: P S Atiyah, 'Misrepresentation, Warranty and Estoppel' (1971) 9 Alta L Rev 347, 376. This was in the broad sense to include representations as to future intention or promises, as promissory estoppel as such did not exist at the time about which he was writing.

[105] *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 (PC).

[106] *Attorney-General to the Prince of Wales v Collom* [1916] 2 KB 193 (PC).

[107] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 127-28.

her maintenance, on the understanding that she would not initiate divorce proceedings.[108] The promise was held to be unenforceable, with Denning LJ declaring that the principle stated in his dicta in *High Trees* did not 'create new causes of action where none existed before'[109] and so it could allow for the creation of a contract where the promise sought to be enforced is not supported by consideration.[110]

Hogg's view of Denning J's words in *High Trees* deserves close attention. Denning J had stated on the basis of decisions since *Jorden v Money* that, while 'courts have not gone so far as to give a cause of action in damages for the breach of such a promise,[111] they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel.'[112] The crucial feature distinguishing these decisions from *Jorden* (which presumably enabled the 'validity of such a promise to be recognised'[113]), he said, was the promisor's intention in each of these cases 'to be legally bound.'[114] This enabled, in Denning J's view, an estoppel to operate when the representation was as to the future, and a promise to be binding in the sense that one could not act inconsistently with it. This was the sense in which the 'law ha[d] not been standing still'[115] for the previous century. So what distinguishes this from a 'full blown right which can be enforced by the promisee under the conditions stipulated for its creation,'[116] as Hogg would argue can exist under *High Trees*?

In *Wilken*, the promise in promissory estoppel is described as being 'a promise that rights will not be enforced and is 'promissory' in that limited sense.'[117] Thus, the promise's own terms restrict the effect of the principle. This was perhaps Hogg's point: that the right 'can be enforced by the promisee under the conditions stipulated for its creation.'

On the other hand, the phrase 'full blown right' may sound overblown to commentators such as Finn. According to Handley, since the Judicature Act, 'a defence of

[108] *Combe v Combe* [1951] 2 KB 215 (CA) 216.
[109] *Combe v Combe* [1951] 2 KB 215 (CA) 219.
[110] *Combe v Combe* [1951] 2 KB 215 (CA) 220: '[t]he doctrine of consideration is too firmly fixed to be overthrown by a side-wind.'
[111] That is, 'one intended to be relied upon…'
[112] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134.
[113] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134.
[114] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134.
[115] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134.
[116] Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge 2011) 183.
[117] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 8.05.

equitable estoppel is in substance an equitable counterclaim,' later adding that it is 'an equitable cause of action which entitles the promisee to an injunction to restrain enforcement of the right with the possibility of an award of equitable compensation or damages under Lord Cairns Act,' or, additionally, 'a defence to proceedings in a Court of Equity to enforce an equitable right, or for equitable relief in aid of a legal right.'[118] Finn adds that there is nothing to object to a cause of action in 'promissory estoppel,' even if in practice it may not arise very often. This is on the basis that '[i]n most instances it is doubtless the case that all that is required is a defensive capacity' but that, where the promisor can assert his rights without the aid of the courts, 'there is, it is suggested, no reason in principle or of policy which should prevent the estoppel being used as a cause of action, for example, to permit a claim for an injunction.'[119] Similarly, Atiyah has noted the similarity between estoppel by representation with specific performance on the basis that the question of being an independent cause of action simply does not arise with specific performance, a doctrine that is only relevant when a contract already exists.[120]

3.2.7.1 (c) Equitable estoppel ought not to create new rights

Finn argues that the very purpose of equitable estoppel is to restrain an unconscionable insistence upon rights,[121] and it has not developed sufficiently to be capable of doing anything more.[122] In particular, he says, 'estoppel is too crude, too unsubtle, an instrument to solve the problems which will necessarily arise if the courts are to commit themselves to a jurisdiction which enforces and relieves against gratuitous promises.'[123] The authors of *Wilken* have said that to extend estoppel beyond a defensive operation would be a 'considerable overreach.'[124] According to Halson, the widest acceptable enforcement mechanism for estoppel is to allow it to prove all the elements of a recognised cause of action.[125]

It has yet still been said that equitable estoppel in reality concerns a range of principles, some of which are inappropriate for the purpose of raising a cause of

[118] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-007.
[119] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 89.
[120] PS Atiyah, 'Misrepresentation, Warranty and Estoppel' (1971) 9 Alta L Rev 347, 371.
[121] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 72.
[122] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 71.
[123] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 77.
[124] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.13; see also Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] LMCLQ 256, 270.
[125] Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] LMCLQ 256.

action.[126] For instance, McFarlane has said that the principle in *Hughes* does not include an independent cause of action because it merely restrains the exercise of a right.[127] Meanwhile, he notes that Lord Denning[128] conceived of his principle in *High Trees* that it essentially set up a contractual promise[129] and hence did not need to create a cause of action of its own. Collins has similarly said of a Denning formulation of equitable estoppel[130] that it 'serves as a qualification to the doctrine of consideration: the principle does not replace consideration as the major test of enforceability of contracts, but represents an equitable exception which supplements consideration in certain situations.'[131] McFarlane has said elsewhere that it is interesting that the *Combe v Combe* decision of Denning LJ seems to be influenced by Williston's description of §90.[132] He says that

> many American jurisdictions have since extended the doctrine so as to include an independent principle that may impose a duty on A to ensure B suffers no detriment as a result of his reasonable reliance on a commitment made by A. Such a manoeuvre, if adopted in England, would radically re-define the doctrine of promissory estoppel, carrying with it two great risks. First, the more limited, defensive principles applicable in cases such as *High Trees* or *Hughes* would be distorted; second, the defensive nature of those principles might impede the utility of the expanded doctrine in protecting B's reliance.[133]

Finn's description is apt for both the *High Trees* and *Hughes* principles: he wrote that estoppel adjusts the level of rights on each side but its raison d'etre is the restriction

[126] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267.
[127] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 283: it is concerned with not allowing A to benefit from encouraging B in the belief that B would be safe to act in a certain way even though that act would permit A to gain a certain right against B. The principle restrains A from acting inconsistently with that belief.
[128] AT Denning, 'Recent developments in the doctrine of consideration' (1952) 15 Modern Law Review 1, 1-3.
[129] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 287: that, 'as a general rule, if A makes a promise which is intended to be binding, and to induce action or inaction from B, then such action or inaction from B will constitute consideration and so A's promise will be binding as a matter of contract law.'
[130] Albeit the formulation discussed was that in *Crabb v Arun District Council* [1976] Ch 179 (CA).
[131] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 76.
[132] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 120, noting that this had been pointed out by Donal Nolan, 'Following in their footsteps: Equitable estoppel in Australia and the United States' (2000) 11 King's College Law Journal 202.
[133] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 120.

against the party whose rights have been diminished by the estoppel from enforcing those rights as if they had not been diminished.[134] Equally, it is said in *Wilken* that '[i]t follows that, for there to be a unified theory, either proprietary estoppel would have to be weakened or the other estoppels would have to be strengthened.'[135] Further, the authors of *Wilken* say, promissory estoppel in England 'is essentially analogous to waiver, filling the lacuna between waiver and estoppel where there has been an unequivocal representation as to future conduct without the requisite knowledge for waiver,' which makes it incorrect to consider whether it should create new rights.[136]

3.2.7.2 Answers

3.2.7.2 (a) Inconsistencies in approaching formalities

To be sure, the concern of some commentators that a cause of action in estoppel will undermine formalities seems over-cautious and it ought to be asked whether there is a concern with precision on the one hand, or rather whether the concern relates to changing the law. If it is the latter, then the arguments against recognising a cause of action seem slightly less legitimate. McFarlane points out that it is odd, in contrast with the English courts' insistence on a narrow promissory estoppel, that formalities in relation to the transfer of proprietary interests are 'happily ignored' when proprietary estoppel is applied.[137] The concerns expressed by the Court of Appeal in *Combe v Combe* [138] that the emerging doctrine of promissory estoppel would obliterate consideration do not have an equivalent holding against a claim in proprietary estoppel on the basis that to hold otherwise would risk weakening either consideration or statutory rules relating to property. McFarlane and Sales argue that, '[i]ndeed, as suggested by the additional formal requirements attaching to a contract for the sale or

[134] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 73-75.
[135] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.17.
[136] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.20.
[137] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 288.
[138] *Combe v Combe* [1951] 2 KB 215 (CA).

other disposition of an interest in land, it seems that it ought to be harder, rather than easier, to justify the application of the principle to promises relating to land.'[139]

3.2.7.2 (b) A distinct character?

An argument advanced in *Wilken* is that the analogy with proprietary estoppel presents a number of difficulties, on the basis that 'proprietary estoppel concerns promises.'[140] These are that distinguishing between the two types of promises might be 'somewhat arbitrary or formalistic,' that there 'would seem to be little substantive or juridical difference between contractual and property rights particularly where they co-exist,' and, further, that certain authority in proprietary estoppel cases has formed the basis of dicta in cases involving other kinds of estoppel, hence allowing for a 'cross-fertilisation and an all-embracing principle.'[141]

McFarlane proposes that 'the most prominent strand of proprietary estoppel,' based on promises and resulting detriment, be separated from other kinds of proprietary estoppel and merged with that strand of promissory estoppel which operates under the same principle.[142] The drawing together of estoppels to be ruled by the same 'promise-detriment' principle is justified, McFarlane argues with Sales, because the reason for the enforcement of the promise is not that it concerns land. Thus, they say, it is arbitrary to limit the principle to promises by A that the other party 'will acquire a right in relation to specific property of A'[143] and a number of cases[144] show that the principle is not so limited but can concern land in other ways (for example, a promise to buy B's land rather than sell it[145]).

[139] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 623.
[140] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 8.81.
[141] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 8.81.
[142] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 290.
[143] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 626.
[144] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 625-626: *Sutcliffe v Lloyd* [2007] EWCA Civ 153 (sharing in the profits of developing land); *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan CC* (1981) 41 P & CR 179; *Waltons Stores v Maher*.
[145] Which the authors point out (at 626) was the scenario in *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan CC* (1981) 41 P & CR 179.

Beyond that, they look to cases of estoppel by representation and acquiescence, which do not depend on 'the presence of specific property,' but which it is possible to apply [146] 'in a proprietary context,' bringing both principles 'within the scope of proprietary estoppel.'[147] However, such promises do not depend for their existence on the subject-matter being land. By analogy with those principles, they argue that the 'promise-detriment' principle ought to abandon its 'arbitrary'[148] restriction to promises involving 'specific property,' regardless of the fact that the principle has 'developed through proprietary estoppel.'[149] Similarly, Friel has argued that the ability to enforce a promise should not depend on its substance.[150] While this contradicts rules on nullity of contracts for illegality or being contrary to public policy, neither factor necessarily applies in this context.

3.2.7.2 (c) New rights?

The application of a minimum equity may be the cost of allowing relief for informal promises, as Bryan argued in 2012 in relation to the *Waltons Stores* case.[151] Evans has suggested that courts may choose to enforce other estoppels in a more limited way than by letting the 'promise defin[e] the rights that arise'[152] or the 'representation clearly determin[e] the court's actions.'[153] He adds that '[t]he model of how proprietary estoppel works could be utilised as a dynamic blueprint for the development of all the estoppels into flexible equitable remedies – with the court, by satisfying equities, controlling the creation of rights – if this was thought to be desirable.'[154]

The orthodox view in respect of the latter is that the courts are reluctant to extend the reach of non-proprietary estoppel because of the 'fundamental inroads' that

[146] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 621: the author adds that acquiescence is usually applied in a proprietary context.
[147] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 621.
[148] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 623.
[149] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 623.
[150] Raymond J Friel, *The Law of Contract* (Round Hall Sweet & Maxwell 2000) 130.
[151] Michael Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 Journal of Equity 1, 10.
[152] P T Evans, 'Choosing the right estoppel' [1988] Conv 346, 353.
[153] P T Evans, 'Choosing the right estoppel' [1988] Conv 346, 354.
[154] P T Evans, 'Choosing the right estoppel' [1988] Conv 346, 355.

this would make into consideration.[155] However, McFarlane has written that (a principle within)[156] equitable estoppel can be reconciled with contract despite the fact that it concerns giving some effect to a promise, and that, in theory, such promises ought not to be restricted to promises concerning land.[157] This is done, he argues,[158] by recognising that it creates merely a liability which then permits a court, 'look[ing] backwards,'[159] to impose a duty and define its content. Even the authors of *Wilken* say[160] of *Waltons Stores* that one way in which a conflict with consideration may be avoided is to restrict the remedy to the minimum necessary to avoid detriment to the promisee. This fulfils Collins' explanation of estoppel in English law that it 'does not replace consideration as the major test of enforceability of contracts, but represents an equitable exception which supplements consideration in certain situations.'[161] It is submitted that establishing the default position that lowest possible remedy is to be awarded in equitable estoppel, consistently with a view of unconscionability as a limiting factor (albeit of the right to a remedy, rather than the inquiry in the strict sense into liability) is a principled way to address both these fears, and the role which the correctly-defined doctrine ought to play.

Further, the doctrine of consideration has not been untouched by significant change. Friel says of *Williams v Roffey*[162] that it renders 'somewhat redundant' any

[155] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.17.
[156] This is the 'promise-detriment' or *Thorner* principle.
[157] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 621-623.
[158] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 346, Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 630-631, 634.
[159] *Walton v Walton* (CA, 14 April 1994), cited in Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 334.
[160] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 8.82 n 90.
[161] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 76.
[162] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA). In that case, a promise by the defendant to pay the claimant subcontractor an additional amount of money after the claimant had run into financial difficulties was held to be enforceable, in circumstances in which those difficulties arose because the agreed price was too low. The significance of *Williams* is restricted, as Smith points out, PS Atiyah, *Introduction to the Law of Contract* (Stephen Smith ed, 6th edn, Oxford University Press 2006) 117, by the fact that the old rule in *Pinnel's case* (1601) 5 Coke Reports 117a, 77 ER 237. (that 'payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum') is still good law and thus a part payment of a debt is not consideration: it does not equal the good consideration represented by the whole of the debt. However, the effect that *Williams* does have is that the validity of similar variations will be decided 'not on the basis of consideration, but according to the doctrine of duress, in particular the new concept of economic duress' (PS Atiyah, *Introduction to the Law of Contract* (Stephen Smith ed, 6th edn, Oxford University Press 2006) 117). The other sense in which the case represents a change is that, as Arden LJ remarked in *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ

'[f]ears that it [promissory estoppel] would cause the doctrine of consideration to be effectively abrogated,' fears which he says are in any event 'over-stated.' In his view, *Williams* has even 'done more to hole the doctrine of consideration below the water-line than any intelligent use of promissory estoppel could.'[163] The Court of Appeal in *Williams* had regard to *Pao On v Lau Yiu Long*,[164] in which Lord Scarman on behalf of the Privy Council had stated that '[t]heir Lordships do not doubt that a promise to perform, or the performance of, a pre-existing contractual obligation to a third party can be valid consideration,' and stated that this applied unless 'the guarantee was void as having been made for an illegal consideration or voidable on the ground of economic duress,' rejecting the argument that the purported consideration at issue in this case was illegal because contrary to public policy.[165] The question in *Pao On* was 'whether, in a case where duress is not established, public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominating bargaining position.'[166] Glidewell LJ stated that Lord Scarman's words were 'of general application'[167] and thus he established a six-part test.[168]

What this all means is that there remains the possibility that archaic rules such as those in *Pinnel's case* (and those making arbitrary distinctions such as *Jorden v Money*) will be increasingly limited by both common-law and equitable doctrines that supersede those rules in specific contexts provided that these doctrines in turn are clearly stated. Glidewell LJ seemed to regret[169] that promissory estoppel was not argued at trial 'nor was it more than adumbrated before' the Court of Appeal, and he appeared receptive to such arguments had they been made, remarking that 'the application of the doctrine of

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1329, [2008] 1 WLR 643 [3], the decision in *Williams* modified the reach of the rule in *Pennel*'s case in that 'the rule does not apply where the debt arises from the provision of services.'

[163] Raymond J Friel, *The Law of Contract* (Round Hall Sweet & Maxwell 2000) 130.

[164] *Pao On v Lau Liu Yong* [1980] AC 614 (PC).

[165] *Pao On v Lau Liu Yong* [1980] AC 614 (PC) 632.

[166] *Pao On v Lau Liu Yong* [1980] AC 614 (PC) 634.

[167] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) 15.

[168] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) 15-16: '(i) if A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.'

[169] Echoing the Privy Council in *Mungalsingh v Juman* [2015] UKPC 38 [25], mentioned in Chapter 1.

promissory estoppel to facts such as those of the present case has not yet been fully developed.'[170] Russell LJ, for his part, cited[171] *Amalgamated*, equally noting that he 'would have welcomed the development of argument, if it could have been properly raised in this court, on the basis that there was here an estoppel.'[172] He also remarked that it would be unconscionable were the defendants not to be held liable.[173]

Two points can therefore be made on the basis of *Williams*. The first is that consideration is not sacrosanct. Provided (it seems) that unfairness or unconscionability can be prevented in a case by confining the modification of consideration rules to specific scenarios involving clear statements of principle, rules that may now be considered archaic and odd will be legitimately modified. The second is that the comments in this case brush close to allowing a cause of action in estoppel, although it is unlikely that the Court of Appeal would have gone so far. The dicta of Russell LJ indicate that, had estoppel been argued and (as it seems likely) arisen on the facts, it would have been in the shape of a claim by the claimants which precluded the defendants from raising a defence.

While Finn has said that reform of contract law is preferable to the extension of equitable estoppel beyond restraining unconscionable insistences upon rights,[174] Clark has said of *Collier*[175] that the decision 'may spark some efforts among the English judiciary to resolve the conflict between orthodox bargain theory and promissory estoppel.'[176] In *Collier*, Arden LJ stated that that rule 'makes it difficult to enter into compromises of claims, which it can often be commercially beneficial for both parties to do.'[177] Wright had obtained a statutory demand against Collier for a debt which Collier and his two business partners owed Wright, and Collier sought to have the demand set aside on the basis of insolvency rules.[178] At a certain point, Wright informed Collier that his partners had not been paying their share of the demand and assured Collier that he would not be liable also for his partners' debt provided he continued to pay his share,

[170] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) 13.
[171] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) 17-18.
[172] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) 17.
[173] *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (CA) 17.
[174] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 72.
[175] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643.
[176] Robert Clark, *Contract Law in Ireland* (8th edn, Round Hall 2016) para 2-73.
[177] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [3].
[178] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [8].

which he did. Collier claimed that this assurance 'resulted in a binding agreement'[179] but that the next information he had was the service of the demand.[180] The trial judge had held against Collier on his first claim, which was based on the presence of the alleged binding agreement and the triable issue this gave rise to under insolvency rules, as well as on his second claim, that Wright was estopped from proceeding against him for more than his one-third share of the debt.[181] The trial judge did not see 'any sufficient relevant alteration of position' from Collier's continuing to make payments and not pursuing his former partners.[182] Arden LJ agreed that there was no consideration.[183] However, by applying *D&C Builders v Rees*[184] she, along with Longmore[185] and Mummery LJJ,[186] held that there was an accord through which Wright had agreed, voluntarily, to accept 'a lesser sum in satisfaction' upon which Collier had acted by paying the sum, which was accepted. Not dissimilarly to what was done in *Williams*, Arden LJ set out a test for how an estoppel would operate in cases such as this: '(1) a debtor offers to pay part only of the amount he owes; (2) the creditor voluntarily accepts that offer, and (3) in reliance on the creditor's acceptance the debtor pays that part of the amount he owes in full, the creditor will, by virtue of the doctrine of promissory estoppel, be bound to accept that sum in full and final satisfaction of the whole debt.'[187]

3.2.8 Summary

The fears outlined above strike at the boundaries of equitable estoppel. There has been academic clarification, although there have also been significant differences even between commentators holding views that are broadly within the same 'support' or 'answering' brackets. It will now be asked how two other jurisdictions have dealt with the cause of action issue. Australia and the United States have been chosen because they represent entirely different positions to that in England and, possibly by extension, in

[179] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [13].
[180] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [14].
[181] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [18].
[182] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [19].
[183] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [27]: 'the most to which the agreement could amount is a promise by Wrights not to sue Mr Collier if he paid one-third of the existing debt,' which was a new collateral agreement not affecting his liability.
[184] *D & C Builders v Rees* [1966] QB 617 (CA): Lord Denning had said in *Rees* that such an accord made it 'inequitable for the creditor afterwards to insist on the balance.'
[185] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [49]
[186] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [50].
[187] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [42].

Ireland (subject to the idea that, estoppel being relatively undeveloped in Ireland, it could quite easily diverge from English law).

3.2.9 Comparative views

3.2.9.1 Australia

The clearest comparison appears to be with the Australian position, which the New Zealand courts have largely followed.[188] Of the Australian cases, *Waltons Stores v Maher*[189] is the most significantly welcoming of an independent enforcement for estoppel. It is significant not only because a pre-contractual relationship was held to give rise to an estoppel, but also because the High Court of Australia awarded damages as a result. Although the Court declined to expressly reverse *Jorden v Money*, it asserted that promissory estoppel extended to representations of future conduct on the basis of *Legione v Hateley*,[190] which it decided five years before *Waltons*. In *Legione*, Mason and Deane JJ had declined to reconcile the cases in which estoppel could only succeed on the basis of a factual representation with those in which estoppels were allowed on the basis of representations as to the future and simply decided to follow the latter. The court, rather than leaving *Jorden* to one side for a potential later decision on more similar facts, seemed to have discredited it altogether.

In the later case of *Commonwealth v Verwayen*, the High Court saw its decision in *Waltons* as holding that estoppel could give rise to an equity which had the effect of preventing a detriment,[191] but, in Deane J's view, no more than that: '[t]hat equity is, as the cases on promissory estoppel seem to me to make plain, an entitlement in equity proceedings to preclude departure by the other party from the assumed state of affairs if departure would, in all the circumstances, be unconscionable.'[192] In *EK Nominees v Woolworths*,[193] White J of the New South Wales Supreme Court asserted that '[t]he fact that a party might rely upon a non-contractual representation or promise to his detriment is the very reason for the doctrine of equitable estoppel,' contrasting this with

[188] *Gold Star Insurance v Gaunt* [1998] 3 NZLR 80; see generally James Every-Palmer, 'Equitable Estoppel' in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd edn, Thomson Reuters 2009).
[189] *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7, (1988) 164 CLR 387.
[190] *Legione v Hateley* [1983] HCA 11; (1983) 152 CLR 406.
[191] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 [33]-[34] (Mason J).
[192] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 [10] (Deane J).
[193] *E K Nominees Pty Ltd v Woolworths Ltd* [2006] NSWSC 1172.

the English position according to the decision in *Baird Textile Holdings*,[194] in which the Court of Appeal held that it was not open to it to use the principles laid down in *Waltons Stores*. It is submitted that the decision in *Verwayen*, although it pays lip service to the preclusionary associations that continue to be attached to estoppel, is not a definitive barrier to the recognition of a cause of action for estoppel.

Apart from the Court's inconsistent findings on the facts,[195] its general view of estoppel is substantially equivalent to a view of estoppel as giving rise to a cause of action, even if the Court did not take the next logical step of approving its enforceability (which was not required for the decision in that case). In addition, although the questions of estoppel's application to a representation as to the future and to a relationship that was not already contractual are different from whether estoppel should be a cause of action, the acceptance in *Waltons* of both of those applications takes the matter a step further. By essentially contradicting the basis of the decision in *Combe v Combe*,[196] that promissory estoppel was not to become an alternative vehicle to contract for the enforcement of promises that fell through the contractual net, the position in Australia makes the final step possible. As has been mentioned, the position in the United States has similarly changed since the assertion by Holmes J, similar to the fears expressed by the English Court of Appeal in *Combe v Combe*, that '[i]t would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it.'[197]

What the enforcement should entail has not been clearly laid out yet. In the Western Australia Supreme Court decision of 2008 in *The Bell Group Ltd v Westpac Banking Corporation*, Owen J referred with approval to a list of principles in relation to promissory estoppel, 'distilled' from *Waltons Stores*, which had been applied in two subsequent cases, and which included, first, that 'this estoppel creates an equity, being

[194] *Baird Textile Holdings v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999.
[195] Brennan J held that the plaintiff's only detriment was the financial loss in respect of the legal action, while Dawson and Gaudron JJ held that stress caused to the plaintiff constituted sufficient detriment. Deane J, meanwhile, saw the detriment as consisting of past waste and the denial to the plaintiff of an expected compensation. Mason CJ and McHugh J denied the availability of estoppel on the basis that there was no proof of causation of detriment.
[196] *Combe v Combe* [1951] 2 KB 215 (CA).
[197] *Commonwealth v Scituate Savings Bank* (1884) 137 Mass 301, 302.

an independent source of legal obligation' and, secondly, that 'it may act as a sword, not merely as a shield.'[198]

It would seem that the cause of action in Australia is not exactly complete, although expansive interpretations of *Waltons Stores* would certainly allow for it. The ability to claim a cause of action in estoppel has been stated to be available where it is 'a step in the case of a plaintiff or counterclaim by a defendant' to ask the court to 'suspend pre-existing contractual rights' or 'preclude the defendant from denying the existence of facts which, if they existed, would give rise to legally enforceable rights between the parties.' [199] On the other hand, the shield-sword metaphor has been stated to be 'apt' for the purpose of stating that 'the doctrine creates no legal relationship or cause of action where none previously could arise between the parties.'[200]

It has been commented that a division has now arisen between appellate courts at state level, with courts in Queensland and Victoria favouring the view that estoppel is a cause of action, but New South Wales courts preferring to see it as a preclusive doctrine.[201] That view, arising from the case of *Saleh v Romanous*,[202] has been argued by Silink to mean that New South Wales courts are potentially bound to apply a contradictory rule to that still applying in the federal High Court on the basis of *Waltons Stores* and on the further supposition that that case involved a positive, offensive application of estoppel.[203] Silink comments that '[t]he current disagreement between the intermediate courts of appeal with respect to the ability of promissory estoppel to be a source of rights is such a problem which is likely to attract leave to appeal,'[204] while noting that the independent enforceability of estoppel 'was squarely in issue' in *Waltons*

[198] *The Bell Group Ltd v Westpac Banking Corporation* [2008] WASC 239. This was not important for the decision in question, and on appeal there was held to be no estoppel: *Westpac v The Bell Group (in liq)* [2012] WASCA 157.
[199] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (J D Heydon, M J Leeming, P G Turner eds, 5th edn, LexisNexis Butterworths 2015) para 17-270.
[200] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (J D Heydon, M J Leeming, P G Turner eds, 5th edn, LexisNexis Butterworths 2015) para 17-270.
[201] Allison Silink, 'Can promissory estoppel be an independent source of rights?' (2015) 40 University of Western Australia Law Review 39.
[202] *Saleh v Romanous* (2010) 79 NSWLR 453, discussed in Allison Silink, 'Can promissory estoppel be an independent source of rights?' (2015) 40 University of Western Australia Law Review 39.
[203] Allison Silink, 'Can promissory estoppel be an independent source of rights?' (2015) 40 University of Western Australia Law Review 39, 41.
[204] Allison Silink, 'Can promissory estoppel be an independent source of rights?' (2015) 40 University of Western Australia Law Review 39, 69.

Stores without which the result would have been different,[205] and adding that *Waltons Stores* has not subsequently been overturned in the High Court.[206] Independently of these precedential issues, the lack of coherence in the view that equitable estoppel is limited to a counterclaim or a manner of proving a principal claim has been noted in this chapter and should, it is submitted, be a guide in considering the significance of *Waltons Stores* and the subsequent High Court cases.

In Australia, therefore, effectively by allowing an overlap between equitable forbearance and equitable estoppel, a psychological barrier is removed from the cause of action prevention, even if it is possible to describe the two as distinct doctrines. It can equally be seen from the Australian example that differences of opinion on the cause of action question can persist, and have negative consequences because they raise uncertainty. On the basis of the first proposition, it may be helpful, for the purpose of recognising a cause of action, to unite the estoppels. These questions are treated separately, but the responses to them can overlap: for instance, if one sees a form of equitable estoppel as being incapable of generating new rights, then the idea of merging it with a general equitable estoppel that can give rise to a cause of action will be troublesome, because of the capability of some estoppels to be based on extracontractual promises. It is, however, not necessary to unite the estoppels in order to recognise a cause of action.

3.2.9.2 United States

A comparison with the position in the United States contains the caveats that, first, decisions at a federal level have been few and, secondly, the basis for promissory estoppel is now contained in the *Restatement (Second) of Contracts*, of which there is no equivalent in this jurisdiction.

Section 90(1) of the United States *Restatement (Second) of Contracts* provides that a promise is binding provided it fulfils three conditions: first, 'the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person,' secondly, that it actually does induce such action or forbearance and, thirdly, that 'injustice can be avoided only by enforcement of the promise.' This doctrine of

[205] Allison Silink, 'Can promissory estoppel be an independent source of rights?' (2015) 40 University of Western Australia Law Review 39, 48.
[206] Allison Silink, 'Can promissory estoppel be an independent source of rights?' (2015) 40 University of Western Australia Law Review 39, 50.

promissory estoppel applies throughout the United States,[207] and is enforceable offensively as well as defensively in the vast majority of states.[208] Promissory estoppel appears in any event to have the potential to be an independent cause of action if only the Restatement is taken into account,[209] regardless of how case law has evolved or continues to evolve in each state.

Feinman described promissory estoppel cases as falling into two camps: in the first group, the reliance was required to be justified; thus, cases in which a promise was insufficiently clear and unequivocal were included within this group. The second category, instead, allowed for promises which 'under a strict view, might be considered preliminary or conditional,' with the standard being 'whether, given the context in which the statement at issue was made, the promisor should reasonably have expected that the promisee would infer a promise.'[210] It can be seen that the reliance that is the basis for this doctrine is one linked to the notion of responsibility, as the promisor must take care not to express a promise in clear terms that he later does not fulfil on the one hand, or not to make statements or act in a way that might lead one to infer a promise. Thus, the foundation for the enforceability of the doctrine is tied to fault-based reliance and exists as a minor element within contract law. What is known there as 'equitable estoppel' and more commonly known in other jurisdictions as 'estoppel by representation' is also capable of independent enforcement in the United States.[211] Nonetheless, promissory estoppel will receive the greatest attention here as, first, it is hoped that this will provide the necessary correction to the line of cases since *Jorden v Money* and, secondly, it is the doctrine that most threatens to encroach on an established area of the law (ie contract); however, the features that have enabled it to become a cause of action in both jurisdictions are shared with other forms of estoppel.

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[207] Jay M Feinman, 'Promissory Estoppel and Judicial Method' (1983-4) 97 Harv L Rev 678 n 3: '[a]ll but perhaps one jurisdiction have embraced the principle; many have cited §90 as authority'; Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45,47: 'all American jurisdictions (including American Samoa, Guam, Puerto Rico and the Virgin Islands) apply some form of 'promissory estoppel', grounded in Section 90 of the Restatement (Second) of Contracts.' However, Mills Holmes says, North Carolina and Virginia are the only states not yet to have moved to allow an offensive doctrine.

[208] Jay M Feinman, 'Promissory Estoppel and Judicial Method' (1983-4) 97 Harv L Rev 678 n 18.

[209] Metzger and Phillips come to this conclusion after analysing §90 according to their conditions for a truly independent theory of recovery: Michael B Metzger and Michael J Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 Rutgers Law Review 472, 511-12.

[210] Jay M Feinman, 'Promissory Estoppel and Judicial Method' (1983-4) 97 Harv L Rev 678, 691-92.

[211] Jay M Feinman, 'Promissory Estoppel and Judicial Method' (1983-4) 97 Harv L Rev 678 n 18. In fact, it was considered to be a tort even prior to the appearance of promissory estoppel in the *Restatement (First)*: W David Slawson, 'The Role of Reliance in Contract Damages' (1990) 76 Cornell Law Review 197, 199.

In Australia, the claim appears to be based on elements that are common to all estoppels.[212] In the US, meanwhile, promissory estoppel is a contractual doctrine. The individual elements of the cause of action, however, are largely similar in both Australia and the US. US promissory estoppel begins, of course, with a promise, but Metzger and Phillips have suggested that the tenor of the Restatement leans further towards the protection of reasonable reliance than towards a strict application to promissory liability.[213] This accords with the aim of equitable estoppel as recognised in Australia.

Mills Holmes identified four phases in the evolution of promissory estoppel in the US towards an obligation entirely separate from contract, tort and 'basic' estoppel itself.[214] 'Basic' estoppel is the first of the phases, in which estoppel is used defensively at the beginning in order to prevent reliance on statutes of frauds or limitations and gradually moves towards preventing a denial of the enforceability as a promise, and eventually to affirming the promise itself. In the second phase, estoppel, now promissory estoppel, is a consideration substitute. However, at this stage it is still said to be a 'defensive shield (protecting a contract right) but [it] is not an offensive sword (creating a new right).'[215] The crux of this phase is that estoppel remains subject to contractual theories, with different state jurisdictions focusing on the requirement of a clear promise or even restricting the operation of estoppel to agreements. The third phase, which Mills Holmes terms the 'most familiar,'[216] is that in which estoppel behaves as a tort that redresses detrimental reliance. Based on 'the necessity for corrective justice between the parties,' those courts which recognise this development 'turned to the notion of a promissory commitment centering on the promisee's right to rely, and the promisor's duty to prevent (or not cause) harmful reliance which was reasonably foreseeable.'[217] Rather than focusing on the need for a promise to be clear, a court will look instead at whether it shows 'sufficient commitment to induce reasonable reliance in another,' and will use the foreseeability standard in tort.[218] The duty is also described by Mills Holmes

[212] This includes common-law estoppel: see Andrew Robertson, 'Reasonable Reliance in Estoppel by Conduct' (2000) 23(2) University of New South Wales Law Journal 87.
[213] Michael B Metzger and Michael J Phillips, 'The Emergence of Promissory Estoppel as an Independent Theory of Recovery' (1983) 35 Rutgers Law Review 472, 537.
[214] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45.
[215] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45, 65.
[216] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45, 67.
[217] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45, 67-68.
[218] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45, 68.

as a duty 'to prevent the reasonable expectation of a right to rely.'[219] The court may award damages for the breach of this duty in the usual tort measure, ie compensating for the plaintiff's reliance. The final phase postulated by Mills Holmes is based on equity and suggests that estoppel is different from tort for two reasons: first, the liability is grounded in 'good faith, conscience, honesty, and equity' and, secondly, the remedy is not strictly based on reliance damages but is discretionary, and, in addition, does not allow for punitive damages.[220]

Both jurisdictions have thus clearly evolved their law of estoppel to the point at which it is the source or, in the case of several American states, has the potential to be the source of, a full obligation, however this may operate.

Thus, comparing the two offensive estoppels, in Australia (where there is, additionally, one unified equitable estoppel) there is arguably not much clarity, but fruitful engagement with the doctrine. In the US, where a (mostly) offensive promissory estoppel is a principle of contract law and is therefore classified and self-contained, the position seems clearer, and the engagement is equally fruitful.

3.3 A unified doctrine?

It can be assumed that the strongest English support for a single doctrine of estoppel can be found in *Taylor Fashions Ltd v Liverpool Trustees*[221] as well as *Amalgamated Investment & Property v Texas Commerce Bank*,[222] in addition to some interpretations of *Crabb v Arun District Council*.[223] The authority of the decisions and dicta does not entirely derive from the status of the Courts in each case: more recent English Court of Appeal decisions also seem to favour, or at least do not reject, a unified doctrine.

That authority has been said to be on the footing that '[t]he basis of all these groups of cases appears to be the same – that it would, despite the general principle, be unconscionable in all the circumstances for the encourager or representor not to give

[219] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45, 70.
[220] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) 20 Seattle U L Rev 45, 73.
[221] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch) 151-52.
[222] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] 1 QB 84 (QB, CA).
[223] *Crabb v Arun District Council* [1976] Ch 179 (CA).

effect to his encouragement or representation'[224] or that '[a]ll these [maxims and developments in estoppel] can now be seen to merge into one general principle shorn of limitations.'[225] However, the Lords Justices in *Crabb* spoke not of the common basis of estoppel doctrines but instead seemed to clarify the circumstances and limitations of estoppel enforcement. In that case, Lord Denning MR went so far as to say that there were 'estoppels and estoppels' and that only proprietary estoppel gave rise to a cause of action,[226] although he otherwise spoke of proprietary and promissory estoppel as having the same basis: 'the interposition of equity' which 'comes in, true to form, to mitigate the rigours of strict law.'[227] Meanwhile, in *Taylor Fashions*, Oliver J referred to the variety of factual situations in which 'acquiescence or encouragement' could arise while stating that, in fact, there is a single principle unifying all estoppels derived from *Ramsden v Dyson* which

> requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.[228]

Thus, the strongest calls in England for a single doctrine of estoppel remain those made by Robert Goff J and Lord Denning MR in the *Amalgamated* case, and the status of both of these judgments in their entirety are potentially more rhetorically influential than precedentially valuable. Lord Denning MR has pronounced that the estoppels 'can now be seen to merge into one general principle shorn of limitations.'[229] On the other hand,

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[224] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] 1 QB 84 (QB) 106 (Robert Goff J).
[225] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] 1 QB 84 (CA) 122 (Lord Denning MR).
[226] *Crabb v Arun District Council* [1976] Ch 179 (CA) 187.
[227] *Crabb v Arun District Council* [1976] Ch 179 (CA) 187.
[228] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch) 151-52.
[229] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] QB 84 (CA) 122 (Lord Denning MR): '[t]he doctrine of estoppel is one of the most flexible and useful in the armoury of the law… It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations.' This general principle was that, '[w]hen the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to misrepresentation or mistake makes no difference - on which they have

as Judge LJ noted in *Baird Textile Holdings*,[230] Lord Denning MR has outlined a contradictory idea, in the shape of the house with many rooms.[231] Meanwhile, the other two Lords Justices in *Amalgamated Investment & Property* decided the case on the basis of estoppel by convention and did not make any statements about creating a new doctrine.

It will now be seen that the current trend signalling judicial imprecision as to the doctrine to be applied, highlighted in section 1.3.2, actually hides some important discussion about the lack of significant differences between several of the estoppels. It is submitted that English courts below the level of the Supreme Court have made comments sufficient to demonstrate a slow move towards rejecting any behaviour-based and doctrinal differences between the equitable estoppels. Specifically, as will be seen below, estoppel by convention has been said to arise on the same basis as proprietary and promissory estoppels, while estoppel by acquiescence has been said to be a 'paradigm' proprietary estoppel[232] while also being said to arise on the same basis as estoppel by convention,[233] and the overlap between promissory estoppel and proprietary estoppel arising on foot of a promise has been noted and is likely in some form to lead to a merging of those two doctrines.[234]

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conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.'

[230] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999 [50] (Judge LJ).

[231] *Hunter v Chief Constable of the West Midlands* [1980] QB 283 (CA) 317: 'It is the house called Estoppel. In Coke's time it was a small house with only three rooms, namely, estoppel by matter of record, by matter in writing, and by matter in pais. But by our time we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatam, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: They are all under one roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying, 'Estoppel is only a rule of evidence.' If you go into another room you will find a different notice, 'Estoppel can give rise to a cause of action.' Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will also find in the others.'

[232] In *Hopper v Hopper* [2008] EWHC 228 (Ch) [116], Briggs J referred to the following example provided by Oliver J in *Taylor Fashions* as being the 'paradigm' case of proprietary estoppel, which is that '[i]f A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such an expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation.'

[233] It has further been said that estoppel by acquiescence will be rare: K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 11-006.

[234] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267; Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610.

The line between promissory estoppel and estoppel by representation – that is, between a statement of intention and a statement of fact – is uncertain. The decisions often provide a variety of terms for the initial step in constructing a promissory estoppel, for example 'promise or representation,'[235] 'promise, assurance or assertion'[236] or 'promise or assurance.'[237] In *Steria v Hutchinson*, both types of estoppel were said to be subject to all of the same requirements.[238] Proprietary estoppel is the only kind of estoppel not named after some kind of conduct, and at the same time it can encompass several kinds of conduct.[239] In Cooke's proposed model of equitable estoppel, the initial condition of a representation 'encompass[es] any communication, by words, behaviour, or (subject to special considerations) silent inaction, capable of leading someone else to believe in a state of affairs (present or future).'[240] It is therefore clear that the exact idea of the initial conduct is somewhat unclear, and that lines tend to be blurred across the estoppels. Does this cast doubt upon the helpfulness of defining the initial conduct? Or, indeed, if several estoppels are pleaded and considered together, where it is immaterial which one enables the claimant to succeed, does representation matter at all?

The unification of the doctrines has been associated with the operation of justice, and it has been recognised as a positive move. Thus in *Liverpool City Council v Walton*,[241] Neuberger J said that it was 'clear that a proprietary estoppel can arise as a species of estoppel by convention,' adding that seemed that, 'at least in this field, justice has tended to prevail over principle, not only because some of Fry J's tests are plainly too narrowly expressed, but also because the courts have tended to take a more flexible approach.' Lord Steyn in *The Indian Grace (No 2)* preferred not to view estoppel by convention and estoppel by acquiescence as arising on the same basis in the case before

[235] *James v Heim Gallery* (1981) 41 P & CR 269 (CA); *Hodgson v Lipson* [2009] EWHC 3111 (QB). In *IMT Shipping and Chartering GmbH v Chansung Shipping Company Ltd (The Zenovia)* [2009] EWHC 739 (Comm) and *Drexel Burnham Lambert Intl NV v El Nasr* [1986] 1 Lloyd's Rep 356 (QB), the two terms are used interchangeably. In *Doran v Thompson Ltd* [1978] 1 IR 223 (SC) 230, Griffin J mentions once the formula 'representation, promise or assurance.' However, a distinction is apparently drawn between 'promise' and 'representation' in *China-Pacific SA v Food Corp of India (The Winson)* [1981] QB 403 (CA) revd [1982] AC 939 (HL).

[236] *Combe v Combe* [1951] 2 KB 215 (CA) 220.

[237] *Spence v Shell UK* (CA, 1 January 1980); *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999.

[238] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [93].

[239] Thus while the three strands of proprietary estoppel according to Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) are best characterised as doctrinally different, they nonetheless also happen to arise from different kinds of conduct: representation, acquiescence, and promises.

[240] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 65.

[241] *Liverpool City Council v Walton Group Plc* (Ch, 25 July 2001).

him.[242] However, later in *Ros Roca*, Rix LJ said that the formulation of Lord Steyn 'implicitly recognised a degree of overlap, since he treated "acquiescence" as one possible foundation for estoppel by convention.'[243]

Rix LJ also had regard to 'doubts about the desirability of sub-division of this "most flexible" of doctrines' and cited dicta of Judge LJ in *Baird Textile Holdings*[244] which itself referred to the 'disadvantages of rigidity' mentioned by Robert Goff J in *Amalgamated Investment & Property*,[245] and cautiously said that 'the different principles encapsulated under the heading, "Estoppel" should cease to be treated as if they were individually compartmentalised.'[246] The defendants reformulated their estoppel case before the Court of Appeal and based it mainly on estoppel by convention while maintaining their case on promissory estoppel, which drew a complaint by the claimant that 'the estoppels now raised are of a different character to those originally advanced' and the claimant was now 'required to shoot at a moving target.'[247] Carnwath LJ allowed the amendment as 'the proper foundation' was estoppel by convention and, '[l]ike the judge,' he found it 'difficult to see how the case can properly be based on promissory estoppel, in the absence of anything which could be categorised in ordinary language as a promise.'[248] Stanley Burnton LJ agreed, but thought it 'unnecessary' to decide the question, 'which is largely one of terminology.'[249]

Interestingly, however, Carnwath LJ chastised counsel for opening 'a 1995 first instance decision'[250] before the Court to make a submission on detriment, and said that '[i]t would have been more useful to refer to' the statement in *Gillett v Holt* that the correct detriment approach is to require 'a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.'[251] Carnwath LJ also noted that, even with the reformulation on the basis of a convention, 'the underlying

[242] *The Indian Grace (No 2)* [1998] AC 878 (HL) 914 (Lord Steyn).
[243] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [60] (Rix LJ).
[244] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999 [50] (Judge LJ).
[245] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] QB 84 (QB) 103 (Robert Goff LJ).
[246] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999 [50] (Judge LJ).
[247] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [52] (Carnwath LJ).
[248] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [53] (Carnwath LJ).
[249] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [76] (Stanley Burnton LJ).
[250] *Crédit Suisse v Allerdale Borough Council* [1995] 1 Lloyd's Rep 315, 367 affd on other grounds [1997] QB 306, cited in *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [63]-[64] (Carnwath LJ).
[251] *Gillett v Holt* [2001] Ch 210 (CA) 232 (Robert Walker LJ).

contention has not changed fundamentally.'[252] Finally, Rix LJ agreed on the convention point but he actually 'consider[ed] that the same solution can be found in the doctrine of promissory estoppel, and is supported by a duty to speak.' He added:

> [t]his should not perhaps come as a surprise since what we are concerned with is an estoppel which alters the effect of a contract by preventing a party from making an assertion or claim contrary to a position adopted mutually between its parties. Although a shared assumption may be lacking from many situations, a representation which is relied upon to the detriment of the representee includes many of the critical aspects of the doctrine of estoppel by convention. Moreover, in a situation in which it is plain that, *internally*, ING did *not* share the assumption concerning transaction costs which *externally and objectively*, it affected and purported to share, there is, to my mind, good sense in considering the matter through the eyes of an estoppel by *representation*.[253]

Thus, while ostensibly basing a decision on estoppel by convention and two of their Lordships unsupportive of a wider basis in equitable estoppel, the Court of Appeal in fact united four different kinds of estoppel – convention, proprietary, promissory and representation – for its holding.

There is not a great deal of certainty as to what the current view actually is, with the Court of Appeal and High Court tending to recognise that estoppels share essential features (to the extent that even Carnwath LJ's judgment in *Ros Roca*, discussed above, cited *Gillett v Holt* on detriment), while the House of Lords has tended to distinguish the estoppels. While Handley decries the introduction of the unconscionability concept into equitable estoppel,[254] Finn views it as a unifying factor with limited effect: the doctrine,[255] he says, is concerned with an unconscionable insistence upon strict legal rights, and so is not capable of creating new rights. The unifying factor may not allow for the estoppels to do very much, other than restrain the enforcement of legal rights, and to do this in such a way that the relative rights are indeed altered, allowing one to bring an independent claim on the basis of those rights, as opposed to a claim in estoppel. The

[252] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [54] (Carnwath LJ).
[253] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [85] (Rix LJ) (emphasis added to word 'representation').
[254] K R Handley, 'Further thoughts on proprietary estoppel' (2010) 84 ALJ 239, 240.
[255] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 72; he acknowledges the existence of an equitable estoppel even as he describes its emergence in distinct principles.

limited aspect of Finn's view is that no rights arise out of the blue, but rather depend on there being a previous right, or duty, which has been modified due to the estoppel.

It is submitted that there is enough on the basis of the foregoing to conclude that the courts support equitable estoppel as encompassing a single idea. Academia has sought to be more cautious and to classify the estoppels more strictly, but it will be seen in the next section that there are divergences of opinion as to how this ought to be done. It will also be argued that the idea of a unified doctrine is not necessarily unprincipled.

3.3.1 An argument for unification

3.3.1.1 The benefits

As Hopkins remarks,[256] a unified model would promote greater consistency and coherence in this area of the law, as well as greater scrutiny of anomalies such as the different treatment of proprietary estoppel in English law, which was discussed here in Chapter 2. There would be a recognition that the ground for intervention across equitable estoppel is the same, as well as a recognition of the recent attempts by judges to consolidate and unify estoppels, as seen in *Ros Roca* and some Chapter 1 cases. In particular, what could on the one hand be characterised as imprecision in *Ros Roca*, can on the other be seen as impatience with the need to 'shoehorn'[257] the estoppels, when what the court essentially wants to do is decide whether an extracontractual duty can be imposed on the defendant provided that the conditions for detrimental reliance have been met.

The recognition of a unified doctrine would eliminate some of the problems identified in this thesis. The anomaly referred to by Hopkins probably has two different consequences, both of which can operate to discourage the development of non-proprietary estoppel: first, an excessive remedial generosity in some cases, and, secondly, the difficulty of establishing a cause of action in non-proprietary estoppel. There seems currently to be a differentiation which tends towards being counterproductive rather than helpful, as the boilerplate lists of estoppel and estoppel-related claims in Chapter 1 indicated.

[256] Nicholas Hopkins, 'Proprietary estoppel: A functional analysis' (2010) 4 Journal of Equity 1, 86.
[257] Nicholas Hopkins, 'Proprietary estoppel: A functional analysis' (2010) 4 Journal of Equity 1, 86.

3.3.1.2 The drawbacks

Handley has said that '[a]ny single overarching doctrine would be at such a high level of abstraction that it would serve no useful purpose.'[258] The editors of *Wilken* refer to Millett LJ in *First National Bank Plc v Thompson*:[259]

> [the attempt[260]] to demonstrate that all estoppels other than estoppel by record are now subsumed in the single and all-embracing estoppel by representation and that they are all governed by the same requirements has never won general acceptance. Historically unsound, it has been repudiated by academic writers and is unsupported by authority.[261]

They add that the trend in English law leans towards fracturing rather than uniting the estoppels.[262] Further, even while supporting a unified estoppel doctrine, Hopkins contrasts the views of Cooke (preferring a looser unification) with those of Mason CJ and Deane J (preferring a stricter unification), preferring the former. However, the authors of *Wilken* question the utility of a theory that does not explain all estoppels but only some.[263] Turning to a wider, 'truly unified theory' of 'injurious reliance,'[264] they say that it would 'embrace everything from variation through to estoppel by convention, to waiver in all its forms and to proprietary estoppel,' which, they add, 'seems to be a considerable overreach for any theory.'[265] Yet Hopkins has argued[266] that, while such a loosely unified doctrine 'may promote greater scrutiny' of the differences between the estoppels, it also 'enables us to accept their continued existence where there is good reason to do so.' Halson writes of the uncertainty in the sense of 'unpredictability of outcome of any dispute', itself ascribed to vague and undefined concepts of estoppel, as well as doubt over 'the precise identification of the instant when an obligation is assumed under the

[258] Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-028.
[259] *First National Bank Plc v Thompson* [1996] 1 All ER 140 (CA).
[260] In G Spencer Bower, *The law relating to estoppel by representation* (1st edn London Butterworths 1923), in which a consolidated estoppel was proposed subsuming the principles into an idea of preclusive 'estoppel by representation.'
[261] *First National Bank Plc v Thompson* [1996] 1 All ER 140 (CA) 144.
[262] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) paras 7.25-7.30
[263] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.16.
[264] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) paras 7.14-715.
[265] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.13.
[266] Nicholas Hopkins, 'Proprietary estoppel: A functional analysis' (2010) 4 Journal of Equity 1, 86.

new estoppel doctrines,'[267] along with the confusion of purpose which might result, which could lead to 'squander[ing] such expertise as the law has acquired in dealing with specific problems by disguising them in the pursuit of a universal panacea.'[268]

Handley has said that, while '[r]igid characterisation is not appropriate' because some of the estoppels 'shade into each other,' there are still very significant differences of outcome: 'proprietary estoppel covers the cases where an equitable cause of action creates proprietary rights, whereas a promissory estoppel does not, and an estoppel by representation is not a source of legal obligation.'[269] The authors of *Wilken* then say of a 'truly unified' theory of estoppel that there are too many inconsistencies between the estoppels to make such a theory viable. Each of these will be examined in turn.

They argue that, owing to the particularly 'muscular' nature of proprietary estoppel, a unified theory would mandate either the weakening of proprietary estoppel or the strengthening of others, the latter of which would involve making 'fundamental inroads' into the doctrine of consideration.[270] Hopkins has suggested, however, that a unified doctrine would promote greater scrutiny of the inconsistency of treatment in English law of proprietary estoppel. Other than the inconsistency of the cause of action position, and in comparing the doctrine's powerful remedial jurisdiction with that of the other estoppels, McFarlane has pointed out a further example of an inconsistency. He refers to an argument that restricting the *Thorner* principle to promises relating to the grant of a future interest in land is valid on the basis that the detriment in this kind of case is more serious, for example giving up other accommodation. He notes that this suffers from the problem that such a distinction is not always present and that the kinds of detriment suffered may be the same in this context as in reliance on other promises, not involving the grant of specific property.[271]

The authors of *Wilken* add in this regard that *Baird* has answered any argument in England that estoppel has substantive force, an argument based on the idea that a 'distinction between promising to undertake [a legally binding] obligation and

[267] Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] LMCLQ 256, 270-271.
[268] Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] LMCLQ 256, 271.
[269] Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 11-026.
[270] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.17.
[271] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 10.61.

representing that such an obligation has been entered into seems illusory.'[272] This is a precedent-based argument: the decision in *Baird* will be discussed in section 7.2.2.2 in applying to it a new model of equitable estoppel.

Other writers have separated the estoppels on strong, principled foundations. Handley criticises the 'confusion' between promissory estoppel on the one hand, and 'estoppel by encouragement' on the other, which he traced[273] to the decisions in *Crabb*, *Taylors Fashions* and *Texas Bank*, on the basis that the former creates personal rights carrying only temporary changes, while the latter creates proprietary rights of permanent effect.[274] McFarlane bases the decisions in *High Trees* on the one hand, and *Hughes* on the other, on different juridical relationships than that arising in the *Thorner* principle, which he says could in theory[275] apply to promises that do not involve the grant of rights in specific property. He further differentiates the latter principle from acquiescence, on which some estoppels are based, and the preclusive doctrine. Handley's estoppel by encouragement is roughly equivalent to the *Thorner* principle albeit explicitly restricted to property,[276] while his estoppel by standing by approximates acquiescence.[277]

The authors of *Wilken* prefer the view that the scope of proprietary estoppel does not extend to assurances not related to property,[278] and note that there is no common approach to 'detriment and state of mind (the factors triggering the equity) and the relief flowing (the effect of the equity)'[279] that would enable the recognition of a unified doctrine. Such a unified doctrine would require subsuming estoppel by representation and by convention, which 'would involve a fundamental reappraisal of the nature of the latter two doctrines,' and a recognition that 'they are not merely evidential doctrines but

[272] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.18.
[273] Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) paras 13-025-13-028.
[274] Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-024.
[275] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610.
[276] See Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 11-044.
[277] On the basis that both require establishing the principles in *Willmott v Barber* (1880) 15 Ch D 96, 105-106: Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 11-006; McFarlane paras 2.04, 2.08. Handley identifies at para 11-018 a further 'mere passivity' idea in *De Bussche v Alt* (1878) 8 Ch D 286 (CA).
[278] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.21.
[279] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.22.

principles of substantive law.'[280] The model will suggest a common approach as to state of mind and relief. It is possible to suggest such an approach, even if it is acknowledged that there may be weaknesses: for example, the approach under the model may be too simplified. It is uncertain whether estoppel by convention is truly a preclusive doctrine. To the extent that the preclusive doctrine can arise in the same context as a finding of liability under the proposed model, this is dealt with in section 7.3.1.

3.4 Conclusions

This chapter has sought to outline the existing approaches in four jurisdictions to the question of whether some estoppels ought not to give rise to a cause of action, and the separate but related question, focusing on England, of whether a unified doctrine is advisable. Opposing views were outlined on both questions.

In relation to the first question, it seems safe to say on balance that the possibility of denying enforceability to all non-proprietary estoppels ought to be discarded. Meanwhile, the views in favour of an enforceability for all equitable estoppels do not mandate a unified estoppel. Thus, the views in the second part of this chapter on the second question do not immediately limit one's approach to the first question. However, given the clear flexibility in the case law as seen in *Ros Roca*, it is likely that accepting a general cause of action in equitable estoppel would eventually give rise to the emergence of a unified doctrine. Thus, pleading a combination of equitable estoppels (which, in many cases, could plausibly include pleadings of promissory, proprietary, convention, and representation estoppels, and perhaps even a general 'equitable estoppel' term added for good measure), all of which would then behave similarly following the recognition that they give rise to independent causes of action, would become a slippery slope to a unified doctrine.

However, it must be asked whether this is an entirely negative proposition. On most of the academic views presented in this chapter, it is. On the other hand, the sense that detrimental reliance needs to be addressed remains: while it is more explicit in academia as seen in the previous chapter, arguably a large number of the cases in section

[280] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.24.

1.3.2[281] appear to reject vague estoppel claims. This, in turn, calls for a more consistent definition of the doctrine, if inconsistency is discovered – as it is submitted it has been done in this chapters. If the judiciary's sense in some of the more significant[282] cases is that there is a basis for such a general doctrine,[283] which would subsume the ideas of convention, promise and the rest, then on balance such merging ought to be favoured, provided that it leads to a simple and precise doctrine. For example, it could exclude estoppel by representation at the outset to preserve the preclusive doctrine's unique nature.[284] Meanwhile, promissory estoppel could initially be regarded separately, and pleaded alongside general equitable estoppel if it is appropriate to do so, as courts determine how best to accommodate the limited number of cases such as *Rees* and *Collier* that fit more squarely within 'equitable forbearance,' to use the term preferred in *Wilken* and *Treitel*. A proposal for this will be outlined in section 6.3.

The judiciary in other recent, significant cases has displayed a sense that equitable estoppel is an interesting avenue of development.[285] A unified doctrine ought, it is submitted, to take on a more 'muscular' than limited nature, drawing inspiration from *Waltons Stores* and, particularly, in view of the fact that proprietary estoppel in England is the most developed kind of estoppel. This expansiveness can be given effect by allowing a cause of action and by drawing upon case law defining detriment. On the other hand, it will need to be balanced with limiting estoppel's effect in other ways: it is submitted that this ought to be particularly addressed at the remedial stage, and the proposed model will reflect this.

On balance, a unified equitable estoppel is to be preferred, based on a tacit implication from the English cases considered above that it is close to acceptance. It may be that the high level of debate and discussion evident in section 3.3.1 above would not be necessary, were it not for a constantly potential unification in England. The debate also suggests that conservatism reigns in the commentary (and for good reasons of caution and a preference for slow, principled development), but it could also be argued that principle need not be the price of unification.

[281] See section 1.3.2 n 34-36.
[282] In the sense that they are decided in a higher court.
[283] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472.
[284] As the model proposed here does: see section 1.4.4.
[285] *Mungalsingh v Juman* [2015] UKPC 38 [25]; *Aquavita International SA v Ashapura Minechem Ltd* [2015] EWHC 2807 (QB) [66]; *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023 [80].

This chapter has thus completed a pre-phase of the proposed model's sequence, which is permitting a cause of action to be proposed – and which, it is submitted, ought to permit a unified doctrine to arise.

Chapter 4: The role of unconscionability in equitable estoppel

4.1 Introduction

An important step in any proposed model of equitable estoppel will be to define the precise helpfulness of unconscionability. Indeed, the influence of an equitable concept in a doctrine with 'equitable' in its name is a topic that must eventually be tackled in a study of the doctrine. The structure of this thesis, with one chapter solely dedicated to unconscionability, is not intended to indicate that detrimental reliance does not or has not depended on the concept, but rather that unconscionability is sufficiently significant to warrant separate discussion. Several reasons are proposed for considering unconscionability alone in this chapter. First, the use of the concept has had difficult consequences. It has been regarded as introducing uncertainty into equitable estoppel. Therefore, to some extent it is safer to analyse its contribution separately. Secondly, there has been plenty of scholarship on its meaning in estoppel – on what has it contributed, and what it has not – so the thesis can make a more meaningful contribution if the concept is analysed comprehensively. Thirdly, and considering the difficulties related to unconscionability and the commentary surrounding it, the issue is simply better dealt with as one in a single chapter in order to be consistent with the single model doctrine proposed in this thesis.

The concept of unconscionability took on a more important role within the doctrine as it became potentially the central idea behind it. Studies of the role of unconscionability in estoppel increased in number from the 1980s, creating an echo chamber of questions, as judges and academics increasingly spoke of unconscionability as a fundamental, unifying, or even altering concept within estoppel. It is the one issue that, without a doubt, unifies the equitable estoppels, more than mere inconsistency, more than the fact that they arise in equity: they all require proof of unconscionability.

In this chapter, it is proposed to look at equitable estoppel cases and academic opinion through a distinct lens, asking how the concept of unconscionability has been thought of and used, and critiquing this.

An unthinking application of unconscionability may prevent a discussion of what

role equitable estoppel can play in the law. A major problem in equitable estoppel is that the reasoning is constantly circular. Thus, estoppel is a unified concept because of its aim of preventing unconscionability; the role of unconscionability means that there can only be one kind of estoppel. Again, equitable estoppel emerged as an alternative to contract, but the existence of contract law means that equitable estoppel cannot exist in its current form. If there is only one estoppel (because of the unification idea), then on one view there can be no estoppel (because all of it defeats the formalistic rules and the certainty of the law). Unconscionability is present in these difficulties.

Ruling out a role for unconscionability in estoppel is, however, a significant step. It has been seen in this thesis that the use of an unconscionability doctrine has been associated with calls for a unified estoppel. Thus, to deny the importance of unconscionability may lead to questioning why the unification of estoppel is needed in any event. However, it was then argued that to allow the influence of unconscionability need not lead to unifying the often very different ideas behind the various estoppel doctrines. It is unwise to deny that unconscionability has a role to play in equitable estoppel for more important reasons. These ideas have at their core the common thread of inducement, of deserving disappointment. The ideals of fairness and justice are implicit in what a court does when allowing an estoppel claim. Equity is especially present in the inquiry as to the extent of the remedy in proprietary estoppel, which is the most developed version of equitable estoppel in England, and so a strong unified doctrine is likely to be based upon it.

Moreover, the law has developed in various ways in the different kinds of estoppel as a pragmatic response to events. In much the same way as other equitable doctrines, estoppel has often been useful as an alternative route to relief. The previous chapter referred to the penumbra in which equitable estoppel and unjust enrichment exist, and from which the House of Lords in *Cobbe* had a selection of doctrines to apply in the claimant's favour, choosing unjust enrichment and awarding a remedy that was consistent with the claimant's reliance loss, albeit that, using the model proposed in this thesis, the facts in *Cobbe* did not give rise to an equitable estoppel.

Unconscionability, then, is a crucial aspect of estoppel analysis. This chapter will address the two most current and advanced uncertainties to which the use of the unconscionability concept in estoppel has given rise. First, academic

opinion on the use of the concept has given it a wide variety of meanings and it must therefore be questioned whether academia has given sufficient guidance as to the correct definition of the concept in equitable estoppel. Secondly, the unification question in estoppel should be expressed more precisely to ask whether the concept is actually the key to all the individual doctrines which could belong to equitable estoppel in a way that one could say it is the operative concept of some metaphysical equitable estoppel and, if so, then unconscionability in this sense must be distinguished from the general residual jurisdiction in equity. The two questions will be addressed in turn and the likely answers to them will illustrate the probable future of the most controversial idea within estoppel.

The chapter will explore the available case law definitions of unconscionability and its academic conceptions. It ultimately sets out a range of meanings of unconscionability in equitable estoppel. A distinction will be drawn between jurisdictional meanings, meanings that in reality correspond to the detriment inquiry, and the one meaning in which court will need to refine the principles belonging to the concept of unconscionability in equitable estoppel.

4.2 A variety of academic definitions

4.2.1 Case law

4.2.1.1 Beginnings

The evolution of the concept of unconscionability in equitable estoppel cases has been well-drawn by several writers. First, it is clear that the concept was initially thought to be capable to override earlier categories and tests that perhaps did not fit with the case at hand, with judges nonetheless wishing to provide a remedy. As McFarlane comments, this was perhaps not necessary: so Robert Goff J's estoppel discussion in *Amalgamated Investment*[1] 'was, technically, redundant'[2] even though fragments from it and from Lord Denning's judgment on appeal[3] (which in McFarlane's view was also obiter) persist in discussions of unconscionability in estoppel. Secondly, the discretionary jurisdiction of the

[1] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] QB 84 (QB) 94-108 and, specifically on unconscionability, 106: '[t]he basis of all these groups of cases appears to be the same – that it would, despite the general principle, be unconscionable in all the circumstances for the encourager or representor not to give effect to his encouragement or representation.'
[2] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 3.159.
[3] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] QB 84 (CA) 116-122, and, specifically on unconscionability, 122.

court has evolved to a point where it need not give effect to the expectation but can award something between it and, at a minimum, the detriment suffered, which intermediate point is both the 'minimum equity to do justice'[4] and, in theory, 'proportionate.'[5] There is evidence of modern support for the move 'away from a concentration of set criteria' towards 'the central question' of unconscionability.[6]

The initial uses of unconscionability in estoppel were few, but influential. In *Taylor Fashions*, Oliver J dismissed the arguments of the then-counsel Millett, acting for the defendants, that unconscionability in estoppel in this case required awareness of one's strict legal rights and the fact that the relying party is acting in the belief that these rights will not be enforced against him.[7] Importantly, it did not seem to be disputed that unconscionability was required. The knowledge issue was not only 'the principal point upon which the parties divide' but also one which appeared to divide the main authorities.[8] What Millett disputed was the applicability of the principle in *Ramsden v Dyson*, which did not require such knowledge of one's strict legal rights, to the situation at hand in which both parties were acting under a mistake of law.[9] This in turn rested on a categorisation separating 'cases of proprietary estoppel or estoppel by acquiescence on the one hand' from 'promissory estoppel or estoppel by representation (whether express or by conduct) on the other.'[10] The former catergory of cases was argued to be subject to the five probanda in *Willmott v Barber*[11] (which Oliver J described as involving what was alleged to be 'a waiver by acquiescence'[12]), which did require this contested knowledge. However, Oliver J stated his uncertainty with the idea 'that so orderly and tidy a theory is really deducible from the authorities - certainly from the more recent authorities, which seem to me to support a much wider equitable jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable.'[13] He also expressed the possibility that the five probanda may have been applicable only to cases of standing by, more susceptible to the idea of a duty to speak, which in turn requires knowledge of what

[4] *Crabb v Arun District Council* [1976] Ch 197.
[5] *Jennings v Rice* [2003] EWCA Civ 159.
[6] *Turner v Jacob* [2006] EWHC 1317 (Ch) [81].
[7] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 144.
[8] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 144.
[9] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 145.
[10] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 145.
[11] *Willmott v Barber* (1880) 15 Ch D 96.
[12] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 145.
[13] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 147.

one is to speak about.[14] It was incompatible with the authorities, in the words of the future Lord Scott as opposing counsel, 'to restrict equitable interference only to those cases which can be confined within the strait-jacket of some fixed rule governing the circumstances in which, and in which alone, the court will find that a party is behaving unconscionably.'[15] Thus, holding that 'knowledge of the true position by the party alleged to be estopped, becomes merely one of the relevant factors,'[16] Oliver J appeared to leave it open for the requirements of the various estoppels to become factors in an overall, conscience-based estoppel analysis. While Lord Denning MR in *Crabb* had said that 'there are estoppels and estoppels,'[17] he viewed the basis of what he called proprietary and promissory estoppel as 'the interposition of equity.'[18] Scarman LJ had earlier in *Crabb* stated that 'the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable or unjust,' with 'the fraud or injustice' taking place 'only when the defendant decides to refuse to allow the plaintiff to set up his claim against the defendants' undoubted right.'[19] The generality of his three conditions for the finding of a remedy in estoppel – that an equity is established, that its extent needs to be the minimum to do justice and the third question of the appropriate relief[20] – seem likely, when combined with later cases, to set up the basis of a general equitable estoppel.

A case more closely connected with *Taylors*' rejection of rigid categorisation is *Amalgamated Investment & Property Co*,[21] in which Robert Goff J at the High Court stage stated that '[o]f all doctrines, equitable estoppel is surely one of the most flexible'[22] and even that none of the recognised statements of principle 'has sought to be exclusive.'[23] Even more strongly, Lord Denning MR said in the Court of Appeal that all the maxims on estoppel, rather than creating a series of separate doctrines, 'can now be seen to merge into one general principle shorn of limitations'[24] which develops rather than contradicts his earlier statement in *Crabb*, and added, '[w]hen the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law - whether due to

[14] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 147.
[15] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 147.
[16] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 152.
[17] *Crabb v Arun District Council* [1979] Ch 179, 187.
[18] *Crabb v Arun District Council* [1979] Ch 179, 187.
[19] *Crabb v Arun District Council* [1979] Ch 179, 195.
[20] *Crabb v Arun District Council* [1979] Ch 179, 198.
[21] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] 1 QB 84.
[22] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] 1 QB 84, 103.
[23] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] 1 QB 84, 103.
[24] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] 1 QB 84, 122.

misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.'[25] These statements of principle are very broad and have left a lot up to later courts to develop.

4.2.1.2 Unconscionability as a behavioural definition: 'infinitely various' meanings

The meaning of unconscionability in equitable estoppel is not exactly clear from the case law and so much is left up to academia to fill in. Thus, while Dixon in 2010 could say that 'the stream of estoppel cases has flowed unabated and at times has resembled a river in flood,' he also remarked that 'very little has been said judicially' about the concept of unconscionability.[26] A number of equitable estoppel cases provide examples of the 'infinitely various'[27] kinds of 'reprehensible'[28] behaviour associated with unconscionability. These include delay, '"blowing hot and cold" and reneging on the understanding,'[29] 'holding out as if' a state of affairs were the case, conduct that was 'tantamount to creating a trap into which [the defendant, who sought the benefit of the estoppel] could easily fall'[30] or that is 'almost dishonest'[31] or would cause 'prejudice.'[32] Likewise, conduct that is 'not honest and responsible'[33] or 'irresponsible'[34] have been provided as perhaps vague alternatives. Reasonableness was said by Lord Neuberger to be a possible basis for the concept, in addition to dishonourableness.[35] Klinck notes that '"unreasonableness" *per se* apparently does not amount to unconscientiousness' but 'an extreme *degree* of unreasonableness' may suffice on some views.[36]

[25] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] 1 QB 84, 122.
[26] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408.
[27] *Capewell v Boulton* [2009] EWHC 2695 (Ch) [44].
[28] *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2 [40].
[29] *Re West Norwood Cemetery* [2015] 1 WLR 2176 (Southwark Consistory Court) [40].
[30] *London Borough of Bexley v Maison Maurice Ltd* [2006] EWHC 3192 (Ch) [70].
[31] *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) [67].
[32] *Edray Ltd v Canning* [2015] EWHC 2744 (Ch) [38].
[33] *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [95].
[34] *Starbev GP Ltd v Interbrew Central European Holdings BV* [2014] EWHC 1311 (Comm) [170].
[35] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 229.
[36] Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 Queen's Law Journal 206, 215.

4.2.1.3 A threshold concept and confusion with the quality of the detriment

It seems that the unconscionability concept is becoming a threshold thanks to which unmeritorious cases can be swiftly disposed of.[37] The fact that the opposite can occasionally occur[38] appears to feed into the often-feared reverse idea that courts will take abuse the unconscionability concept in demonstrating sympathy with a claimant who may have no other recourse. In spite of that, it may be that a litmus test for the significance of an estoppel case has become whether the court moves beyond a simple dismissal of the unconscionability point and analyses whether there has been an act of reliance and sufficient detriment. However, it is submitted that the correct idea is expressed, rather colourfully, by the Privy Council, that '[i]t is only where the "other elements" are present that the court's conscience requires to be examined for the presence of shock.'[39]

The meaning of unconscionability may also be associated with the quality of the detriment, thus in *Beale v Harvey* the detriment suffered by the appellant was said to be too insubstantial to create unconscionability, in view of the offer to pay expenses which was made by the developers who sold land to the appellant, the small size of the portion of the garden affected, and the short period throughout which the detriment occurred.[40] The reverse has also been said; that is, 'whether the detriment suffered by [the claimant] was sufficiently substantial… is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded.'[41] Again, in *Hunt v Soady* the submission based on unconscionability was said to be rejected on the same grounds on which the submission based on detrimental reliance was rejected, and the point was therefore swiftly dismissed.[42] There seems to be a confusion in terminology. It is submitted that the detriment element needs to be isolated in order to allow it to describe a quality of loss to

[37] See, for instance, *Harper v Interchange Group Ltd* [2007] EWHC (Comm) [141]; *R v R* [2007] EWHC 2589 (Fam).
[38] See, for instance, *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782; *Ghazaani v Rowshan* [2015] EWHC 1922 (Ch), an unfortunate example given that the court disposed of the unconscionability question (finding that there was unconscionability present) very briefly and at the 196th paragraph; *AC Yule & Son v Speedwell Roofing & Cladding Ltd* [2007] EWHC 1360 (TCC) [19]-[20]. However, the latter decision, which dealt with estoppel by convention, based itself on the statement of principle by Clarke J in *The Stolt Loyalty* [1993] 2 Lloyd's Rep 281 (QB) 290 which is often used in cases falling under this category of estoppel (see *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [71]): that is, whether ''a reasonable man would expect' the person against whom the estoppel is raised 'acting honestly and responsibly' to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations.'
[39] *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2 [40].
[40] *Beale v Harvey* [2003] EWCA Civ 1883 [38]-[39].
[41] *Murphy v Burrows* [2004] EWHC 1900 (Ch) [112].
[42] *Hunt v Soady* [2007] EWCA Civ 366 [37].

the claimant, upon the defendant's insistence upon his rights. This is, it is submitted, distinct from the question whether the court then finds it would be unconscionable to insist upon such rights at the time of the trial. In reality, this is the same question as asking whether the liability is to be given effect. A further meaning of unconscionability is potentially the further question of whether conscience dictates the grant of a remedy that is the minimum equity to do justice.

The question of when the unconscionability ought to arise will now be addressed. Gardner states that '[m]ost of the decisions are clear that this [as he calls it, the '"equity" (claim to relief)'] occurs when the claimant relies on his understanding, not at some later time such as that of the court's decision.'[43] He thus criticises[44] the reasoning of Roch LJ in *Sledmore v Dalby* in asking 'whether it was still inequitable' to defeat the equity on the basis that the equity's magnitude does not change between the time of its creation and the court's decision. The decision in *Hopper v Hopper*, paraphrasing a passage from Lord Oliver appears to be in agreement, with Briggs J stating that '[i]n Lord Oliver's simple A and B example, that [equity] would normally be constituted by B's personal representative's refusal to confer upon A any sufficient proprietary interest in the subject property, or to compensate A for her detrimental reliance.'[45]

However, a number of decisions of the last 15 years contradict this point. Thus, Neuberger J (as he then was) stated in *Milton Gate* that '[e]stoppel is a doctrine designed to do justice, and, at least normally, it seems scarcely consistent with doing justice to ignore facts, which have occurred since the date upon which an action was taken in reliance upon the estoppel, and which may well impinge significantly, or even determinatively, on the issue of unconscionability.'[46] Although he earlier in the paragraph referred to the fact that he was dealing with an estoppel by convention, the generality of this statement, added to the earlier fragment which stated 'it is that irrevocable act upon which PW relies to found the unconscionability which is an essential agreement of an estoppel by convention,'[47] allows for it to apply to estoppels not dependent on a convention. Similarly, in *Uglow v Uglow* Mummery LJ stated that '[t]he scope of the court's

[43] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 503.
[44] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 504.
[45] *Hopper v Hopper* [2008] EWHC 228 (Ch) [111].
[46] *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch) [238].
[47] *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch) [238].

inquiry is not limited to what it would be unconscionable for the Testator to have done in 1976, but should take account of subsequent events affecting the conscience of the Testator.'[48] It was said in *Clark v Clark* that the equity which had arisen had not been 'satisfied' either by the passage of time or by the changed circumstances of the party whose conduct it was claimed was unconscionable.[49] In *Koulias v Makris*, the test was said to be whether 'the circumstances make it unconscionable for him *now* to assert' the beneficial interest, as opposed to impugning the actual transactions by which he acquired the property,[50] and likewise in *Van Laethem v Brooker* it was said that '[t]he unconscionable behaviour of Mr Brooker required for proprietary estoppel is his denial of her interest.'[51] In theory, if one takes the aim of equitable estoppel to be the correction of conscience, the question of when the interest is created should not be rigid. However, it must be subject to principle, so it is submitted that this view is correct.

4.2.1.4 Other (remedial) effects

Another effect of unconscionability has been to allow for a balancing of the respective parties' conduct, comparing the factors weighing in favour of an estoppel with 'as it were, the debit side of the account'[52]: so 'there may be no estoppel, because there may be other, more powerful, factors pointing the other way.'[53] Thus, in *Knowles v Knowles*, the Privy Council stated that it would be unconscionable to remove the property interest from the party against whom the estoppel was sought, rather than the reverse. Their Lordships remarked, '[w]hile recourse to the doctrine of estoppel provides a welcome means of effecting justice when the facts demand it, it is equally important that the courts do not penalise those who through acts of kindness simply allow other members of their family to inhabit their property rent free.'[54] The case of *McGuane v Welch* had the curious result that conduct which was said not to be unconscionable nonetheless had the effect of creating an equity which would be satisfied by reversing the detriment.[55] Clearly, the Court of Appeal was prepared to hold that there was an equity in the property but nothing so much as a constructive trust held absolutely over the lease. In addition, the court may have

[48] *Uglow v Uglow* [2004] EWCA Civ 987 [29].
[49] *Clark v Clark* [2006] EWHC 275 (Ch) [43].
[50] *Koulias v Makris* [2005] EWHC 526 (Ch) [9] (emphasis added).
[51] *Van Laethem v Brooker* [2005] EWHC 1478 (Ch) [234].
[52] *Henry v Henry* [2010] UKPC 3 [53].
[53] *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch) [222].
[54] *Knowles v Knowles* [2008] UKPC 30 [27].
[55] *McGuane v Welch* [2008] EWCA Civ 785 [44].

been referring solely to the remedial stage of the inquiry and using unconscionability as the term for what it was doing at that point.

4.2.2 Academia

4.2.2.1 Conscience generally

4.2.2.1 (a) Development from ancient and ecclesiastical law

Unconscionability 'has been said to play a central role'[56] and one of the most important equitable estoppel cases[57] was said to 'dramatically displa[y] this centrality,'[58] while on another view it is in some ways 'useful' yet a 'potentially distorting lens.'[59] As in the case law, academic writing can be accused of seeing fairness, justice and equity as a mystical and inexplicable source of decision-making. This is most evident in the wide use of metaphors throughout case law and academic writing. Birks has said of unconscionability's contribution that it 'seems no more than a fifth wheel on the coach.'[60] Notwithstanding Lord Walker's comment that Birks was referring to one isolated meaning of unconscionability different from that argued for in *Cobbe*,[61] McFarlane has since provided the related metaphor that unconscionability in equitable estoppel is more like 'a set of stabilizers on a child's bicycle.'[62] In fact, the metaphors in this area of the law are amusingly varied and a clear sign of the mystery that is still present here: hence the references to armament, whether referring to the sword/shield dichotomy or to the 'Denningesque sword of justice'[63] which played an important role in fashioning equitable estoppel, as well as to a 'wild horse cantering through property law,'[64] penicillin,[65] an axis[66] and a portable palm-tree.[67]

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[56] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 230.
[57] *Gillett v Holt* [2001] Ch 210 (CA).
[58] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 406.
[59] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.77.
[60] Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 226.
[61] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [92]. Lord Walker noted that Birks had been 'criticising the use of "unconscionable" to describe a *state of mind*' in the case of *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 455.
[62] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.63, preferring the stabilizers metaphor to the fifth wheel metaphor. Dixon had made a smaller modification in Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408: 'fourth wheel on the carriage.'
[63] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 230.
[64] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408, 416.

There appears to be no single definition of the concept. Gardner has described '[t]he essence of unconscionability' as being that 'the defendant has behaved *vis-à-vis* the claimant in a way which means that it would be morally reprehensible for him to insist on the current allocation of resources between them.'[68] This echoes the comment of Lord Templeman that it is insufficient for unconscionable bargain if the bargain is 'hard, unreasonable or foolish; it must be proved to be unconscionable, in the sense that "one of the parties to it has imposed the objectionable terms in a morally reprehensible manner, that is to say in a way which affects his conscience."'[69] While stating that this is the concept's meaning in property law generally, Gardner said that in proprietary estoppel specifically 'there is unconscionability where (and because) the defendant is responsible, by his encouragement or acquiescence, for an expectation on the part of the claimant, and for the reliance that the claimant has placed on that expectation, to his detriment.'[70]

Hedlund has said that conscience in equity has its basis in the writings of the scholastic school of philosophy and has sought to root the modern unconscientiousness concept in medieval Chancery decisions,[71] which were handed down by bishops who were 'interested in the state of the soul of the defendant,' regardless of the secular obligations of their jurisdiction.[72] Not only was the influence of Christian doctrine coming directly from the Chancellors themselves, it was also brought to bear in additional ways; thus Kelly wrote of late-medieval equity that 'the case for equity was much strengthened by the influence of the ecclesiastical courts, applying canon law but in this way also introducing the values of moral theology, in particular the duties of *conscience* and obedience to the moral instinct, as well as the principle of looking to the intent rather than the word.'[73] Kelly also writes that the 'vitality and familiarity' of the ancient epieikeia idea was noted by legal writers of the late middle ages, and he describes epieikeia as 'that modification of strict legality which is made necessary by the inability of any general rule to meet the justice of

[65] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408.
[66] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 404.
[67] *Taylor v Dickens* [1998] 1 FLR 806 (Ch).
[68] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 500.
[69] *Boustany v Piggott* (1993) 69 P & CR 298 (PC) 303.
[70] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 500.
[71] Richard Hedlund, 'Equity's Conscience' (2015) Oxford Journal of Law and Religion 119, (for example) 121.
[72] Richard Hedlund, 'Equity's Conscience' (2015) Oxford Journal of Law and Religion 119, 125.
[73] J M Kelly, *A Short History of Western Legal Theory* (Oxford University Press 1992) 189 (emphasis added).

every case.'[74] MacNair, for his part, describes epieikeia in Aristotle's *Nicomachean Ethics* as being explained 'in terms of the difficulty of making general definite rules cover the indefinite range of possible factual situations.'[75] Returning to the Chancery adjudication process itself, Hedlund writes that '[t]he question is whether the wrongdoer has acted unconscionably. If the answer is yes, the petition is upheld and a remedy is awarded. The purpose of this remedy is to relieve the defendant's conscience.' [76] Conscience, as understood then by scholastics, was effectively 'moral reasoning' and the umbrella term for the mental recognition of right and wrong and the consequent actions.[77] Together with the prism of natural law, present in modern Catholic thinking, moral reasoning requires the existence of 'an objective, or communal, sense of morality that is shared within a group of people' and it arises both from inborn reason and things that are later learned, such as the teachings of the Church.[78] This objectivity is therefore not the same thing as mere intuition, something which Birks has asserted is a 'hopeless cul-de-sac' [79] as a definition of conscience. Instead, a 'taxonomised and systematised understanding of that same difference [between good and evil]'[80] is to be preferred.

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[74] J M Kelly, *A Short History of Western Legal Theory* (1992 Oxford University Press) 190.
[75] Mike MacNair, 'Equity and Conscience' (2008) 27(4) Oxford Journal of Legal Studies 659, 660.
[76] Richard Hedlund, 'Equity's Conscience' (2015) Oxford Journal of Law and Religion 119, 125.
[77] This glosses over even the summarised theological differences in this area provided by Hedlund at 127-128. The mental recognition of right and wrong came to be known as synderesis while the action was called conscience in the narrow sense, although the various theologians had slightly different defintions: thus St Thomas Aquinas' view, which 'broadly sums up the scholastic conception of conscience' (127), was that synderesis 'knows moral precepts' while conscience 'applies those moral precepts to particular actions' (126-127), while St Bonaventure said that synderesis was an affective catalyst for action but conscience alone was mere reason and not a catalyst in itself, rather something which divides actions into good and bad on a purely mental level (127). Hedlund says (126) that the initial division into these two concepts by St Jerome has been disputed in modern times on the basis that the terms are respectively Greek and Latin for the same concept.
[78] Richard Hedlund, 'Equity's Conscience' (2015) Oxford Journal of Law and Religion 119, 128-129.
[79] Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' [1999] Melbourne University Law Review 1, 21.
[80] Birks added that this understanding was that taught by St Thomas Aquinas, reinforced by the authority of the church, and still expounded by natural lawyers such as John Finnis.' The content of this morality in Christianity is particularly concerned with 'protecting the weak and the vulnerable and ensuring a form of social justice that no one is taken advantage of and that money does not rule.' (Hedlund, 128) There is a rigour to the morality in natural-law reasoning; thus conscience requires 'careful attention to classification and analysis, accurate discrimination between reliance on logic and reliance on other forms of argument, all the apparatus of reason' and must be separated from the potentially dangerous ramifications of 'conscience, alias intuition, alias gut reaction.' (Birks, 21-22) Hedlund describes the idea that conscience derives its authority from the fact that it is a 'direct "link" between a person and God' or 'the voice of God,' present in the writings of the scholastics and all the way through to Carl Jung. This leads him to the conclusion, which of itself does not quite match Birks' ideal of conscience, that '[w]e can recognize right and wrong instinctively; sometimes we just know the right thing to do.' However, this innate ability or 'inner voice' is, he argues, what gave shape (in its more complex 'moral reasoning' form described earlier in this paragraph) to many doctrines developed in the Chancery jurisdiction. Such development, it is probably unnecessary to say, has allowed for the replacement of God's voice with a certain standard of conduct, a deviation from which the Court of Chancery

Hedlund thus states that conscience should be understood in an objective rather than a subjective sense, and that courts have come around to this view. The troubling subjective view he describes as 'something wholly personal, where each person is allowed to formulate their own sense of morality and ethics,' while the better objective view is that conscience is 'a person's engagement with a unified communal morality, an individual's application of social mores.'[81] This echoes two of three possible meanings of dishonesty raised by Lord Hoffmann in *Twinsectra Ltd v Yardley*,[82] contrasting objective with subjective dishonesty, to which a third combined test was added. It is interesting that the tests are described in similar terms, which separate general from subjective morality, and yet the noun 'dishonesty' on its own seems to be a clearer description of a certain standard of conduct (regardless of whether the threshold is higher or lower, and in whose view) than is 'conscience.' Thus, while it may indicate worse behaviour than unconscionability[83] or, perhaps more accurately, behaviour at the worse end of the unconscionability spectrum,[84] honesty has also been described as giving 'particular overtones' to the technical sense of conscience in modern equity.[85] Lord Nicholls has made the point that '[i]f unconscionable means no more than dishonesty, dishonesty is the preferred label.'[86] As Birks has stated, unconscionable behaviour potentially ranges from not giving back what one was not intended to receive to dishonest behaviour, and, 'indicating unanalysed disapprobation, thus embraces every position in the controversy.'[87]

Birks has said of the unconscionability standard in *Akindele*, dealing with receipt of misappropriated trust property, that '[w]hat it requires is unreasonableness and, in particular, unreasonable failure to appreciate the trust provenance of the assets in

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would not allow. At the outset, it is clear that God's voice may speak in subtly different ways depending on which listener is involved: the judge, the claimant or the defendant.

[81] Richard Hedlund, 'Equity's Conscience' (2015) Oxford Journal of Law and Religion 119, 120.

[82] *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164 [27].

[83] Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 Queen's Law Journal 206, 215 commenting that dishonesty '"feels" more pejorative' than unconscientiousness; Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 227: 'Despite the undesirability of the recourse to "unconscionable," it can thus be deduced in one way or another that the *Akindele* case constitutes a commitment to the view that the equitable version of the wrong of misappropriation requires fault less than dishonesty.'

[84] By Birks himself in the same article: Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 226.

[85] Mike MacNair, 'Equity and Conscience' (2008) 27(4) Oxford Journal of Legal Studies 659, 660.

[86] *Royal Brunei Airlines v Tan* [1995] 2 AC 378 (PC). Lord Nicholls added that 'If unconscionable means something different [than dishonesty], it must be said that it is not clear what the something different is.'

[87] Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 226.

question.'[88] However, Birks' meaning was said by Lord Walker in *Cobbe* to be different from that in equitable estoppel or at least the meaning used in counsel's arguments in the latter case: Birks was criticising the use of unconscionability to describe a state of mind, while in the arguments in *Cobbe* 'it is being used (as in my opinion it should always be used) as an objective value judgment on *behaviour* (regardless of the state of mind of the individual in question).'[89] This interestingly echoes the subjective and objective views of unconscionability described above. It also accords with the meaning provided by Lord Neuberger, writing extra-judicially.[90] It seems to emerge from these statements that an objective standard of conduct is the paradigm, with honesty in equity classified as objective, and with reasonableness suggesting (although not, to date, expressly associated with) objectivity. This echoes standards of conduct present in the common law which are, it is argued, similar in nature and operation. It is thus worthwhile to return to the development of the objective scholastic sense to determine whether and how conscience has become solidified as a legal concept.

Hedlund provides the surprising viewpoint that scholastic conscience had become, 'well beyond the Reformation,' so 'internalized into equity itself' that references to an external moral law had been dropped, which 'might have helped fuel the misunderstanding that equity is overly subjective and dependent on the personal views of judges.'[91]

4.2.2.1 (b) Conscience as objectively wrong behaviour

Applying this to the differently-expressed ways in which behaviour can be wrong, described in the previous paragraph, it becomes clear that what is being sought in the application of conscience, or unconscionability, in equity is simply a way to describe that the behaviour is *objectively wrong*. The idea of an 'examination of the *conscientia* of the defendant' was 'the absolute centre of the fact-finding procedure of Chancery and other equity courts' '[f]rom the beginning until 1873-75.'[92] The defendant was 'in roughly three-quarters of all cases in equity' required to 'answer the plaintiff's questions on oath, directly

[88] Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 227.
[89] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [92].
[90] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 229.
[91] Richard Hedlund, 'Equity's Conscience' (2015) Oxford Journal of Law and Religion 119, 137.
[92] Mike MacNair, 'Equity and Conscience' (2008) 27(4) Oxford Journal of Legal Studies 659, 676.

and without equivocation.'[93] Conscience as private knowledge, MacNair says, also had its 'substantive implications' in what became the equitable maxim 'equity looks to the intention, not to the form.'[94] However, conscience as an organising principle is, in MacNair's view, 'what Chancery does,' as is all of equity itself, and in this respect it is no more than 'general morality.'[95] Yet *general* morality is inherently objective.

A number of issues in modern equity and particularly in equitable estoppel flow from this analysis**.** First, as has been seen, academics favour an objective and taxonomised view of conscience. Secondly, it may be disputed that the thought process in equity is any different than that which applies at common law. This point is relevant for the idea that equitable estoppel may have strayed too far from the more predictable (and incorrectly viewed as solely common-law-originating) representation branch. Hence, while Lord Neuberger, once a Chancery judge, stated that equity's 'parental genes are fairness and flexibility' and its 'environmental influences are multifarious, but they include the need for consistency and flexibility,'[96] Birks wrote that the notion that 'equity is by comparison with the law more sophisticated, subtle, and flexible' is 'mere rhetoric, either false or meaningless.'[97] In fact, he said, 'the reverse might seem more true,'[98] which so far as sophistication and subtlety (not flexibility) are concerned appears applicable to unconscionability in equitable estoppel. Ultimately, 'there are from time to time patches of incoherence or underdevelopment in both' which 'are repaired by the same people using the same juristic techniques.'[99] MacNair has even said that the concept of epieikeia 'means merely techniques of interpretation of general rules which are necessary and unavoidable aspects of the judicial function.'[100] Thus, while equity has references to 'a righteous man'[101]

[93] Mike MacNair, 'Equity and Conscience' (2008) 27(4) Oxford Journal of Legal Studies 659, 676.
[94] Mike MacNair, 'Equity and Conscience' (2008) 27(4) Oxford Journal of Legal Studies 659, 678.
[95] Mike MacNair, 'Equity and Conscience' (2008) 27(4) Oxford Journal of Legal Studies 659, 680.
[96] Lord Neuberger, 'Equity – The soul and spirit of all law or a roguish thing?' Lehane Lecture, Supreme Court of New South Wales (4 August 2014) [7] <https://www.supremecourt.uk/docs/speech-140804.pdf> accessed 27 March 2017.
[97] Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' [1999] Melbourne University Law Review 1, 19.
[98] Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' [1999] Melbourne University Law Review 1, 19.
[99] Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' [1999] Melbourne University Law Review 1, 19.
[100] Mike MacNair, 'Equity and Conscience' (2008) 27(4) Oxford Journal of Legal Studies 659, 681.
[101] *R Griggs Group Ltd v Evans* [2005] Ch 153 [39], cited by Hedlund.

and (from equitable estoppel itself) 'a reasonable and honest man'[102] these are not far removed from standards developed at common law. Thus, the doctrines to which the Chancery judgments eventually gave rise are equally susceptible of rigour and taxonomy. Writing in Canada, Klinck has proposed the categorisation of equitable doctrines that invoke conscience into five categories: mutuality, leverage, confidence, candour and awareness.[103] It shows that conscience has solified into doctrines of predictable content and specific application, while of itself proving that conscience-based doctrines can be taxonomised. Proprietary estoppel enters into two of those categories: confidence, which he explicitly associates with 'estoppel and related constructive trusts'[104] and also includes powers and secret trusts, and which 'involves a person entrusting something – an asset or power – to another, or otherwise relying on that other;'[105] and mutuality, which arises in cases such as *Chalmers v Pardoe*[106] and involves 'one party's having or not having received something for what is claimed.'[107] The categories may be elastic: thus, Klinck identifies several ways in which they can overlap,[108] which potentially suggests to a reader that his five categories are not the sole possibility. MacNair has also highlighted the fact that, in the time of St German, 'the natural law foundations of positive law were a commonplace' and conscience was also employed in common law courts.[109]

Thirdly, doubt has been cast upon the commercial-domestic dichotomy in equitable estoppel, a dichotomy which appears to highlight the fact that commercial disputes should be less susceptible to an unconscionability analysis. The dichotomy is exemplified by the consistency with which it has been applied by two members of the senior English judiciary. In *Jennings v Rice*, Robert Walker LJ recognised that expectations giving rise to an equity may not have been focused on specific property and may have arisen 'on the basis of vague and inconsistent assurances.'[110] A few years later, in *Cobbe*, he actually referred to

[102] *The Stolt Loyalty* [1993] 2 Lloyd's Rep 281 (QB); *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 (CA) [71].
[103] Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 Queen's LJ 206.
[104] Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 Queen's LJ 206, 243.
[105] Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 Queen's LJ 206, 234.
[106] *Chalmers v Pardoe* [1963] 1 WLR 677 (PC), cited by Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 Queen's LJ 206, 222.
[107] Dennis R Klinck, 'The Nebulous Equitable Duty of Conscience' (2005) 31 Queen's LJ 206, 217.
[108] For example, it may be difficult to separate concealment of material information from the resulting lack of mutuality of knowledge, or the leverage that would result for the better-informed party: the difference would be a matter of 'emphasis' (246-247).
[109] Mike MacNair, 'Equity and Conscience' (2008) 27(4) Oxford Journal of Legal Studies 659, 662.
[110] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [46].

the existence of a factual dichotomy[111] which separates the commercial cases, in which hopes by themselves are most often never enough, from the domestic cases in which that point is not so frequently made,[112] and in which the outcome might have been different had the claimant's belief been more thoroughly questioned in cross-examination.[113] He stated, '[i]n the commercial context, the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a *contract*' whereas '[i]n the domestic or family context, the typical claimant is not a business person and is not receiving legal advice' and 'he or she wants and expects to get [an] *interest* in immovable property, often for long-term occupation as a home.'[114] Equally, Lord Scott in *Cobbe*, although emphasising the lack of a certain interest in land or an expectation of a forthcoming binding agreement as being fatal to the estoppel claim, referred expressly to Cobbe's experience as a property developer and his knowledge that Lisle-Mainwaring was not legally bound,[115] while in *Thorner* he was content to find an equity on the basis of a remedial constructive trust.[116]

These views are consistent with there being a commercial and domestic dichotomy. If proprietary estoppel 'will not often assist a plaintiff in a commercial context, that is probably all to the good: in the business world, certainty and clarity are particularly important, and judges should be slow to encourage the introduction of uncertainties based on their views of the ethical acceptability of the behaviour of one of the parties.'[117] However, equally the dichotomy 'may well not be entirely satisfactory' in view of equity's reluctance to be subject to rigid rules and the notion that estoppel is based on fairness, as well as the point that a case as important as *Gillett*, for example, does not fit neatly into either category[118] and in fact did involve the kind of cross-examination to which Lord Walker was referring.[119] It could simply be said instead that there are factors which will trigger and compound unconscionability, and that often in a domestic or commercial context they will include or not include some of the factors seen in the existing cases. In addition, even commercial negotiations can be delicate and the fact that Cobbe had 'no

[111] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [47].
[112] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [66].
[113] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [67].
[114] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [68].
[115] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [5], [15].
[116] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [14].
[117] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 231.
[118] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 233.
[119] As he acknowledged in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55 [67].

emotional or social impediment' to ask for a legally binding protection before proceeding[120] may not always hold. The risks to commercial certainty arising from the spectre of unconscionability are overstated for a further reason. The concept is indeed employed in other areas of equity, to a more or less 'developed and nuanced' degree.[121] Oakley has noted that 'the most interesting feature' of Lord Millett's formulation of institutional constructive trusts – that is, that such a trust arises 'whenever the circumstances are such that it would be unconscionable for the owner of the legal title to assert his own beneficial interest and deny the beneficial interest of another' – is 'its emphasis on unconscionability, a clear indication of the increasing importance of this concept in English law.'[122] It has been roundly asserted that equity is 'alive in the UK Supreme Court.'[123] It is also not often mentioned in the context of the commercial-domestic dichotomy that unconscionability is unambiguously a requirement of estoppel by convention, which has been claimed and given serious consideration in commercial situations in which the estoppel claim is often made in tandem with a claim for a legal or equitable remedy pursuant to a contract. Thus, *Milton Gate*[124] concerned a commercial subtenancy; *Steria v Hutchinson*,[125] an occupational pension scheme; while *Ros Roca*[126] concerned a contract for financial services. An entire subcategory could be made within estoppel by convention of shipping cases, in which the claim in estoppel by convention is usually coupled with one in estoppel by representation.[127] None of this is to forget that two of the three cases which initially made unconscionability an important topic in estoppel

[120] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 232.
[121] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 428, speaking specifically about dishonest assistance and unconscionable receipt.
[122] A J Oakley, 'Restitution and Constructive Trusts: Commentary' in W R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998 Hart Publishing) 221-222, citing at 221, n 22 the definition of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 705: 'In the case of a [constructive] trust, the conscience of the legal owner requires him to carry out the purposes… which the law imposes on him by reason of his unconscionable conduct.'
[123] Lord Neuberger, 'Equity – The soul and spirit of all law or a roguish thing?' Lehane Lecture, Supreme Court of New South Wales (4 August 2014) para 6 <https://www.supremecourt.uk/docs/speech-140804.pdf> accessed 27 March 2017.
[124] *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch).
[125] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445.
[126] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472.
[127] *Republic of India v India Steamship Co Ltd (The Indian Grace No 2)* [1997] 2 WLR 538 (CA) affd [1998] AC 878 (HL); *Norwegian American Cruises A/S v Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343 (CA), in which the judge's rejection of estoppel by representation was not appealed, whereas in the Court of Appeal the case turned on estoppel by convention.

themselves concerned estoppel by convention: *Amalgamated Investment & Property*[128] and *Taylors Fashions*.[129]

It may also be that the dichotomy is redundant because unconscionability will in any event provide the most reasonable solution. Again, the distinction between *Cobbe* and *Thorner* is an illustration of this: so the idea that a contract should have been sought in the latter case 'seems somewhat unreal'[130] in contrast to the situation in the former case, leading to the conclusion that what resulted seemed particularly unfair in contrast to the position of Cobbe, who was a knowing risk-taker.[131] Further, Birks has interestingly commented that an economic analysis of the result in any decision applying the unconscionability standard, an analysis which Susan Thomas believed was unrelated to unconscionability,[132] in fact leads to the same result: thus, in *Bank of Commerce and Credit International v Akindele*, the unconscionable person according to Thomas' economic analysis who did not prevent the loss of the subject monies at the lowest cost was the same unconscionable person 'who could, in the circumstances, have reasonably been expected to discover the trust or fiduciary provenance of the assets received.'[133] The commercial-domestic dichotomy, while conveniently explaining *Cobbe* and *Thorner*, does not strictly hold for every case and it might well be abandoned in favour of a more specific approach. Again, unconscionability itself is not the problem, but rather it is the lack of development to date on what such an approach might be.

4.2.2.2 Academic positions on the concept's influence in equitable estoppel

This section will study the writings of academics who have engaged with the topic of unconscionability as it is applied specifically in equitable estoppel. It will be argued that, the more precisely one defines unconscionability, the less one is likely to dismiss is as being too dangerous on the grounds that it is imprecise. Often, a cursory analysis of estoppel merely refers to the growing role of unconscionability in the case law which, it is argued, adds to the confusion in this area by not answering the main questions such as whether

[128] *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] QB 84 (QB, CA).
[129] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch).
[130] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 232.
[131] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 232. For the last point, Lord Neuberger cites Amy Goymour, 'Cobbling together claims where a contract fails to materalise' (2009) 68(1) CLJ 37, 39.
[132] Susan B Thomas, 'Goodbye Knowing Receipt. Hello Unconscientious Receipt' (2001) 21 OJLS 239, 252-53.
[133] Peter Birks, 'Receipt' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 227.

the various categories of estoppel remain useful or they all merge into one with the aim of preventing unconscionability, whether the aim is actually redressing unconscionability rather than preventing it, or even redressing something else, and whether estoppel can be an independent cause of action. This section will look at more deeply analytical writing. It will ultimately argue that none of the views discussed here excludes the notion that conscience is the concept at the heart of equitable estoppel: nothing should prevent the concept from developing with the doctrine. The views of those who see unconscionability as not only unnecessary but also dangerous will be discussed first, followed by the views of those who likewise think it unnecessary but at the same time see a limited role for it, followed last by a set of more receptive views. A gradient of expansiveness in the definition of unconscionability will not exactly be found, but it will be seen that it does more or less correlate with how much one accepts the concept.

4.2.2.2 (a) Those who see the concept as unnecessary and dangerous

The inherent problems with using an unconscionability analysis do not vary amongst these three categories, but the receptiveness to using it regardless of these problems does change depending on whether one accepts that conscience is capable of an 'increasingly nuanced and sophisticated application'[134] as a 'relatively precise concept.'[135] The critics in this category see the concept as introducing undue imprecision and uncertainty into the law and, unlike those in the following category, see no current role for it in equitable estoppel. It is submitted that this view is due to a flawed sense of the breadth of unconscionability and a distrust of the internal rigour of case-based law, and that it does not engage with the possibility that unconscionability can be attenuated or have its internal conditions.

The two main writers in this category are Handley and McKendrick. Handley in particular prefers the view that estoppel represents a number of doctrines, the individual features of which would seemingly be blurred by using unconscionability, which might in turn unify the estoppel doctrines into one. McFarlane (discussed below) similarly separates the requirements to form a *proprietary* estoppel according to the kind of behaviour leading

[134] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 428.
[135] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408, speaking of the aim of his earlier paper: Martin Dixon, 'Proprietary estoppel and formalities in land law and the Land Registration Act 2002: a theory of unconscionability' in Elizabeth Cooke (ed), *Modern Studies in Property Law Volume 2* (Hart Publishing 2003).

to its formation – which is the dividing factor for all estoppels except proprietary estoppel itself, the name of which refers to the thing sought by the claimant rather than the defendant's behaviour. However, while McFarlane subdivides proprietary estoppel into three categories and clearly separates these from the rigid categories of evidentiary estoppel (a distinction also made by Cooke[136]), Handley refers to eight.[137] Halson has referred to the 'wildly divergent opinions' retained by writers, noting that '*Williston on Contracts* classified nine different species of estoppel, while Ewart's *Waiver Distributed* denied its existence at all!'[138] Thus, the estoppel concerned in *Waltons Stores* is described by Handley in one article as 'orthodox proprietary estoppel by encouragement' and in another as 'in substance an estoppel by encouragement.'[139] The operating factor here seems to be 'orthodox' rather than anything else. At one point, he refers to a rather specific 'estoppel by representation based on silence in breach of a duty to speak,' which he said might have been at issue in *Waltons*,[140] and which appears on another analysis to be exactly what was at issue in *Willmott v Barber*. However, the 'five probanda' in that case have been less helpful for at least 40 years than they previously might have been, and even rigid categories are not immune from change. Further, Lord Neuberger has said that, to many in England and to most in Australia, 'what we in England call proprietary estoppel is more properly called equitable estoppel' and, indeed, 'the naming of categorising of different estoppels is a parlour game for legal academics, which obfuscates rather than illuminates,'[141] with the distinct features of the various estoppels being 'more hypothetical than practical' such that 'insofar as they have any effect, […] they should not exist.'[142]

Thus, unsurprisingly in view of the number of distinct estoppels possible in his view, Handley has said that unconscionability 'has no real work to do and is little more than a vituperative and confusing epithet.'[143] He welcomed the return to orthodoxy represented

[136] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) Chapter 2.
[137] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006); K Handley, 'The three High Court decisions on estoppel 1988-1990' (2006) 80 ALJ 724; K Handley, 'Further thoughts on proprietary estoppel' (2010) 84 ALJ 239: encouragement, standing by, convention, representation, promissory, negligence or silence in breach of a duty to speak, grant, and deed.
[138] Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] Lloyd's Maritime and Commercial Law Quarterly 256, 257.
[139] K R Handley, 'Further thoughts on proprietary estoppel' (2010) 84 ALJ 239, 241.
[140] K R Handley, 'The three High Court decisions on estoppel 1988-1990' (2006) 80 ALJ 724, 725.
[141] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 237.
[142] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 237.
[143] K Handley, *Estoppel by Conduct and Election* (2006 Sweet & Maxwell) para 1-027.

by the cases of *Baird Textile Holdings*,[144] *Criterion Properties*[145] and *Actionstrength*,[146] remedying the 'public nuisance' of *Crabb* and *Taylor Fashions* which had 'encourag[ed] the notion that unconscionability was a freestanding principle capable of generating legal rights outside established principles.'[147] Commenting that it is 'remarkable' that the concept 'should suddenly be thought relevant a hundred years after the Judicature Act,' he says that it "raises a false issue, it suggests a discretion which does not exist, and is unnecessary because an estoppel follows on findings of representation, causation, change of position and prejudice"[148] (a comment that seemingly acknowledges the aspects that the various estoppels have in common, despite Handley's insistence that estoppel is in fact a number of doctrines[149]). McKendrick has also referred to the 'real danger that principles will be abandoned and hard questions ducked by conferring a broad and largely unstructured discretion on the courts,' while nonetheless recognizing the advantages of flexibility 'in the absence of a settled meaning of unconscionability.'[150] McKendrick refers to the fourth edition of *Goff & Jones: Restitution* in which the editors, writing of the pre-contractual context in which both estoppel and unjust enrichment can be useful, stated that estoppel principles 'particularly the elaboration of the concept of unconscionability, should be of significant assistance to future courts when confronted with comparable problems.'[151] This is at odds with a passage already cited in this thesis[152] in which the latest editors of the treatise recommend that unconscionability be abandoned in this context. Handley comments that '[w]e no more need a single overarching doctrine of estoppel than

[144] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999.
[145] *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL 28, [2004] 1 WLR 1846.
[146] *Actionstrength Ltd v International Glass Engineering* [2003] UKHL 17, [2003] 2 AC 541.
[147] K R Handley, 'Further thoughts on proprietary estoppel' (2010) 84 ALJ 239, 240.
[148] Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-027.
[149] See Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-028: he mentions estoppel by deed, by grant, by convention, by representation, and promissory and proprietary estoppels (which he later subdivides in two: see Chapter 11 of the same work), which rest on 'various rationales – recital, grant, convention, representation, positive promise or encouragement, fraud and mistake, and negative promise.'
[150] Ewan McKendrick, 'Work Done in Anticipation of a Contract Which Does Not Materialise' in W R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998 Hart Publishing) 189.
[151] Ewan McKendrick, 'Work Done in Anticipation of a Contract Which Does Not Materialise' in W R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones* (1998 Hart Publishing) 189.
[152] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (Thomson 2011) para 6-24.

we need a single overarching doctrine of torts,'[153] which is interesting to compare with Birks' questioning whether there is, in fact, a law of torts or a law of tort.[154]

The problem with such scare-mongering is that there is no evidence that courts even in their equitable jurisdiction do not eventually reach a place of balance and common sense, at least in setting the moral standard of behaviour, which we have seen thanks to Hedlund was always the aim: that is, correcting the conscience of the defendant. At least in a contractual context, the courts are unlikely to defeat what the parties have agreed except for excellent moral reasons. In addition, '[i]n equity, as in common law, a defendant is entitled to say that the plaintiff took the risk that the defendant would not act honourably.' [155] Thus even using the meaning of unconscionability adopted by the naysayers, which is the vaguest and most nebulous meaning, it can be argued that there is an equilibrium from which courts will not depart. The duo of *Cobbe* and *Thorner*, for all the flaws evident particularly in the former, is a prime example of that equilibrium and compromise, as are the Court of Appeal cases of *Taylor v Dickens* followed by its corrective, the more expansive decision in *Gillett v Holt*.

The second problem with this is that unrestricted and unprincipled adjudication is not necessarily the outcome of the currently significant authorities on equitable estoppel. It may be that Oliver J's judgment in *Taylor Fashions* allowed for any recourse to 'conscience' to substitute for the required formalities. First, this is not universally accepted: hence, Neuberger J (as he then was) in *Milton Gate* commented that counsel's 'suggestion that the words "without more" indicate that a convention could be established in the circumstances described by Oliver LJ provided that the essential additional element of unconscionability could be established, does not appear to me to accord naturally with the meaning of the words in that context.'[156] Secondly, the result is entirely different if one considers the natural meaning of this well-known statement of Robert Walker LJ in *Gillett v Holt*:

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[153] K R Handley, 'Further thoughts on proprietary estoppel' (2010) 84 ALJ 239, 243; see also Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-028.
[154] Peter Birks, *Unjust Enrichment* (2nd edn, Oxford University Press 2005) 107.
[155] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 229.
[156] *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch), [2004] Ch 142 [165], which was then cited in *Commissioners for Her Majesty's Revenue and Customs v Benchdollar Ltd* [2009] EWHC 1310 (Ch) [50], with the addition that '[a] similar conclusion is to be found' in *Colchester BC v Smith* [1991] Ch 448 (Ch) 496.

> … although the judgment is, for convenience, divided into several sections with headings which give a rough indication of the subject matter, it is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments. Both sides are agreed on that, and in the course of the oral argument in this court it repeatedly became apparent that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a 'mutual understanding' may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.[157]

If this statement is taken as describing the precise role of unconscionability in estoppel, it actually precludes the unorthodox use of unconscionability. It merely states that the three traditional elements of estoppel are linked in ways that target unconscionability, and can thus be taken as an attempt to prevent the finding of an estoppel where a court decides that the three elements are present, even where the conscience of the person against whom the estoppel is sought remains unaffected. Thus, '[t]he doctrine applies only if these elements, in combination, make it unconscionable for the person giving the assurances (whom I will call the benefactor, although that may not always be an appropriate label) to go back on them,' which it is necessary to highlight since 'proprietary estoppel can apply in a wide variety of factual situations, and any summary formula is likely to prove to be an over-simplification.' [158] Indeed, this view of unconscionability can be understood to preclude, rather than encourage, discretion. The paragraph also shows the necessary interconnection between the various elements ('[t]hese three elements are interdependent'[159]), so that '[i]t is difficult to envisage circumstances in which it would be inequitable for the party giving an assurance alleged to give rise to a proprietary estoppel, i.e. an estoppel concerned with the positive acquisition of rights and interests in the land of another, unless the person to whom the assurance

[157] *Gillett v Holt* [2001] Ch 210 (CA) 225.
[158] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, [44].
[159] *Herbert v Doyle* [2008] EWHC 1950 (Ch) [17].

was given had suffered some prejudice or detriment.'[160] This again blurs the definitions of detriment and unonscionability.

In the view of the Privy Council, 'just as the inquiry as to reliance falls to be made in the context of the nature and quality of the particular assurances which are said to form the basis of the estoppel, so the inquiry as to detriment falls to be made in the context of the nature and quality of the particular conduct or course of conduct adopted by the claimant in reliance on those assurances… notwithstanding that reliance and detriment may, in the abstract, be regarded as different concepts, in applying the principles of proprietary estoppel they are often intertwined.' [161] The Privy Council in *Capron v Government of Turks and Caicos Islands* seemed to think it was necessary to remark that 'unconscionable behaviour cannot stand alone as the basis for a finding of proprietary estoppel. Where there is no ground for a belief that the claimant was entitled to acquire a certain interest in land, the fact that the behaviour of the person against whom proprietary estoppel is sought to be established was unconscionable cannot fill the gap that exists in the essential proofs required for the doctrine to come into play.'[162] With respect, a proper reading of the statement in *Gillett* makes it superfluous to point out that unconscionability should not be allowed to 'fill the gap.' It was Lord Walker in *Cobbe* who correctly reanalysed his own earlier position in *Gillett*, stating that the concept 'play[s] a very important part in the doctrine of equitable estoppel, in unifying and confirming, as it were, the other elements,' so that '[i]f the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again.'[163] In Privy Council advice given earlier in the same year that *Cobbe* was decided, although there was no discussion at this level of reliance, or of detriment except to state that the trial judge had been satisfied of its existence,[164] the discussion of unconscionability focused on the issue of the precise nature of the representation, and it was found that the owner 'had done nothing at all to encourage any belief that his brother and sister-in-law could treat the property as belonging to them' and had merely been passively kind in allowing his sister-in-law to remain in the house in question (one of seven on an estate in Antigua and Barbuda) after the breakdown of her marriage: '[w]hile recourse to the doctrine of

[160] *Watts v Storey* [1983] CAT 319.
[161] *Henry v Henry* [2010] UKPC 3 [55].
[162] *Capron v Government of Turks and Caicos Islands* [2010] UKPC 2 [39].
[163] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55 [92].
[164] *Knowles v Knowles* [2008] UKPC 30 [18].

estoppel provides a welcome means of effecting justice when the facts demand it, it is equally important that the courts do not penalise those who through acts of kindness simply allow other members of their family to inhabit their property rent free.'[165] Finally, in the Lands Tribunal case of *Oakglade Investments*, it was said that the 'obvious absence of unconscionability' made it 'unnecessary for [the president of the tribunal] to consider whether the other elements of estoppel were present.'[166] The parties seeking to rely on the alleged unconscionability had in fact 'become the victims of their own failure,'[167] and it was this which made it apparent that an estoppel could not have arisen.

This view of unconscionability as being dangerous and unnecessary therefore suffers from two problems and should consequently be abandoned. The first is that it adopts an unnecessarily wide definition of the concept, which is not required by the case law and can, indeed, potentially suffer from the problems highlighted by Handley. The second is that the case law itself recognises it as playing an important role in balancing the rights of the parties. The next view of unconscionability will be seen to be more realistic.

4.2.2.2 (b) Those who see the concept as occasionally or potentially useful

While academics in this category view unconscionability as being occasionally close to 'redundant,'[168] they do not altogether rule out its helpfulness. This view of the usefulness of the concept still suffers from the problem that it is largely dependent on what meaning one adopts of the concept. However, the writers falling under this category acknowledge that there is a variety of possible meanings. This commentary on the concept's 'increasing importance' is acknowledged.

It is undeniable that unconscionability, whatever its meaning, is a requirement of equitable estoppel. Academics who acknowledge that there is a role for it often do so in a cautious way, emphasising the need to guard against imprecision. This section will analyse the approaches of McFarlane and Cooke, as well as early writings of Dixon, and Lord

[165] *Knowles v Knowles* [2008] UKPC 30 [27]. In its focus on kindness, the Privy Council omitted at this point mentioning the fact that the owner had been cutting down trees in the property and pouring diesel oil on them shortly after his brother had divorced the claimant, which it did acknowledge at [7].
[166] *Oakglade Investments Ltd v Greater Manchester Passenger Transport Executive* (Lands Tribunal Manchester, 16 September 2008) [21].
[167] *Oakglade Investments Ltd v Greater Manchester Passenger Transport Executive* (Lands Tribunal Manchester, 16 September 2008) [24].
[168] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.49.

Neuberger writing extra-judicially. It will show that, once again, an emphasis on caution is tied to the adoption of a particular definition of unconscionability, one of the several definitions which may be applied to it. It will conclude, before moving on to the opinions which have most embraced unconscionability, that 'reference to well developed principles'[169] should be encouraged in order to prevent the concept from becoming obsolete.

First, the ability to define unconscionability in varying ways is obvious in this category. McFarlane describes two senses of unconscionability, which he says are taken from Lord Walker's speech in *Cobbe*. One sense is that of the state of mind of the party said to be acting unconscionably, with Lord Walker providing the impugned state of mind in *Akindele*[170] as an example (as we have seen, that was a state of mind said to be, simply, 'unconscionable').[171] The other sense 'refers to the general, overarching question of whether there are grounds on which the court can make an order against' that party.[172] Cooke also describes a dual meaning of unconscionability in equitable estoppel: in her monograph, unconscionability first 'points us to the equity tradition and to the discretionary nature of the court's jurisdiction' and, secondly, 'in the context of estoppel it indicates the issues relevant to the court's decision, namely detrimental reliance and, where appropriate, other factors.'[173] McFarlane's mind-related 'narrow' sense can potentially be found in both of Cooke's definitions, while his broad sense is most related to Cooke's second meaning although not unrelated to her first meaning which relates to all of equity jurisprudence. Hence, unconscionability in two of the main treatises on equitable estoppel is given four different meanings, each of which has a different scale and reach. Lord Neuberger, finally, in a speech delivered following the fortuitous fact that the House of Lords ruled three times on equitable estoppel in the space of 366 days,[174] provided his two qualifications for the correct use of unconscionability, which are in reality a prescription for the one correct meaning of unconscionability in his view: first, it is to be judged objectively, a point which he said appeared to be supported by Scarman LJ in *Crabb*

[169] *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324.
[170] *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437.
[171] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.05; Lord Walker's reference to *Akindele* is at *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [92].
[172] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.06.
[173] Elizabeth Cooke, *The Modern Law of Estoppel* (2000 Oxford University Press) 85.
[174] *Cobbe* was handed down on 30 July 2008, *Thorner* on 25 March 2009, and *Fisher* on 30 July 2009.

and Oliver J in *Taylor Fashions*, and, secondly, it is to be assessed according to the principles alluded to by Dixon J in the case of *Grundt v Great Boulder Mines Pty Ltd*.[175]

Secondly, the approach in this category evokes the dangers of employing unconscionability as it stands and is understood, while also recognising its influence and occasional usefulness. McFarlane's separation of proprietary estoppel into strands based on representation, acquiescence or a promise allows for his argument that whether unconscionability in one or another sense is required depends on which strand is in question (neither,[176] both[177] and only the broad sense[178] respectively). In any event, he cites an Australian case, *Lenah Game Meats*, to the effect that 'the notion of unconscionable behaviour does not operate wholly at large,'[179] and warns that applying an entirely broad approach might lend itself to increased litigation if the concept thereby remains 'ill-defined'[180] and lacking in transparency. [181]

The three-strand approach differs from that adopted by Cooke, who sought to explain how a unified equitable estoppel was possible, and whose view of unconscionability applied across the board of that equitable estoppel. Returning to Cooke's first definition of unconscionability, she states that to invoke this term in a decision 'is to place it in the equity tradition…, where the court is regarded, to some extent, as a court of conscience, a court that is making a value judgement [sic] and saying something about fairness.'[182] In fact, the very breadth of 'conscience' and its related terms allows one to draw upon the centuries of equitable thought which should be welcomed as an opportunity to fashion a useful doctrine, rather than shutting down a doctrine for the reason that it is insufficiently evolved. McFarlane (referring to both of his suggested meanings) prefers to see unconscionability as providing an overall guidance for what the court ought to do when inquiring into the presence of the more precise elements of the representation (or equivalent conduct), the reliance and the detriment. Compellingly, he

[175] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 230.
[176] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 5.44-5.53.
[177] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 5.33-5.43.
[178] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 5.54-5.112 and particularly paras 5.54-5.64.
[179] *ABC v Lenah Game Meats Pty* (2001) 208 CLR 199, 245 cited in Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.16.
[180] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.17.
[181] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.18.
[182] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 85.

describes the proof of prima facie unconscionability as 'consist[ing] precisely in establishing each of the three main elements.'[183] The concept itself, he says, is 'a set of stabilizers on a child's bicycle' which is merely helpful as guidance while the courts still work out the parameters of the doctrine, as 'there is a chance that an unthinking application of the three main elements of promise, reliance and detriment may lead the courts off course.'[184]

While Cooke also sees unconscionability as replaceable, she does so on the basis that 'detrimental reliance is what the court actually examines.'[185] This is not altogether different from McFarlane's conception since detrimental reliance itself imports the necessary representation – as Cooke says, 'the representation must have led the representee to believe something, or have reinforced a belief he already held. Because of that belief he must have done something, and his action must have been in some sense a detriment to him' – thus, all three elements are present and inextricably linked. The simple fact is that no one element stands out as being particularly crucial, thus McFarlane disagreed[186] with Neuberger LJ's statement in *Steria v Hutchinson* that one should identify a single factor. If one takes 'detrimental reliance' as the crux, then McFarlane's next step is to simply take the ultimate aim of unconscionability as guidance, while the analysis is mostly supported by finding *detriment* (given that the mental element of reliance is not a usual subject of inquiry in equitable estoppel[187]). He states that unconscionability does not obviously bring transparency to the detriment inquiry,[188] a lack of transparency being a danger with unconscionability in his view.[189] The 'stabilizer' justification still acknowledges that unfairness is at the heart of the doctrine. Further, he says of the notion that unconscionability is not required in estoppel by representation but is (in both senses) for acquiescence that the elements of the former are more established while the latter is equitable and based on an unconscionable assertion of right.

Neither the definitions of unconscionability seen in this category nor the way in which they are applied to the cases exclude the idea that unconscionability fulfills an

[183] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.60.
[184] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.63.
[185] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 86.
[186] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.47.
[187] See further Chapter 5. Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) divides her reliance analysis into a section focusing on the mental element and a section focusing on the action element. Her section on 'detrimental reliance' follows and is twice as long as the reliance per se section.
[188] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.48.
[189] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.18.

epieikeia function and will continue to do so. Thus, while McFarlane notes that 'stabilizers are usually outgrown,' he also implicitly says that the use of the broad unconscionability standard as a stabilizer ensures that the 'judge considers the broader purpose, and not just the specific formulation, of a detailed rule'[190] and that the concept can provide an 'initial means' of looking at issues arising from a change of circumstances.[191] To sum up McFarlane and Cooke's views at this point at least with regard to the definition of unconscionability, they are that it does not have a definition in this context beyond 'what it is that equitable estoppel does.' This can be added to by focusing on the idea propounded in this thesis that equitable estoppel redresses an unfair inducement, on the basis of which a claimant detrimentally relied, and which should normally lead to a remedy reversing the detriment. Dixon had cautioned in 2000 that the 'precise meaning of unconscionability' is crucial, since '[i]f unconscionability resides only in the fact of a denial of an assurance that has been relied on to detriment, the law requiring formality for dispositions of proprietary rights can be overthrown with ease.'[192]

The relationship of their analysis to the cases deserves some comment. McFarlane's assertion that unconscionability in the broad sense of a general, overarching question explains the result in, for example, *Cobbe*, is an antidote to the House of Lords' contradictory and slightly melodramatic tone on unconscionability,[193] while he also defends the view that 'the need to make use of this broader sense of unconscionability will disappear; stabilizers are usually outgrown.'[194] Again, in an English High Court case following swiftly on the heels of *Cobbe*, the problem '[u]nconscionability aside' lay in the lack of an adequate representation: '[t]he Claimant accepts that there was no concluded agreement, and therefore how can the Defendant be precluded from asserting just that? Indeed, how could it be unconscionable for her to say so?'[195] An application of conscience as the concept has come to develop in modern equity and, particularly, in equitable estoppel, should not be ruled out at this stage merely because one's view of what conscience means in the case law is too broad. McFarlane says of *Walton v Walton* and

[190] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.63.
[191] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.110.
[192] Martin Dixon, 'Estoppel, unconscionability and formalities in land law' [2000] Conv 453, 455.
[193] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 5.58-5.60 makes this point – that the required promise was lacking in *Cobbe* – when discussing why the broad and not the narrow version of unconscionability applies to promise-based proprietary estoppel.
[194] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.64.
[195] *A v B* [2008] EWHC 2687 (Ch) [198].

Milton Gate that unconscionability in those cases (characterised by him as belonging to the 'promise' category of proprietary estoppel) could emphasise the backwards-looking nature of estoppel,[196] so the 'broad concept of unconscionability'[197] can be helpful in this regard. Equally, he says, using the concept might at the same time obscure the 'ongoing mutuality' aspect of estoppel by convention, which was at issue in one of those cases: *Milton Gate*.[198]

The advantage of the more nuanced views of unconscionability exhibited here, which accept the possibility of multiple definitions thereof, is that they arrive closer to a sense that equitable estoppel is a doctrine with a real aim. As with so much in this area of the law, the question is begged as unconscionability is useful for equitable estoppel when equitable estoppel is seen as a doctrine with a basis in unconscionability. As long as a sufficiently certain view of unconscionability is adopted, the concept can be useful when cautiously used, or perhaps merely kept in mind.

4.2.2.2 (c) Those who take a positive approach to the concept

The concept of unconscionability has often been recognised as deserving of inclusion in estoppel analysis: '[t]o this extent, then, it is correct to assert that the notion of unconscionability does lie at the heart of the doctrine of proprietary estoppel and that it is the central ingredient in the cause of action.'[199] These views, as will be seen, generally give unconscionability a very specific meaning. This section will discuss the approaches of Dixon, Delany and Ryan, Gardner, and Mason.

At the outset, there are invocations of the concept's history and a confidence in the ability of the courts to develop it in a careful manner that will not be easily thrown into question later. This is exemplified by Sir Anthony Mason's statement that

> …the ecclesiastical natural law foundations of equity, its concern with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the ground of relief, stand in market contrast to the more rigid formulae applied by the common law and equip it

[196] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 5.89-90.
[197] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.83.
[198] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.96.
[199] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 407.

better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century.[200]

This amounts to an acceptance that unconscionability in equitable estoppel is incompatible with the existence of rigid rules, and a sense that this is nonetheless permissible.

Delany and Ryan have referred to 'the tension that can exist between seeking to confine the principle of unconscionability to a sufficiently controlled remit, on the one hand, and accepting, on the other, that neat and elegant compartmentalisation will inevitably elude the principle.'[201] Likewise, Lord Neuberger has said that the 'straightjacket' of requiring the 'crystal certainty' of the 'precise nature' of the property interest to be determined is 'inimical' to proprietary estoppel.[202] However, at the same time it is clear from some of the writing that balance can be achieved by employing a 'relatively clear meaning of unconscionability'[203] with 'sufficient inbuilt safeguards to defend against the criticisms of uncertainty and excessive discretion with which it has traditionally been fashionable to decry the principle.'[204] It was emphasised in *Jennings v Rice* that '[t]he court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case.'[205] Delany and Ryan proposed that a contextual analysis would be key, highlighting that the commercially-minded approach in *Tan* whereby 'the sheer breadth of the principle could not be reconciled with the exigencies of commercial life' was doctrinally preferable to the view in *Powell* that 'concerns about realistic commercial standards or marketplace viability or effectiveness should not affect equitable intervention.'[206] They view this as bolstering the concept as it would allow for a diversity of unconscionability-based solutions to 'entirely diverse and unrelated problems in equity.'[207] Meanwhile, Dixon has proposed in relation to proprietary estoppel that the unconscionability element must lie in the 'double

[200] Anthony Mason, 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 LQR 238, 239.
[201] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 420.
[202] Lord Neuberger, 'Thoughts on the law of equitable estoppel' (2010) 84 ALJ 225, 231.
[203] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408, 416.
[204] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 423, speaking of the point which has been achieved specifically in relation to remedial constructive trusts.
[205] *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8, [43].
[206] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 426.
[207] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 427.

assurance' idea: this requires that an assurance 'amounts both to an assurance of a "certain enough"[208] right in relation to land *and* [that it] carries with it a further assurance that the right will be granted despite the absence of the formality that is normally required to create, transfer or enforce that right.'[209] The interesting point about these conclusions is that they rest on foot of the acceptance that unconscionability applies in a wide variety of contexts and will accordingly have to be used in different ways: Dixon identifies four contexts within equitable estoppel (relating to land) – cases of failed contract, inheritance cases, subject-to-contract cases and cases 'where the need for formality is notorious'[210] – while Delany and Ryan refer to five different uses of unconscionability across equity – as a constituent ingredient of the cause of action in equitable estoppel,[211] as a means of determining the extent of the remedy, again in equitable estoppel,[212] as a means of fashioning new remedies in equity generally,[213] as a general standard of conduct[214] and as a vehicle for arriving at a desired result.[215] This shares with Mason's 1994 overview a sense of the contribution made by ideas of fairness and justice to a range of doctrines within equity. Thus, what is true of other areas of equity must be true for estoppel.

Following on from that point, it seems by now clear that, if unconscionability permeates one estoppel (excluding res judicata and similar evidentiary estoppels), it permeates them all. In Mason's view, the unconscionability concept provides a way of reconciling common-law and equitable estoppels, the unification being justified also on the broader basis that '[t]he notion of unconscionability underlies some common law doctrines as well as equity' and '[e]quity and common law now import from each other, just as they can and do import from other systems of law and learning.'[216] There should be caution on the latter point, however, since '[u]nderstanding equity through a common law mind-set will undoubtedly lead to confusion and vice versa as well.'[217] While Cooke chose only to

[208] Here, Dixon cites *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.
[209] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408, 417.
[210] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408, 417-419.
[211] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 402-407.
[212] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 407-414.
[213] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 415-424.
[214] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 425-430.
[215] Hilary Delany and Desmond Ryan, 'Unconscionability: a unifying theme in equity' [2008] Conv 401, 430-434.
[216] Anthony Mason, 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 LQR 238, 239.
[217] Richard Hedlund, 'Equity's Conscience' (2015) Oxford Journal of Law and Religion 119, 122.

briefly sketch the 'formal' estoppels in her monograph,[218] she did provide the historical background of estoppel by representation by way, among other things, of showing how estoppel was prevented in *Jorden v Money* and *Low v Bouverie* from becoming 'the principle for enforcing relied-on statements or promises' alongside contract.[219] She also acknowledged that estoppel by convention has become an equitable doctrine ('[i]n more recent years estoppel by convention seems to have moved house, from the common law tradition to equitable estoppel'[220]). Most pertinently, she saw that 'the courts are no longer prepared to give effect to the distinction'[221] between statements of fact and statements of intention for the purposes of estoppel.[222]

The categorisation of contexts and doctrines relevant to unconscionability as well as the engagement with the idea that it can be helpful notwithstanding its incompatibility with rigid rules augurs better for the future of equitable estoppel than does a blanket view that flexibility should be avoided altogether, 'associated with the belief, in [Mason's] view erroneous, that rigid rules promote clarity and certainty in the law.'[223] The 'stabilizer' idea is taken one step further in the sense that unconscionability is here seen as a legitimate operative factor in equitable estoppel.

4.2.2.2 (d) Conclusions to the analysis of the academic approaches

The most pertinent question at this point is which of the approaches studied is the preferable one, or if there is indeed a most credible approach. While all these views are credible, it seems logical to prefer those which expand on the meanings of unconscionability as far as possible. McFarlane's analysis has this advantage while at the same time emphasising the difficulties related to the practical use of the concept. It is therefore one of the most likely approaches a court might take.

It may be questioned what value the concept of unconscionability has for the last stage of an estoppel claim: Balen and Knowles note that 'unconscionability per se tells us nothing about the nature of the relief that should be afforded to the claimant' and they

[218] Elizabeth Cooke, *The Modern Law of Estoppel* (2000 Oxford University Press) chapter 2.
[219] Elizabeth Cooke, *The Modern Law of Estoppel* (2000 Oxford University Press) 25.
[220] Elizabeth Cooke, *The Modern Law of Estoppel* (2000 Oxford University Press) 31.
[221] Elizabeth Cooke, *The Modern Law of Estoppel* (2000 Oxford University Press) 59.
[222] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 58-59.
[223] Sir Anthony Mason, 'The place of equity and equitable remedies in the contemporary common law world' (1994) 110 LQR 238, 256.

favourably contrast unjust enrichment which 'axiomatically reverses the defendant's enrichment.'[224] The courts have clearly interpreted the unconscionability concept as permitting discretion at this stage of the inquiry.[225] This is perhaps the natural consequence of an unconscionability concept, and so the concept may be criticised as allowing for excessive discretion to creep in. Yet McFarlane notes that 'this discretion is not peculiar to proprietary estoppel'[226] giving the example of a case[227] in which he says that the practical difficulties of giving effect to the equity would have been the same in contract as in proprietary estoppel. Gardner notes that while proportionality cannot be the aim of a court's discretionary jurisdiction in implementing a remedy in proprietary estoppel, unconscionability is in fact the aim and expectation and reliance (the end points of the proportionality spectrum) 'are relevant because they are the essential ingredients of the unconscionability.'[228] In his view, '[t]he aim of the jurisdiction is to redress the resulting state of affairs' from the defendant's responsibility for the claimant's reliance.[229] So what does this mean for the actual effect of invoking unconscionability in a court? According to Gardner, 'the recipe by which a claim arises' in estoppel 'is the unconscionability of the state of affairs that has arisen between the parties.'[230] It seems therefore that there is general agreement that unconscionability is in essence the same thing as the inquiry into the reasons for the detriment and whether these along with the detriment warrant redress. Specifically in relation to the remedy, again Gardner accepts that uncertainty is a necessary result of the jurisdiction: '[t]he whole point may be that the defendant has lulled the claimant into an assumption that all will be well, without need for clear particularisation' and so it should be 'no surprise, therefore, that the law tolerates inexactitude over those matters.'[231]

4.3 Chapter conclusions

This chapter has sought to show what unconscionability adds to any analysis of whether equitable estoppel applies to a particular case. Conscience has been present in

[224] Mischa Balen and Christopher Knowles, 'Failure to estop: rationalising proprietary estoppel using failure of basis' [2011] Conv 176, 182.
[225] See further Chapter 6.
[226] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 9.06.
[227] *Griffiths v Williams* [1978] 2 EGLR 121 (CA) 122.
[228] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 499.
[229] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 500.
[230] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 502.
[231] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 508.

civil adjudication for centuries, and of its various possible meanings it is at least very likely that equitable estoppel chooses that of an objective value judgment on wrongful behaviour. There is certainly enough writing and historical material to draw upon when adjudicating a difficult point in an estoppel claim. The unconscionability inquiry is not invalidated merely because the meaning of conscience is, at first glance, imprecise. One problem is that there is simply an insufficient number of cases. Those influential cases discussed at the beginning of this chapter provide insufficient guidance: the cases following them have not put them in doubt, but they also have not added a great deal or clarified what it is that the concept brings to the table. The reactions of their Lordships in the three 2009 cases showed a tacit acceptance that equitable estoppel exists and that the concept of unconscionability is present in it, yet the cases of *Thorner* and *Cobbe* in particular have led to more questioning and doubts than is warranted. Arguably this, and not unconscionability itself, is what is creating the most uncertainty in this area.

Smith has written that

> …law is the starting point and the default mode, and equity is a "safety valve." Equity applies in a smaller domain with an eye to deterring opportunism, but where it applies it is vague and ex post. Most of all, equity is a second order type of law – law about law.[232]

It has been seen that academia has provided many welcome studies of the operation of the idea of conscience in both estoppel and equity generally. It remains clear that there is much discussion of unconscionability, but it has also been seen that the discussion is illuminating and helpful. The less-than-perfectly defined character of unconscionability is also its natural consequence. In fact, discretionary intervention is in itself positive and an existing, indeed necessary feature of developed legal systems and should not be discarded as a normative justification. We have also seen that McFarlane and Sales note the 'broader concept of injustice or unconscionability' which 'has a residual role in *limiting*' liability in equitable estoppel.[233] It is argued that both of these ideas can be used together in understanding equitable estoppel's role in the law.

[232] Henry Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 59 <http://ssrn.com/abstract=2617413>accessed 20 March 2017.
[233] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632 (emphasis in original). They apply this view also to unjust enrichment.

We can move on to determine a number of meanings of the concept in equitable estoppel. While unconscionability is often treated as a separate element to the traditional three-part test (which, confusingly, is also said to be tied to the other three elements), it seems that its more specific meaning in estoppel includes, first, the jurisdiction in the sense of a basis for the existence of equitable estoppel in the first place; secondly, the context in which the reliance takes place; thirdly, the justifiability of the reliance; fourthly, whether it is unconscionable to move to an inconsistent position; fifthly, whether the court ought to grant a remedy; and, finally, what parameters aid the court in shaping the remedy. It is submitted that a unified doctrine needs unconscionability, and a relatively strong interpretation of it, to justify its existence, but that in order to balance this and in keeping with the generally limited effect of equity, unconscionability ought to be negative in its operation, and limiting in its effect. In Chapter 7, these factors will be fully deployed in a new model, and we will see in the next two chapters how the basis for the model can be seen to arise in various equitable estoppel cases.

We will see further in section 5.3.2.2 that, while detriment describes a quality pertaining to the claimant, caused by the defendant, and necessary to give rise to a liability, unconscionability on the other hand is properly a question for the court in deciding whether, taking into account the circumstances at the point of trial, a remedy ought to be granted. Collins has said that an element of the inquiry is whether it is unconscionable to allow someone to go back on his undertaking,[234] which corresponds with meaning four. Ostensibly one is to be prohibited from going back on his position, but the problem arises in the first place because he is going, or has gone back, or threatens to go back in a way that jolts insecurity in the claimant. In any event, rights are constrained at this point as McFarlane and Robertson have pointed out.[235] If the defendant decides to comply, he can be seen as fulfilling an obligation, thus there is no liability or unconscionability inquiry. If he does not comply, the claimant can decide to seek a determination of rights and a possible remedy.

We can now isolate the fifth meaning of unconscionability, properly distinguished from detriment, as the inquiry whether it would be unconscionable not to give effect to the

[234] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 83.
[235] Ben McFarlane, 'Blue Haven Enterprises Ltd v Tully & Another' (2006) 1 Journal of Equity 156, 159 cited in Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 205.

liability. However, as Balen and Knowles have noted, if 'a judge can ascribe a wide variety of meanings to the term' this 'will encourage parties to try their luck in court' so that '[t]he best that lawyers can do is to provide examples where certain matters have been considered relevant to the unconscionability enquiry, an approach which does not necessarily provide much guidance for the next estoppel case.'[236] It is important therefore to narrow down as far as possible the ability of the court to consider matters pertaining to unconscionability in a dispute. It is submitted that such consideration ought to be restricted to the fifth and sixth senses of unconscionability.

We have seen in *Cobbe* that Lord Walker framed the concept somewhat positively, 'in unifying and confirming, as it were, the other elements,' and negatively in the sense that '[i]f the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again.' [237] It is submitted that the choice of a positive or negative phrase – whether it would be unconscionable not to give effect to the liability, or whether it would not be unconscionable to declare the liability extinguished – does not provide much guidance as to which will lead to more predictable results. The former phrasing seems to demand more scrutiny of the claimant's position which, in view of the disproof element which will be proposed, seems fairer. Further, it seems less likely to lead the court astray into excessive sympathy or overcompensation.

Part (C)(i) of the sequence can now be given meaning: it addresses the question whether a court finds it would be unconscionable for the defendant to resile. However, it is suggested that this question whether it is unconscionable to allow a defendant to go back on the position is in reality a proxy for the true question of whether a court is satisfied that the conditions for a liability have been met. This, in turn, enables the court to grant, or refuse, a remedy, and, in a further step, whether to vary it. The next chapter will seek to narrow down the important ideas in (A) and (B), which relate to the liability-finding inquiry.

[236] Mischa Balen and Christopher Knowles, 'Failure to estop: rationalising proprietary estoppel using failure of basis' [2011] Conv 176, 182.
[237] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55 [92].

Chapter 5: The finding of liability

5.1 Introduction

Charny says that the difficulties of proving reliance can be resolved with 'accepted common law methods and constructing broad presumptions to cover recurrent cases.'[1] In this chapter, it will be seen that the various liability formulas, found throughout decisions on the equitable estoppels, are different ways of stating one threshold. The courts ask whether a detrimental act was justifiable by reference to what is an obviously inducement-causing statement or conduct. There may also be an objective element of the ability of such statement or conduct to induce, thereby making the induced act reasonable, a proposition which will be analysed in this chapter. In reality, it is submitted, the relevant question is whether the detriment warrants some compensation.

A unified doctrine will accordingly fall without an emphasis upon detriment. Meanwhile, some other thresholds for liability will be argued to be unhelpful. In fact, there are simply too many of them. Another obscure element is the proof of mental reliance, and whether the claimant's reliance or the defendant's intention to induce such reliance ought to be emphasised. A proposal for a unified doctrine provides the ideal opportunity to simplify and refine the liability thresholds in the case law.

One feature which characterises equitable estoppel is that the focus is increasingly on the overall impression a court has of the relationship between the parties involved, something which is sometimes referred to as unconscionability. Chapter 4, however, argued for a more limited view of unconscionability to be applied in determining the remedy. However, an 'in the round'[2] approach acknowledging the interconnectedness of the elements is reflected in this chapter: following a discussion of the overarching thresholds of inducement and reasonable reliance, and narrower thresholds of intention and knowledge, the following section will explore the inter-relationship of the three traditional elements of representation, reliance and detriment in three parts, focusing in each part on the interaction of two of those elements.

[1] David Charny, 'Nonlegal sanctions in commercial relationships' (1990) 104 Harvard Law Review 373, 450.
[2] *Gillett v Holt* [2001] Ch 210 (CA) 225.

5.1.1 Preliminary ideas: Distinguishing the basis for liability from the basis for the remedy

A preliminary distinction can be made between the basis of the *liability* and the basis of the *relief* that the courts will grant.[3] Estoppel has, potentially, between three[4] and six[5] liability bases. Meanwhile, the available relief bases in estoppel have been linked by academics[6] to those famously expounded by Fuller and Purdue in 1937: the expectation, reliance and restitution measures of relief in contract.[7] At the remedial stage of an estoppel case, there is a choice between fulfilling the expectation basis, which involves the granting of relief in the measure of what the plaintiff expected to gain from the concluded relationship, and granting something that is less than the expectation. The second option is somewhat at large between the reliance measure, involving putting the plaintiff in the position he would have been in had the loss not occurred, but nothing more advantageous than that, and the expectation measure. The last of the bases, restitution, is used to reverse a gain made by the defendant.[8] The choice between expectation on the one hand, and something less than that on the other, is made using the principle of proportionality, which dictates that, while the expectation measure of relief is the starting-point, a court must effect an alternative (and lesser) remedy where the expectation measure is disproportionate to the plaintiff's detriment. The debate about the kind of detriment that should be analysed is focused on finding the best of two

[3] This distinction is made in NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract, Eighth Australian Edition* (LexisNexis Butterworths Australia 2002) para 2.15.

[4] Stephen A Smith, *Contract Theory* (Oxford University Press 2004) 234-235: these are, first, 'to protect detrimental reliance' and, '[m]ore specifically, its purpose is to protect persons who reasonably and detrimentally rely on the representations of others, promissory or otherwise'; secondly, to enforce promises while avoiding the limitations of consideration; thirdly, to enforce relied-upon promises, which is distinct from the second basis since reliance is also required and is a substitute for consideration.

[5] Ewan McKendrick, *Contract Law: Text, Cases, and Materials* (6th edn, Oxford University Press 2014) 239-243: these are an alternative to consideration in contract, a cause of action to enforce promises outside contract, a wrong based on unconscionability but not a tort, a way of reversing unjust enrichments, a cause of action in equity with a flexible remedy and Spence's duty to ensure the reliability of induced assumptions.

[6] Hilary Biehler, *Equity and the Law of Trusts in Ireland* (6th edn Round Hall 2016); Cheshire and Fifoot, *Law of Contract, Eighth Australian Edition* (NC Seddon and MP Ellinghaus eds, LexisNexis Butterworths Australia 2002) para 2.9 (mentioning only the expectation and reliance interests); NC Seddon and MP Ellinghaus, GE Dal Pont & DRC Chalmers, *Equity and Trusts in Australia* (4th edn Lawbook Co Sydney 2007).

[7] LL Fuller and William R Perdue, 'The Reliance Interest in Contract Damages' (1936) 46 Yale Law Journal 52.

[8] Although the restitution measure is not typically associated with the available remedies in estoppel, the analysis in Chapter 4 of estoppel's liability basis will incorporate the point referred to above that the liability basis in estoppel may be the reversal of unjustified enrichments (a different thing from the doctrine of unjust enrichment).

alternatives, one narrow and one broad.[9] It is most relevant to the question of which is the preferable basis for relief. Both kinds of basis may appear to be connected: so, in theory, stating that liability in estoppel is based on reliance should lead to the conclusion that the correct measure of relief is on the reliance basis, although this has not been the case.[10] The bases may also be mismatched: thus, the equitable basis of liability is not necessarily connected with any of the three measures, implying that liability and remedial bases generally need not have an immediately apparent connection. This, in fact, is precluded by the operation of the principle of proportionality, a principle which is explored in the next chapter.

5.2 New conceptions of equitable estoppel

5.2.1 Inducement

The importance of inducement in equitable estoppel is increasingly being emphasised. Robertson indicates that what gives rise to an estoppel is not merely a representation but an *induced* assumption.[11] Spence recasts equitable estoppel as a duty to ensure the reliability of *induced* assumptions[12] and his model would require that the induced party prove the inducement of the relevant assumption.[13] Inducement has been alluded to as a requirement in various Irish[14] and Australian cases.[15] Spencer Bower has a chapter dedicated to reliance in estoppel which principally discusses inducement and its constituent features.[16]

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[9] Mark Lunney, 'Towards a unified estoppel – the long and winding road' [1992] Conv 239, 242-43; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 [43].

[10] Cheshire and Fifoot, *Law of Contract, Eighth Australian Edition* (NC Seddon and MP Ellinghaus eds, LexisNexis Butterworths Australia 2002) para 2.9.

[11] Andrew Robertson, 'Reasonable reliance in estoppel by conduct' (2000) 23(2) University of New South Wales Law Journal 87.

[12] See generally Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999).

[13] Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999) 50-54.

[14] *CF v JDF* [2005] 4 IR 154 (SC); *Prunty v Crowley* [2016] IEHC 293.

[15] For example, by the New South Wales Supreme Court in *E K Nominees Pty Ltd v Woolworths Ltd* [2006] NSWSC 1172 or Mason CJ and Wilson J of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7, (1988) 164 CLR 387 [38], though they referred to 'encouragement or inducement.'

[16] George Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham, Daniel Hochberg and Tom Leech eds, 4th edn, Bloomsbury Professional 2004) Chapter V. The chapter is entitled 'Inducement and reliance: the effect of estoppel by representation of fact.'

Spence states that '[a]n inducement of an assumption consists in either the creation or the encouragement of that assumption in the mind of the other party.'[17] The editors of Spencer Bower define inducement in estoppel as consisting of two elements: first, the actual effect of the representation on the representee, and, secondly, the intention, actual or imputed, of the representor to bring about this result.[18] They state that demonstrating the presence of the latter in turn requires proof that it was reasonable for the representee to infer that the representor intended him to act on the representation.[19] This proof that such an inference was reasonable is not unlike the idea of reasonable reliance: it may even be an element of reasonable reliance. Butler has described the three different stages of reliance at which reasonableness may be found.[20] The first is the belief, which is to be 'judged by the standard of a reasonable person in his or her position,' the second is the decision to rely, which 'will be assessed objectively, and will depend on the circumstances of the case as well as the nature of the belief or expectation,' and the third is reasonableness 'in an ongoing sense' including the taking of reasonable steps to mitigate one's position after becoming aware that the other party intends to depart from the representation. Thus, the belief in the seriousness of the communication must be reasonable, the decision to act must be reasonable, and the failure to mitigate must also be reasonable. It may thus be said that the permeation of reasonableness should dominate the traditional three-step inquiry. Robertson has argued that the reasonableness or otherwise of the representee's belief 'has, in modern times, become the primary basis for limiting the application of the doctrine,' superseding the alternative basis of the representor's intention in making the representation,[21] albeit confining his remarks to common-law estoppel as it has evolved in England.

[17] Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999) 50.
[18] George Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham, Daniel Hochberg and Tom Leech eds, 4th edn, Bloomsbury Professional 2004) para V.2.3.
[19] George Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham, Daniel Hochberg and Tom Leech eds, 4th edn, Bloomsbury Professional 2004) paras V.3.3, V.3.4.
[20] James Every-Palmer, 'Equitable Estoppel' in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd edn, Thomson Reuters 2009) para 19.2.2.
[21] Andrew Robertson, 'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24(1) Monash University Law Review 115, 120.

5.2.2 Reasonable reliance: appearance and increased importance

As Bant and Bryan put it, 'the chief concern here is to prevent the harm that would be caused by allowing the defendant to act inconsistently with the assumption created by his conduct.'[22] Since 'contract is the primary vehicle for moderating risk in commercial transactions,' '[t]here will have to be exceptional circumstances in play before a commercial player's decision to act on the basis of a non-contractual promise can be regarded as reasonable and hence not unduly risky.'[23] In other words, the authors view reasonable reliance as the in-built defence which will prevent estoppel from encroaching on territory that is properly contractual and by which parties are given the juridical tools to determine (or choose not to determine) their levels of risk. Bant and Bryan's development of the idea of reasonable reliance builds on the work of Michael Spence, who 'clearly agrees that one person's reliance *per se* gives rise to no liability upon anyone,'[24] and of Andrew Robertson, for whom reasonable reliance 'has, in modern times, become the primary basis for limiting the application of' estoppel.[25] He has put forward two possible definitions of reasonable reliance: the 'reasonableness of reliance,' which prevails in Australia and 'exemplifies the greater focus on reliance' there, and the 'reasonable expectation of reliance' idea preferred in the United States.[26] He sees the latter as being more compatible with an aim of preventing unconscionable conduct, rather than one of preventing detriment, since it is a reasonableness focused on the actions of the representor[27] (he suggests that common-law estoppel has a comparable aim of preventing unjust conduct[28]).

Swan argues that the greater importance of reasonableness in the cases is due to the greater objectivity of reasonableness compared with intention, which mirrors the

[22] Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) Oxford Journal of Legal Studies 427, 449-450.
[23] Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) Oxford Journal of Legal Studies 427, 445.
[24] J E Penner, 'Michael Spence: Protecting reliance: the emergent doctrine of equitable estoppel' [2000] Conv 360, 363.
[25] Andrew Robertson, 'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24(1) Monash University Law Review 115, 120.
[26] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne University Law Review 805, 836.
[27] Andrew Robertson, 'Towards a Unifying Purpose for Estoppel' (1996) 22 Monash University Law Review 1, 18.
[28] Andrew Robertson, 'Towards a Unifying Purpose for Estoppel' (1996) 22 Monash University Law Review 1, 12.

objectivity required in contract law.[29] In the English cases of *Troop v Gibson*,[30] *Vanden*,[31] and *Mackprang*,[32] it was held that the representor need not know of the representation he is making, as long as a reasonable man would be led to believe it and the other party does in fact believe it. In *Moorgate*,[33] the reasonable man standard was also upheld. In addition, reasonableness is not a universally-accepted measure. While Neuberger J in *Iceland Foods*[34] held that the representee must have been induced or reasonably induced, or that the other party's conduct must have been unconscionable in some other way, Richards J in *Downderry*[35] said there was no authority for the proposition that reliance must be reasonable and, further, that a lack of reasonableness would not defeat estoppel if the representor knew or intended that it would be relied on. A reconciliation of these two views is offered by Robertson. He cites a statement in Spencer Bower, that 'the representor cannot offer as a defence the contention that the representee should not have believed his representation, or was negligent in doing so,' before offering a 'more accurate' version, which is that 'where an express representation is made with the intention that it be acted upon, then the representor cannot avoid the estoppel on the basis that the representee should not reasonably have believed the representation.'[36]

The protection of reasonable reliance has been argued to be of the essence of promissory estoppel.[37] In *High Trees*[38] and the cases that led to it,[39] as well as in *Collier*,[40] the representations essentially renovated an existing legal relationship between the

[29] John Swan, *Canadian Contract Law* (LexisNexis Canada 2006) 90-91.
[30] *Troop v Gibson* [1986] 1 EGLR 1 (CA).
[31] *Bremer Handelsgessellschaft v Vanden* [1978] 2 Lloyd's Rep 109 (HL).
[32] *Bremer Handelsgessellschaft v Mackprang* [1979] 1 Lloyd's Rep 221 (CA). Stephenson J's dissent was on the basis that one must have the means of knowing what one is representing in order to make the reliance reasonable.
[33] *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 (HL) 919, citing Parke B in *Freeman v Cooke* (1848) 18 LJ Ex 114, 119.
[34] *Iceland Foods Plc v Dangoor* [2002] EWHC 107 (Ch) [53].
[35] *Downderry Construction Ltd v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 2 [31].
[36] Andrew Robertson, 'Reasonable reliance in estoppel by conduct' (2000) 23(2) University of New South Wales Law Journal 87.
[37] R Bradgate, 'Formation of Contracts' in M Furmston (ed), *The Law of Contract* (LexisNexis Butterworths 2010) para 2.119(ii).
[38] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.
[39] *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 (HL); *Birmingham & District Land Company v London & North Western Railway Company* (1889) LR 40 Ch D 268; *Fenner v Blake* [1900] 1 QB 426 (QB); *Re William Porter* [1937] 2 All ER 361; *Marquess of Salisbury v Gilmore* [1942] 2 KB 38 (CA) and *Buttery v Pickard* (1946) 174 LT 144; cited by Denning J: *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134.
[40] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643.

parties in circumstances in which it was more financially beneficial for the promisee to accept than to reject the representation. It is more likely than not correct to say that the acceptance of the new commitment was inevitable. Such an inevitability can also be re-interpreted as inducement, but, again, it does not appear to be necessary (and, indeed, such cases apparently did not consider it necessary) to inquire into the reasonableness of the reliance. Inducement is thus shown by the promisor's intent to bind himself, and the circumstances which make reliance more likely and foreseeable. It can equally be said, however, that the reliance was reasonable. The circumstances in *High Trees* and *Collier* in which the parties found themselves make it reasonable to trust that one can remain in the wider arrangement subject to the modification.

Eric Mills Holmes has said of §90 promissory estoppel that it 'recognizes the promisee's *right to reasonably rely*, arising from the reasonable expectations created and foreseeable by the promisor.'[41] This is significant in that it frames reasonable reliance not as a threshold of promissory estoppel but rather as a positive right of the person to whom the promise is made. That person's reliance is not only justified, but it is recognised that that person had a right so to rely, the infringement of which should lead to certain consequences. There is then a duty on the part of the promisor 'to prevent a promisee's detrimental reliance.'[42] Inducement is equally a consideration in §90: an Iowa case recites that promissory estoppel 'arises when an innocent promisee relies, to his disadvantage, upon a promise intended or reasonably calculated *to induce action* by him.'[43] The reference in the statement to reasonableness refers to conduct 'reasonably calculated to induce' the reliance act.

We have seen so far that there are two possible views of reasonable reliance: one asks whether the belief, or alternatively the decision, has been established as a mental element, and the other asks whether a representation can reasonably be construed as tending towards inducement, and is therefore a standard of proof.

[41] Eric Mills Holmes, 'A Restatement of Promissory Estoppel' (1996) 32 Willamette Law Review 263, 516 (emphasis added).
[42] Eric Mills Holmes, 'A Restatement of Promissory Estoppel' (1996) 32 Willamette Law Review 263, 516.
[43] *Miller v Lawlor* 66 NW 2d 267, 274 (Iowa 1954) cited in Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89(1) St John's Law Review 55, 65.

Pratt has said that the standard of reasonable reliance for unconscionable conduct is circular.[44] He prefers the term 'justifiable'[45] reliance while maintaining that what it refers to remains question-begging.[46] He cites Robertson's statement to the effect that 'the only answer to the question: "when should reliance be protected?" is "when it is reasonable."'[47] Pratt takes a normative idea of reasonable reliance whereby reasonable reliance means that the representor must do Φ. He says that, supposing that the representee has incurred cost in his induced belief that Φ will be done by the representor, reasonable reliance merely requires that the representee must believe that (the representor believe that) the representor must do Φ, which in turn presupposes that the representee believes that (the representor believe that) the representor must do Φ.[48] An epistemic idea, he says, is not much better because one expects the promise to be fulfilled because one has been told the promise will be fulfilled, but the communication is not the reason for enforcing the promise.[49] It may, he says, be possible to redefine it without regress by saying that 'reasonable reliance is reliance on an expectation that performance ought to occur *if* reliance occurs.'[50] This, he says, does not explain whether a promise is required, but seems eventually to fall into the trap of requiring it, because 'the reasonableness of an act of reliance depends on the bindingness of the relied-upon representation.'[51] Reliance theorists such as Spence, in Pratt's view, describe several acceptable forms of conduct but do not fully outline the kinds of conduct on which reliance is not justifiable: in the normative-sense example above, there is no reason for believing that the representor ought to do Φ other than that the representee believes it, and no reason has been supplied.

Collins, meanwhile, has put forward an individual reasonable reliance element as part of his description of estoppel in English law.[52] Collins defines this as 'the perception

[44] Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181, 188.
[45] PS Atiyah, *Promises, Morals, and Law* (Clarendon Press 1981) 129, cited by Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181, 188 n 26.
[46] Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181, 188.
[47] Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181, 187.
[48] Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181, 188.
[49] Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181, 189.
[50] Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181, 190.
[51] Michael Pratt, 'Defeating Reasonable Reliance' (1999) 19 University of Tasmania Law Review 181, 190.
[52] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 75: These are deliberate encouragement of reliance through a promise or some other undertaking; proof of detrimental reliance; 'the perception that the detrimental reliance was reasonable in all the circumstances'; and whether it would be unfair or unconscionable to go back on the undertaking.

that the detrimental reliance was reasonable in all the circumstances,'[53] implicitly recognising that it is not a separate element to be proven by a claimant but rather a court's view of the situation. He cites the 'presumption' that reliance on a future commercial transaction, by which a business takes on substantial costs, is *un*reasonable unless it is rebutted, as in *Waltons Stores v Maher*.[54] It is therefore, in his view, a negative element: it 'clearly functions to rule out the enforceability of undertakings which were not intended to be binding and could not reasonably be expected to be binding.'[55]

Thus, if the refusal to acknowledge an integration of the estoppels persists, the acceptability of the model may have to depend on reformulating the inducement stage as requiring conduct amounting to a commitment from the claimant's point of view that was capable of inducing the particular belief.

5.2.3 The role played by intention and knowledge

The second sense of reasonable reliance is whether it would be reasonable to construe one as seeking to induce, which, it is submitted, is the same inquiry as intention. Finnis has described intention as including everything that is part of one's plan: a proposal (or an end), and a way of effecting it (or means, which could also be characterised as the *proximate ends* of the one who intends).[56] It has been said that estoppel requires an intention on the part of the representee to be taken seriously, or that the representation be acted upon. A similar rule has been expressed whereby a statement must have been calculated to influence someone, with the corollary inference that that person was *so* influenced. A separate meaning of intention is that which has been specified in a number of cases concerning promissory estoppel, which provides that a promisor must have intended to affect[57] legal relations between the parties. Arguably, this meaning encompasses both an intention to be taken seriously, which is the first

[53] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 75.
[54] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
[55] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 82.
[56] John Finnis, 'Intention in Tort Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1995) 229, 232.
[57] Or, in *High Trees*, 'create.'

meaning, and thus describes the quality of the promise (and, in turn, the reasonableness of relying upon it), and it also relates to the content of the intention: thus, legal relations must be involved, whether it is said that these must be created or affected. A final meaning of intention is used to describe the type of content that will generally not found an estoppel by representation: these estoppels are based on representations relating to facts, not intentions.

When it is said that intention is required in the first sense, what the representor must intend is that the representee act on foot of the representation. It appears not to be necessary, however, to intend one exact way of acting; rather, that it be material.[58] This, in order words, is what must be foreseeable by the representor as he makes the representation. The editors of Spencer Bower contend that, for the purposes of inducement, the elements of intention and the actual effect of the representation cannot exist without the other,[59] and argue that intention must be a requisite for proprietary estoppel in addition to its more recognised place in promissory estoppel.[60] Likewise, Brennan J in the Australian case of *Waltons Stores* affirmed, based on Lord Denning's judgment in *Crabb*, that knowledge or intention that the party adopting the assumption will act or abstain from acting in reliance on it is essential for the purposes of inducement.[61] In *High Trees*,[62] Denning J's summary of the factual situation in the applicable authorities was as follows: 'a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on.'[63] Likewise, in *Combe v Combe*,[64] he spoke of the need for 'a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly' and which did in fact lead to the other party acting on the promise.[65] One application of the same rule provided that the first step was an 'unequivocal acceptance of liability',

[58] George Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham, Daniel Hochberg and Tom Leech eds, 4th edn, Bloomsbury Professional 2004) para V.4.1.
[59] George Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham, Daniel Hochberg and Tom Leech eds, 4th edn, Bloomsbury Professional 2004) para V.2.3.
[60] George Spencer Bower, *The Law Relating to Estoppel by Representation* (Piers Feltham, Daniel Hochberg and Tom Leech eds, 4th edn, Bloomsbury Professional 2004) para V.3.2.
[61] *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7, (1988) 164 CLR 387, [24].
[62] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB).
[63] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB) 134.
[64] *Combe v Combe* [1951] 2 KB 215 (CA).
[65] *Combe v Combe* [1951] 2 KB 215 (CA) 220.

although that decision, *Robertson v Minister for Pensions*.[66] Later well-known decisions, however, omitted any need for the initial promise to be clear.[67]

A representation that is made because of the negligence or passivity of the representor is more difficult to characterize as having been intended than are deliberate representations. In *Greenwood v Martin's Bank*,[68] the defendant bank's negligence in allowing the plaintiff's wife to fraudulently draw funds on the plaintiff's account was a representation which was held to give rise to an estoppel, but the result of the bank's representation was hardly one which it desired or which, more narrowly speaking,[69] constituted its ultimate and proximate ends. It may therefore in some cases, contrary to the opinion of the editors of *Spencer Bower*, be difficult to say that intention is required for inducement.

A representation that seems irrational, and thus not seriously intended, is not likely to be one that is susceptible of reasonable, or justifiable, reliance. The need for emphasis may explain why the court may highlight both terms, as in the Irish proprietary estoppel case *Naylor v Maher*, in which O'Keeffe J said of the 'promises/representations' that they were 'intended to be deceased to be relied upon by the plaintiff and were in fact relied upon by the plaintiff,' then adding that such reliance was reasonable.[70] Several cases support this understanding, even if the formula used is not always consistent. The decisions in *Brikom Investments v Carr*[71] and *Greasley v Cooke*[72] speak of a promise that 'is calculated to influence' behaviour,[73] while the decisions of *Johnson v Gore Wood*[74] and *Doran v Thompson*[75] refer to promises likely to induce a sense or feeling of security.[76] These expressions of the rule fit the *Naylor v Maher* idea of presenting the threshold as *both* an intention to induce, and an inducement that is justifiable.

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[66] *Robertson v Minister for Pensions* [1949] 1 KB 227 (KB) 230.
[67] *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761 (HL); *D & C Builders Ltd v Rees* [1966] 2 QB 617 (CA).
[68] *Greenwood v Martin's Bank Ltd* [1933] AC 51 (HL).
[69] Desire is not synonymous with intention, as is clear from Finnis' definition above, John Finnis, 'Intention in Tort Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press 1995), 229, 232.
[70] *Naylor v Maher* [2012] IEHC 408.
[71] *Brikom Investments Ltd v Carr* [1979] QB 467 (CA).
[72] *Greasley v Cooke* [1980] 1 WLR 1306 (CA).
[73] *Brikom Investments Ltd v Carr* [1979] QB 467 (CA) 483; *Greasley v Cooke* [1980] 1 WLR 1306 (CA) 1311.
[74] *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL).
[75] *Doran v Thompson Ltd* [1978] 1 IR 223 (SC).
[76] *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) 41; *Doran v Thompson Ltd* [1978] 1 IR 223 (SC) 225.

It seems, however, superfluous to require both of these thresholds. In *Snell*, both are offered as alternatives.[77] Further, the calculation or intention idea is arguably not required in cases such as *Gillett v Holt*[78] and *Ottey v Grundy*,[79] even though they can be characterised as cases involving a promissory obligation. In those cases, the parties claiming the benefit of the estoppel had been, with respect to their opposing parties, in a more vulnerable position, and were thus more likely to accept the burden of the detriment in return for the material advantages offered. It is perhaps artificial to speak of the representor having or failing to have a particular intention when the target of the estoppel is inconsistent[80] behaviour that is less than fraudulent. It seems that this is likely in most cases to be readily proven where the promise is clear and unequivocal,[81] so the calculation aspect need not itself be an independent requirement.

However, the most significant difficulty when dealing with an intention to induce some reliance is that it is difficult to prove exactly *what* was calculated or intended. The end result of the detrimental reliance act, when accompanied by a representation that crosses the threshold, is deemed to have been intended or calculated (or justifiable, or linked to a commitment, or 'clear enough'[82]). It is clear from the English Court of Appeal's decision in *Kosmar Villas*[83] that if the finer details are yet to be expressed following an initial assurance, the reliance is not proven and so certainly not reasonable, nor is there any intention to induce reliance. In *Bhimji v Salih*,[84] likewise, it was emphasised that 'it must be open to the promisor to withdraw the promise before it was acted upon' and that a promisor 'is under no obligation to maintain the promise before it has influenced the conduct of the party to whom it has been made; just as the promise may be withdrawn, so it may be qualified by contemporaneous, or near contemporaneous,

[77] In Snell, *Equity* (John McGee ed, 33rd edn, Thomson Reuters 2015) para 12-018, intention to induce reliance and reasonable reliance are offered as alternatives within a 'General Formulation' of promissory estoppel that is 'judicially approved': 'that promise or assurance is intended to affect the legal relations between them (whether contractual or otherwise) or was reasonably understood by B to have that effect.' A further dimension of intention is then added in the same paragraph: 'B must also show that the promise was intended to be binding in the sense that (judged on an objective basis) it was intended to affect the legal relationship between the parties and A either knew or could have reasonably foreseen that B would act on it.'

[78] *Gillett v Holt* [2001] Ch 210 (CA).

[79] *Ottey v Grundy (Andreae's Executor)* [2002] EWHC 2858 (Ch) affd [2003] EWCA Civ 1176.

[80] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 32.

[81] MP Thompson, 'The flexibility of estoppel' [2003] Conv 225, 228 also makes this point.

[82] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.

[83] *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] 2 All ER (Comm) 14 [84].

[84] *Bhimji v Salih* (CA, 1 January 1982).

statements which deprive the original promise of the character of an unequivocal representation.' There, a promise contained in a notice was followed by a letter which was said to create 'such an ambiguity' that one 'ought fairly to have been treated as put upon enquiry as to the real nature of the notice.' That ambiguity appears to have led the Court to state that '[n]othing material can possibly have been done by Mr Salih to his relevant detriment' at the relevant time. In *Doran v Thompson*, Henchy J affirmed that the words or conduct constituting the promise must have been such 'from which it was reasonable to infer, and from which it was in fact inferred, that liability would be admitted.'[85] Thus, if the promise is of a nature that makes reliance unreasonable, it follows that inducement will not be readily inferred. The test focuses on the 'likely effect of the words in question'[86] and is thus objective.

The making of something which can reasonably be construed to be a promise should in itself be proof of intention. An intention to induce a belief (with its consequent act) does not automatically lead to such inducement; and, thirdly, it might still be possible that the representee did not interpret the representation in the way that was intended, thus the effect of the representation will need to be examined in any event. It may be that, in respect of any kind of estoppel, *inducement* is a more useful line of inquiry than intention. In *Gillett v Holt*,[87] *Ottey v Grundy*[88] and *Thorner v Major*,[89] the intention of the representors to have the work, company and other benefits of the representees, seems a less important factor in those cases, less conducive to the granting of some remedy, than the continuing vulnerable position of the representees and the fact that they were induced to remain in it.

We turn now to the second meaning of intention. The doctrine is sometimes said to include a condition that the parties have a pre-existing legal relationship, and it is in this sense that the requirement is sometimes stated to be 'to affect legal relations.' This was emphasised in the Irish Supreme Court in *Moroney v Revenue Commissioners*,[90] and the English Court of Appeal *James v Heim Galleries*.[91] The originating case of *Hughes*

[85] *Doran v Thompson Ltd* [1978] 1 IR 223 (SC) 225.
[86] *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1393 (Ch) [52].
[87] *Gillett v Holt* [2001] Ch 210 (CA).
[88] *Ottey v Grundy (Andreae's Executor)* [2002] EWHC 2858 (Ch), affd [2003] EWCA Civ 1176.
[89] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.
[90] *Revenue Commissioners v Moroney* [1972] IR 372 (SC) 387.
[91] *James v Heim Gallery* (1981) 41 P & CR 269 (CA) 275.

refers to the parties' 'contract', and *High Trees*, in spite of its reference to the intention to '*create* a legal relationship,'[92] certainly involved parties to an existing contract. In *Cobbe v Yeoman's Row Management Ltd*, in which Lord Scott characterised proprietary estoppel as 'a sub-species of a "promissory estoppel,"[93] the lack of any formal arrangement between the parties was said to preclude the operation of estoppel. On the other hand, Mance LJ in *Baird Textile Holdings v Marks & Spencer*[94] echoed *High Trees* in stating that the requirement was to intend to 'make, affect or confirm a legal relationship.'[95] Yet the need for a pre-existing legal relationship appears to be retained with varying strength in different jurisdictions.[96] A 'legal relationship' appears to have a wider meaning than a relationship contained within a contract, and certainly if equitable estoppel is understood as a single cause of action creating a substantive obligation, it would be artificial to deny that a legal relationship is in existence. However, the existence of a substantive obligation appears not to be the crux of the 'intention to create [or affect] a legal relationship' formula.

The requirement of knowledge is repeated in several cases concerning different kinds of equitable estoppel.[97] It is one of the stringent requirements in *Willmott v Barber*,[98] which involved a claim of 'waiver by acquiescence'[99] and in which Fry J laid down the so-called five probanda, beginning stridently with the proposition that '[a] man is not to be deprived of his legal rights unless he has acted in such a way as would make it

[92] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, 134.
[93] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [14]. See Etherton, 'Constructive trusts and proprietary estoppel: the search for clarity and principle' [2009] Conv 104, 120.
[94] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999 [92].
[95] It seems that the influence of this intention requirement upon the result in *Baird* was as a threshold factor for limiting the scope of estoppel, rather than for the purpose of defining the liability.
[96] See the discussion of the Irish position contrasted with the English position in Chapter 2. In England, the need for a pre-existing legal relationship is clear from cases such as *James v Heim Galleries* (1981) 41 P & CR 269 (CA) and see Treitel, *The Law of Contract* (Edwin Peel ed, 13th edn, Sweet & Maxwell 2012) para 3-079: the doctrine's nature is 'to restrict the enforcement by the promisor of previously existing rights against the promisee,' and those rights 'can arise only out of a legal relationship existing between these parties before the making of the promise or representation.'
[97] The phrase 'knows and intends' was used in *Re Wyvern Developments* [1974] 1 WLR 1097 (Ch). *James v Heim Gallery* (1981) 41 P & CR 269 (CA) 277 (Buckley LJ): the promise must have been made 'in circumstances in which, to the promisor's knowledge, the promise would be acted on'; 280 (Oliver LJ): the promise must have been made with the 'intention, or at least the knowledge that it is to be acted upon.' Similar formulations were made in *Evenden v Guildford City Association Football Club Ltd* [1975] QB 917 (CA) 924; *Rastill v Automatic Refreshment Services Ltd* [1978] ICR 289 (EAT) followed *Evenden*.
[98] *Willmott v Barber* (1880) Ch D 96.
[99] In the words of Oliver J: *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch) 145; Fry J referred to it simply as 'acquiescence': *Willmott v Barber* (1880) Ch D 96, 105.

fraudulent for him to set up those rights.'[100] Fry J stated that such *fraud* required, first, a mistake by the plaintiff as to his legal rights; secondly, 'the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief'; thirdly, the defendant 'must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff' as, otherwise, 'he is in the same position as the plaintiff' and, further, 'the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights'; fourthly, the defendant must also know that the plaintiff has this mistaken belief about the plaintiff's rights; and, finally, the defendant 'must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.'[101]

Oliver J stated in *Taylor Fashions* that knowledge is 'merely one of the relevant factors – it may even be a determining factor in certain cases – in the overall inquiry.'[102] Oliver J referred to *Inwards v Baker*,[103] in which he noted the lack of any mistaken belief on either side, which did not prevent the Court of Appeal from holding that there was an equity in estoppel on the basis that the defendant had been induced to spend money in 'the expectation of obtaining protection.'[104] Oliver J also referred to the 'even more striking example'[105] of *ER Ives Investment*,[106] in which 'there does not appear to have been any question of the persons who had acquiesced in the defendant's expenditure having known that his belief that he had an enforceable right of way was mistaken.'[107] It seems that Oliver J based his statement of principle on the lack of any requirement to find a mistake that is not shared, which is, almost by definition, not a requirement in estoppel by convention, with which *Taylor Fashions* was concerned. Later cases of estoppel by convention or acquiescence have, however, emphasised the knowledge requirement in a modified form, in that they say that a duty to act is required, which presupposes knowledge of some kind. In *The Lutetian*, Bingham LJ stated that 'the duty necessary to found an estoppel by silence or acquiescence arises where a reasonable

[100] *Willmott v Barber* (1880) Ch D 96, 105.
[101] *Willmott v Barber* (1880) Ch D 96, 105-106.
[102] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch) 152.
[103] *Inwards v Baker* [1965] 2 QB 29 (CA).
[104] *Inwards v Baker* [1965] 2 QB 29 (CA) 38.
[105] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch) 152.
[106] *ER Ives Investment Ltd v High* [1967] 2 QB 379 (CA).
[107] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133 (Ch) 152.

man would expect the person against whom the estoppel is raised, acting honestly and responsibly, to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations.'[108] In *The Stolt Loyalty*, Clarke J stated that some legal duty must be found 'to take action of some kind.'[109] In *AC Yule*,[110] the High Court approved Clarke J's longer statement of principle in *The Stolt Loyalty*, which he had expressed in nearly identical terms to those of Bingham LJ in *The Lutetian*.[111] In *The Indian Grace*, Lord Steyn had stated that the rule applied in an acquiescence context.[112] In *ING Bank NV v Ros Roca SA*,[113] the Court of Appeal approved Lord Steyn's test for estoppel by acquiescence as being relevant to the instant case, notwithstanding that, in *Ros Roca*, an estoppel by convention had been pleaded.[114]

Such an attempt to unify the principles relating to equitable estoppel[115] seems to suggest that knowledge of a mistake is required in cases in which the rules relating to estoppel by convention would otherwise have applied, which appears to contradict the position of Oliver J in *Taylor Fashions*. However, it is submitted that the Court's reference to a mistake actually applies to the position existing after the party seeking to resile has finally realised that the convention was on unstable ground (for example, on the basis that it was an incorrect interpretation of a contractual term; so in *Ros Roca* the alleged convention related to the basis of the calculation of fees for financial services, with the

[108] *Tradax Export SA v Dorada Cia Naviera SA (The Lutetian)* [1982] 2 Lloyd's Rep 140 (CA) 157.
[109] *The Stolt Loyalty* [1993] 2 Lloyd's Rep 281 (QB) 289. He added that this had been established in *Spiro v Lintern* [1973] 1 WLR 1002 (CA) and *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd's Rep 456 (QB).
[110] *AC Yule & Son v Speedwell Roofing & Cladding Ltd* [2007] EWHC 1360 (TCC) [19]-[20] (HHJ Peter Coulson QC).
[111] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [71].
[112] *The Indian Grace (No 2)* [1998] AC 878 (HL) 914 reiterated the rule, which was quoted from the dissenting speech of Lord Wilberforce in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 (HL) 903 as being 'helpful as indicating the general principle underlying estoppel by acquiescence.' The fragment cited from Lord Wilberforce's speech read as follows: 'whether, having regard to the situation in which the relevant transaction occurred, as known to both parties, a reasonable man, in the position of the "acquirer" of the property, would expect the "owner" acting honestly and responsibly, if he claimed any title in the property, to take steps to make that claim known …' While Lord Steyn in *The Indian Grace (No 2)* had also made a statement of principle relating to estoppel by convention, he declined to apply a single test to both kinds of estoppel, noting their 'necessarily separate requirements, and distinct terrain of application' (914).
[113] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472.
[114] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [57]-[60].
[115] Notwithstanding Lord Steyn's statement, see n 99 above.

difference between the alleged convention and the alternative position amounting to over €5.7m[116]).

The elements of inducement and reasonable reliance are beginning to be propounded, and what is curious about this development is that they have not emerged as a stand-alone requirement to replace, or even deepen the analysis of, the traditional elements of reliance and detriment. The courts, as we will see in the next section, prefer to focus on the issue of whether there has been proof of representation, reliance and detriment, whether or not these are preceded or followed by the general question of whether there has been unconscionability. This appears to be difficult to reconcile with academic views. In fact, with unconscionability already being characterised as the 'something more'[117] that a claimant needs to prove, it seems that reasonable reliance is a 'something more' added to the 'something more.' This also does not address the question which of inducement or reasonable reliance is the clearer or more appropriate term, or whether the answer to that question makes any difference. All of these issues are thus rendered unclear by the emerging literature.

There are simply too many tests potentially applicable in the liability-establishing inquiry. This may be obscuring the exercise for courts that seem already to display a certain impatience, on a reading of some of the surveyed cases in Chapter 1 – which coexists with a lack of clarity surrounding what equitable estoppel is. It seems plausible at least, on the basis of current developments, that inducement is a required element of equitable estoppel, that it is plausible for it to overshadow the requirement of the quality of the promise or representation, and that alternative forms of 'representation' in a wider sense – whether this is convention or silence, for example – are directed at a similar inducement question. The second of these points relates, first, to the fact that clarity and a lack of ambiguity, in themselves, are not the aim of a 'clarity and a lack of ambiguity' element because its aim is, instead, to provide a seriousness threshold; and, secondly, this seriousness threshold is possibly most reliably proved by analysing the conduct of the representee in light of the representation together with its context.

However, some difficulties equally attend the minimisation of clarity and intention, as well as the further element of knowledge, which may be a limiting factor in

[116] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472 [12].
[117] *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7, (1988) 164 CLR 387 [34] (Mason CJ and Wilson J).

certain estoppels. We lose the body of jurisprudence surrounding the 'clarity and a lack of ambiguity' requirement, and its well-established parameters, if we lose that requirement. Thus, while clarity is emphasised throughout the traditional doctrines, the comparison between those doctrines shows that the emphasis itself varies too. The classification into the traditional estoppels, although perhaps lacking in inherent value, has acquired the circumstantial value that the success of one or another estoppel claim provides a significant clue to the kind of context in which the estoppel is claimed to have arisen. However, this is not an argument for maintaining the traditional estoppels as it can equally be said that a contextual analysis (whatever name is proffered for the legal process in question) is what should prevail.

A flexible idea of clarity in equitable estoppel seems to be emerging. The requirement in promissory estoppel has been said to approximate the clarity requirement for a contractual promise. The justification for this version of the rule is that, if it were otherwise, 'in the case of a genuine misunderstanding as to the meaning of an offer, the offeree could obtain by means of the doctrine of promissory estoppel something that he must fail to obtain under the conventional law of contract.'[118] Conversely, in the important English decisions of *Gillett v Holt* and the earlier *Pascoe v Turner*, the fact that a promise was repeated several times (and was therefore an obvious promise) was considered to be significant.[119] The case of *Murphy v Burrows*[120] also illustrates this point: here, some promises of an equivocal nature were made that an interest in land would one day be granted and, although the detriment incurred by the promisee was substantial, it was held that this was insufficient to make it unjust to disregard the promises.

The purpose of requiring sufficient clarity of the representation may be to give it causative legitimacy; that is, to show that it actually did cause the promisee to rely upon it. However, this is equally answered by the question whether the inducement actually happened, which it would a priori not be if there were no detriment. It appears that the inquiry is simply starting from the wrong premise. In fact, to state that equitable estoppel can only be found by parsing through each in turn, in that order, does not contribute a

[118] *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) 757.
[119] *Gillett v Holt* [2001] Ch 210; *Pascoe v Turner* [1979] 1 WLR 431 (CA).
[120] *Murphy v Burrows* [2004] EWHC 1900 (Ch).

great deal to understanding the purpose and significance of the doctrine. It may be that one reason for the desire to move away from the bare three elements is the difficulty of analysing them in isolation, which is clear from Robert Walker LJ's statement that the analysis is to be effected 'in the round.'[121] This is added to by Collins' view that the elements he identifies[122] 'may prove hard to disentangle, for unreasonable detrimental reliance may not have been sufficiently encouraged under the first element, or alternatively it may not be unfair or unconscionable to go back on the promise in such circumstances.[123] The next section will discuss the connections which show that it is unhelpful, in any analysis of estoppel and whether or not one favours the existence of equitable estoppel, to analyse the traditional three elements totally independently from each other.

5.3 The connections between the three elements

A number of refinements have been made to the elements of representation, reliance, and detriment, such that it is more accurate to speak of a clear representation and substantial detriment than mere representation and detriment, while detriment can be interpreted broadly or narrowly. Meanwhile, reliance has received less attention, at least until the discussion on reasonable reliance (referred to in the previous section) started gaining significance.

5.3.1 The inseparable: The representation and the reliance

The premises that the reliance must be reasonable or the representation must be reliable essentially mean the same thing. As has been seen, the requirement of intention is not universally accepted and it is submitted that it is a factor of minor significance since it does not in itself render the reliance reasonable or the estoppel claimant susceptible of inducement. The difficulty of separating the representation from the reliance can be seen from the following analysis of case law relating to the promisee's state of mind.

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[121] *Gillett v Holt* [2001] Ch 210 (CA).

[122] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 75: These are deliberate encouragement of reliance through a promise or another undertaking; proof of detrimental reliance; 'the perception that the detrimental reliance was reasonable in all the circumstances'; and whether it would be unfair to go back on the undertaking.

[123] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 75.

5.3.1.1 The claimant's mental state

It is not necessary in cases of proprietary estoppel to demonstrate intention by a promise: it is sufficient to show that the act was done as a result of the actor's reasonable belief that what was promised will be granted.[124] The existence of the assumption (not just the reliance) may be inferred from evidence that the party would have acted differently if the true position had been known.[125] Thus, the factor on which all else depends is the mental state of the promisee.

The standard of proof for a valid representation in equitable as opposed to promissory estoppel is not expressed in terms of intention: instead, it has been said that it must be asked whether it 'was calculated to influence the judgment of a reasonable man,'[126] or, alternatively, 'whether it can fairly be held to have been capable of creating or encouraging the expectation,'[127] the latter being a principle of wider application since its wording potentially applies to acquiescence cases. An example of these is *ER Investment Ltd v High*,[128] to which the standard likewise applied. It seems from *Queen's Gardens*[129] that a hope, even when reasonably held, is an insufficient basis for an estoppel if the representation is not sufficiently clear. Thus, neither a long-standing practice[130] nor an historical tradition[131] is likely, without more, to create a reasonable foundation for an estoppel. Promises attached to conditions that are not performed cannot be relied on for an estoppel.[132] Meanwhile, in informal, familial or romantic

[124] The House of Lords in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 rejected the Court of Appeal's dependence on intention to induce conduct in favour of the question whether it was reasonable for the claimant to hold the belief and rely on it. See Martin Dixon, 'Proprietary estoppel: a return to principle?' [2009] Conv 260, 264. Typical formulations of the rule in cases concerning promises merely refer to the promise itself and the acts done as a consequence: see, for example, *ER Ives Investment Ltd v High* [1967] 2 QB 379 (CA) 399, 404-5 or *Carter v Ross* (HC, 8 December 2000). In *Habib Bank v Nasira Tufail* [2006] EWCA Civ 374 [22] (Lloyd LJ): requiring that the representation was intended to be relied on was 'not necessarily a separate and distinct ingredient of an acquiescence case.' The intention to induce certain behaviour can be clear from the words and conduct of the representor, as in *Jones v Jones* [1977] 1 WLR 438 (CA), but there may be additional conduct with an apparently conflicting intention – in that case, for instance, the house remained in the father's name. See also Snell, *Equity* (John McGee ed, 33rd edn, Thomson Reuters 2015) para 12-018.

[125] *Hiscox v Outhwaite* [1991] 2 WLR 1321 (CA) 1333-4. In this case, such evidence was in an affidavit.

[126] *Jones v Watkins* (CA, 26 November 1987) (Slade LJ).

[127] Ralph Gibson LJ discussing *Crabb v Arun District Council* in *JT Developments v Quinn* (1991) 62 P & CR 33 (CA) 49.

[128] *ER Ives Investment Ltd v High* [1967] 2 QB 379 (CA).

[129] *Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114 (PC).

[130] *Keelwalk Properties Ltd v Walker* [2002] EWCA Civ 1076.

[131] *Earl of Macclesfield v Parker* [2003] EWHC 1846 (Ch).

[132] *Hunt v Soady* [2007] EWCA Civ 366 [33]-[34] (Mummery LJ).

relationships that have not progressed as the parties had hoped, an initial valid expectation or 'natural probability'[133] that one of the parties would end up with an interest in land has been held not to be enough. The standard also applies in estoppel by convention in that the belief of the party seeking to establish the estoppel must be reasonable.[134] A 'longstanding practice' alone will not be enough to prove that there was an assumption of the required nature.[135] The point is highlighted in *John Dee Group Ltd v WMH (21) Ltd*,[136] in which it was held that a mere informal arrangement for a debt set-off could not give rise to an estoppel. To do so, there needed to be a 'clearly expressed understanding or agreement between the parties that such a practical ad hoc arrangement was intended to alter their contractual rights in the future,'[137] which would have been a promissory estoppel.

The first incidence of the test in an English case concerning promissory estoppel was in the *Woodhouse*[138] case. There, Lord Hailsham stipulated that 'to give rise to an estoppel, representations should be clear and unequivocal, and that, if a representation is not made in such a form as to comply with this requirement, it normally matters not that the representee should have misconstrued it and relied upon it.'[139] Viscount Dilhorne likewise stated a 'clear and unequivocal' formula.[140] To that, Lord Pearson added that the promise 'ought to be reasonably clear and definite both as to the terms of the contract which is being waived and as to the duration of the waiver.'[141] Such a first step, requiring a clear promise, has been described more recently as a 'classic requirement'[142] of promissory estoppel.[143] As was acknowledged in *Woodhouse*, though,

[133] *Gordon v Mitchell* [2007] EWHC 1854 (Ch) [36] (Evans-Lombe J).
[134] *Liverpool City Council v Walton Group Plc* (Ch, 25 July 2001) [76] (Neuberger J): '[i]n proceeding in this way, Walton was clearly acting in the reasonable belief that all aspects of the Agreement were enforceable.'
[135] *Jet2.com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417 [36]: a 'long standing practice' of submitting flight schedules for the following six months and their acceptance by the airport 'falls far short of demonstrating that the parties shared a common assumption that Jet2 had a right to insist on aircraft movements outside normal opening hours and that BAL had an obligation to accommodate them.'
[136] *John Dee Group Ltd v WMH (21) Ltd* [1997] BCC 518 (Ch). Estoppel was not in issue on appeal: [1998] BCC 972 (CA).
[137] *John Dee Group Ltd v WMH (21) Ltd* [1997] BCC 518 (Ch) 525-6.
[138] *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL).
[139] *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) 755.
[140] *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) 761.
[141] *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) 762.
[142] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [93] (Neuberger LJ) quoted in *Re Prudential Staff Pension Scheme, Prudential Pensions Ltd v The Prudential Assurance Company Ltd* [2011] EWHC 960, [2011] Pens LR 239 [197] and *Grievson v Grievson* [2011] EWHC 1367 (Ch), [2011] Pens LR 283 [25].

the authority for this requirement is a decision on estoppel by representation, *Low v Bouverie*.[144] In *Freeman v Cooke*,[145] 'relief was refused upon the ground that no reasonable man would have acted on the faith of the statements made if they were taken altogether.'[146] The test, as in the *Woodhouse* opinions themselves, does not have a universal formulation but the standard form is 'clear and unambiguous.'[147] A test expressed in very similar terms was brought into Irish law by the Supreme Court in *Doran v Thompson*.[148]

In determining whether a promise is sufficiently clear, the standard of proof is one of reasonableness. In *Woodhouse*, it was said to be enough if the promise was 'reasonably clear and definite both as to the terms of the contract which is being waived and as to the duration of the waiver.'[149] Another formulation was given in *Mackprang*, where it was said to be sufficient if, '[i]n the prevailing conditions affecting the position of the parties to a contract, the conduct of one of them affords a reasonable foundation for the inference that he is prepared to forgo any right or rights he may have in a certain regard.'[150] Such a standard has evident limits: as Nourse LJ posited in *Goldsworthy v Brickell*,[151] '[i]t cannot in my view have been enough that the defendant might reasonably have arrived at that conclusion. There could only have been a clear and unequivocal representation if he could not reasonably have arrived at any other conclusion.'[152] The

[143] See also Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) para 3-081; Snell, *Equity* (John McGee ed, 33rd edn, Thomson Reuters 2015) para 12-018.
[144] *Low v Bouverie* [1891] 3 Ch 82 (CA).
[145] *Freeman v Cooke* (1848) 2 Exch 654, 154 ER 652.
[146] *Low v Bouverie* [1891] 3 Ch 82 (CA) 111.
[147] See *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [18] ('clear and unambiguous'), [93] ('clear'); *China-Pacific SA v Food Corp of India (The Winson)* [1981] QB 403 (CA) 429 (Megaw LJ) 'quite unequivocal'; *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade*) [1983] QB 529 (CA) 534 (Robert Goff LJ) 'unequivocally represent'; *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2001] CLC 999 [24] 'sufficiently certain.' Many decisions use the 'clear and unequivocal' formula from *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL): *Goldsworthy v Brickell* [1987] Ch 378 (CA) 410; *Spence v Shell UK* (CA, 1 January 1980); *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2001] CLC 999 [84]; *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia (The Laconia)* [1977] AC 850 (HL) 872 (on the requirement for waiver); *Dollond v Trustees of the BTG Pension Fund* [2011] EWHC 1373, [2011] Pens LR 291 [52]; *IMT Shipping and Chartering GmbH v Chansung Shipping Company Ltd (The Zenovia)* [2009] EWHC 739 (Comm) [34]; *Hodgson v Lipson* [2009] EWHC 3111 (QBD) [25].
[148] *Doran v Thompson Ltd*. [1978] 1 IR 223 (SC): 'clear and unambiguous.' See also *In the matter of JR, a Ward of Court* [1993] ILRM 657.
[149] *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co Ltd* [1972] AC 741 (HL) 762.
[150] *Bremer Handelsgessellschaft v Mackprang* [1979] 1 Lloyd's Rep 221 (CA) 230.
[151] *Goldsworthy v Brickell* [1987] Ch 378 (CA).
[152] *Goldsworthy v Brickell* [1987] Ch 378 (CA) 411.

Irish Supreme Court adopted this standard in *Doran v Thompson*,[153] where Griffin J stated that 'the party relying on the representation must show that the representation was *reasonably* understood by him in a sense materially inconsistent with the allegation against which the estoppel is attempted to be set up.'[154] Close to this qualification are dicta that warn against giving words a strained meaning in the elucidation of their level of clarity. These dicta indicate that common sense and objectivity are being applied: that the prevailing policy may be pragmatism. The Irish Supreme Court has stated that, in cases in which 'more than one construction is possible, the meaning relied upon must clearly emerge in the context and circumstances of the case, although in other contexts or other circumstances the same words might possibly have borne a different construction.'[155]

The clarity requirement has been more flexible in proprietary estoppel. This is evident from *Thorner v Major*, in which the House of Lords held that it is essential to consider the context of the representation and the question of whether reliance on it is reasonable. Lord Walker thus commented that a representation would be acceptable if its meaning were 'clear enough,'[156] while Lord Neuberger remarked that what the court should seek is not 'ambiguity or uncertainty' but that it should instead 'assess the question of clarity and certainty practically and sensibly, as well as contextually.'[157] Meanwhile, it was said to be an undisputed matter in *Gillett v Holt* that 'the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood... In the end the court must look at the matter in the round.'[158] The Irish High Court held in *McDonagh v Denton*[159] that an owner of land had made a valid representation for the purposes of proprietary estoppel when it became necessary for him to assert a conflicting right and failed to do so: he had been warned that part of his land was being sold by another to a third party and did not take any action. This lack of action when it is imperative to act is

[153] *Doran v Thompson Ltd* [1978] 1 IR 223 (SC).
[154] *Doran v Thompson Ltd* [1978] 1 IR 223 (SC) 230-31.
[155] *Doran v Thompson Ltd* [1978] 1 IR 223 (SC) 230 (Griffin J).
[156] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [26] (Lord Walker).
[157] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [85] (Lord Neuberger).
[158] *Gillett v Holt* [2001] Ch 210 (CA) 225 (Robert Walker LJ).
[159] *McDonagh v Denton* [2005] IEHC 127.

difficult to characterise as clear and unambiguous, yet it is similar in that it indicates to a similar degree that action will not be taken to secure one's legal rights.

This would seem to fit within Dixon's suggestion that a 'double assurance' is required in proprietary estoppel. This double assurance 'amounts both to an assurance of a "certain enough"[160] right in relation to land *and* [that it] carries with it a further assurance that the right will be granted despite the absence of the formality that is normally required to create, transfer or enforce that right.'[161] Lord Walker's view in *Cobbe* that the representation must be believed by the representee to be *legally* binding has been criticised for unduly restricting the doctrine in a way that is inconsistent with previous authorities.[162] Thus, in *Jones v Watkins*,[163] Slade LJ said that the equivocal nature of the promises made in that case did not by itself prevent the operation of an estoppel, and added that equivocality 'is clearly one relevant factor' in the overall assessment of unconscionability.

We cannot say that the court does, or indeed should, ignore the context and construe the terms of the representation, whatever its nature (whether verbal, written, repeated, or emphasised). First, it should not construe it strictly: it is not a contractual term. Secondly, it is probably impossible to ignore the context. Arguably, clarity is concerned with justification rather than intention. It can be deduced that the question of whether a clear intention is demonstrated – a clear intention to be believed, with the attached possibility that it will be acted upon in a detrimental way – is related to the context. A move towards a broader inducement view is plausible, and the larger hurdle seems to be the requirement of proof of a clear representation, rather than the requirement of proof of a representation in the first place. In other words, the focus on construction may be obscuring the true significance of the representation-reliance nexus, which is to justify the reliance and the reliance act. With that link established, we move on to considering the impossibility of separating the reliance and the reliance act, the quality of which must be detrimental.

[160] Here, Dixon cites *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.
[161] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408, 417.
[162] McFarlane and Robertson, 'Apocalypse averted: proprietary estoppel in the House of Lords' (2009) LQR 535, 538.
[163] *Jones v Watkins* (CA, 26 November 1987).

5.3.2 The inevitable: reliance and detriment

The immediately apparent issue is that reliance and detriment can amount to the same thing. Thus, what is done to one's detriment is the reliance act, while reliance can be proven by requiring substantial detriment, with a greater degree of substance indicating further proof. The availability of different tests for the proof of reliance showcases this confusion and undermines the requirement that the elements of equitable estoppel must be specifically proven. The possible meanings of substantial detriment will be discussed and it will be argued that the term has a broad meaning.

5.3.2.1 Substantial detriment

The substantiality test for detriment provides a threshold for the disadvantage suffered by the estoppel claimant as a result of his reliance, below which the court is less likely to award relief. The threshold in proprietary estoppel has been defined as 'substantial' and not necessarily financial.[164] What constitutes 'substantial' or 'material' detriment is a matter of degree,[165] and a wide set of criteria has been applied in the jurisdictions researched. It tends to involve either a significant amount of money spent or something irrevocable and lifelong, whereby other, more advantageous opportunities are lost willingly for reasons which include (but need not be limited to) the expectation of receiving the property interest. Thus, in *Ottey*, the plaintiff's diminished career options caused by her commitment of several years to caring for the defendant, did constitute detriment even though the judge was skeptical about her past career success and her chances of obtaining it in future.[166] The plaintiff's diminished capital in *Pascoe*[167] was considered to be sufficient, as was the lifelong work, for relatively low remuneration, and close relationship involved in *Gillett*[168] and the considerable amounts of work and the disapproval of family and friends for the plaintiff's romantic and work attachment to the defendant in *Chan Pui Chun*.[169]

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[164] *Gillett v Holt* [2001] Ch 210 (CA); *Earl of Macclesfield v Parker* [2003] EWHC 1846 (Ch); *Owens v Owens* (HC, 2 April 2004).
[165] GE Dal Pont & DRC Chalmers, *Equity and Trusts in Australia* (4th edn Lawbook Co Sydney 2007) para 10.210. They say that substantiality is relative and there are no strict parameters.
[166] *Ottey v Grundy (Andreae's Executor)* [2003] EWCA Civ 1176 [24].
[167] *Pascoe v Turner* [1979] 1 WLR 431 (CA).
[168] *Gillett v Holt* [2001] Ch 210 (CA).
[169] *Chan Pui Chun v Leung Kam Ho* (Ch, 30 November 2001) affd [2002] EWCA Civ 1075, [2003] 1 P & CR DG2.

5.3.2.1 (a) A spectrum from change of position to substantial detriment: the options

The paradigmatic form of a change of position has been said to be refraining from taking any steps to protect one's legal position.[170] There have been some strong assertions that a change of position simpliciter, as opposed to detriment, will suffice in order to establish promissory estoppel.[171] However, the former can also be seen to be a classic iteration of detriment.[172] While McFarlane has said that cases based upon the principle in *High Trees*[173] do not require detriment,[174] Handley has stated that, in 'promissory estoppel,' the promises need to have 'induced a change of position which makes such enforcement inequitable,'[175] which change of position he then qualifies as 'in a meaningful way.'[176] Robertson, meanwhile, has said that detriment is 'not consistently required' in English promissory estoppel.[177] Handley states that Lord Denning's later assertion that a change of position without detriment would suffice was incorrect.[178] While a change of position may be beneficial at the time as in *Hughes*,[179] the relevant detriment in Handley's view is that which a promisee 'would suffer as a result of that change [of position] if the promisor could repudiate his promise.'[180] He notes in this regard that the tenant's change of position 'when it conducted its affairs on the basis that it did not have to pay the rent in full' may not have been sufficient to release the tenant from liability for arrears.[181]

Lunney suggests two definitions of detriment that have been provided by case law: the 'narrow' sense means a result of 'consequential damage or loss' from the doing

[170] Mark Lunney, 'Towards a unified estoppel – the long and winding road' [1992] Conv 239, 243.
[171] Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) para 3-084 and Spencer Bower and Turner, *The Law Relating to Estoppel by Representation* (3rd edn, Butterworths 1977) 389, 392-393.
[172] James Every-Palmer, 'Equitable Estoppel' in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd edn, Thomson Reuters 2009) para 19.2.3, citing *Smyth v Walland* (2007) 26 FRNZ 255.
[173] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 274: which he says is not an example of estoppel.
[174] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 287.
[175] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-028. See also para 13-001.
[176] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-016.
[177] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 218.
[178] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-017.
[179] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-017.
[180] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-018.
[181] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-017.

of an act that one was not previously bound to do, while the 'broad' sense 'only requires the promisee to have altered his position so that it would be inequitable to allow the promisor to act inconsistently with it.'[182] The same dichotomy is described in Mason CJ's judgment in the Australian case of *Commonwealth of Australia v Verwayen*.[183] He defined narrow detriment to mean that 'which the person has suffered as a result of his reliance upon the correctness of the assumption,' and the broad kind to mean that 'which would result from the denial of the correctness of the assumption upon which the person has relied,' or a 'loss attributable merely to non-fulfilment of the promise.'[184] In *The Vistafjord*, a case concerning estoppel by convention, the court's conception of detriment appeared to be that which would occur if the assumption were allowed to fall, leading to a loss of commission for the defendants. Bingham LJ held it would be unfair for this to occur since the gain on the plaintiffs' part was due to their adoption of and acting on the assumption.[185] He quoted *Keen v Holland*[186] and *Amalgamated*[187] to the effect that it would be unjust or inequitable to allow one to resile when the parties had conducted their dealings on the basis of the assumption.

Applications of both broad and narrow detriment can be seen in the cases. In a convention estoppel context in *Troop v Gibson*,[188] the Court of Appeal applied a broad version when it adverted to the effect on the defendants of the court's not declaring an estoppel: that the plaintiffs would be enabled to obtain forfeiture against the defendants. Robert Walker LJ indicated in *Gillett v Holt* a difficulty with detriment: that it can also relate to the future. So, he said that it is 'entirely a matter of conjecture what the future might have held' but that the detriment would at least include 'depriving themselves of opportunity of trying to better themselves in other ways.'[189] The broad view is also apparent in promissory estoppel cases. The decisions of *Spence v Shell* and *Brikom Investments v Carr* list the requirement simply in terms of acting on the

[182] Mark Lunney, 'Towards a unified estoppel – the long and winding road' [1992] Conv 239, 242-243.
[183] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394.
[184] *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 [43].
[185] *Norwegian American Cruises A/S Paul Mundy Ltd (The Vistafjord)* [1988] 2 Lloyd's Rep 343 (CA).
[186] *Keen v Holland* [1984] 1 WLR 251 (CA) 261.
[187] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] QB 84 (QB, CA).
[188] *Troop v Gibson* [1986] 1 EGLR 1 (CA).
[189] *Gillett v Holt* [2001] Ch 210 (CA) 234-5.

promise.[190] Such terminology is stated by Spencer Bower and Turner logically to mean a change of position.[191] Peel, referring to detriment as an 'alleged requirement', points out that its inclusion in the doctrine may derive from an analogy with estoppel by representation which is 'inexact.'[192] A further problem is that it has been said not to be necessary to define detriment as being either broad or narrow in the various cases in which the narrow sense is easily found,[193] and so even the English statements of the law are few. In *WJ Alan v El Nasr*,[194] Lord Denning described detriment as it had been used in previous cases as 'only mean[ing] that [the promisor] must have been led to act differently from what he otherwise would have done,'[195] which appears to assert that the causation of only a different, as opposed to a prejudicial, act is necessary. The comment is echoed in Lord Denning's later judgment in *Greasley v Cooke*.[196] Confusingly, that decision was interpreted by Dunn LJ in *Watts v Story* not to say anything new, since, he said, the indispensable requirement of inequitability amounted to the same thing as classic detriment.[197]

5.3.2.2 Isolating detriment from unconscionability

It is clear that potential detriment can have a role in a unified equitable estoppel. Robertson has said of potential detriment that '…B would suffer detriment if A did not adhere to it.'[198] Lunney's broad version of detriment is the same in that it relates to potential detriment: it 'only requires the promisee to have altered his position so that it

[190] In *Spence v Shell UK* (CA, 1 January 1980), the expression used by Oliver LJ is 'in reliance upon which the other party has acted', while in *Brikom Investments Ltd v Carr* [1979] QB 467 (CA) 482, it is that 'by acting on it, by altering his position on the faith of it, by going ahead with a transaction then under discussion.'
[191] Spencer Bower, *The Law Relating to Estoppel by Representation* (Turner ed, 3rd edn, Butterworths 1977) 152, 388-89.
[192] Treitel, *The Law of Contract* (Edwin Peel ed, 14th edn, Sweet & Maxwell 2015) para 3-084.
[193] As in *Bremer Handelsgessellschaft v Vanden* [1978] 2 Lloyd's Rep 109 (HL); *IMT Shipping and Chartering GmbH v Chansung Shipping Company Ltd (The Zenovia)* [2009] EWHC 739 (Comm).
[194] *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189 (CA).
[195] *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189 (CA) 213.
[196] *Greasley v Cooke* [1980] 1 WLR 1306 (CA). Another decision of Lord Denning's is that in *Evenden v Guildford City Association Football Club Ltd* [1975] QB 917 (CA). There, at the time when the promisee's employer was changed from a supporters' club to its associated football club, an assurance was made that redundancy payments would be calculated on the basis of the promisee's continued employment with the promisor's current and previous incarnations. This did not cause immediate hardship; it meant that the promisee did not, at the time that his employment was moved to the football club, seek redundancy payments from the club in circumstances in which he was, in fact, still employed. These decisions thus also hold themselves to the broad sense of detriment.
[197] *Watts v Story* (CA, 14 July 1983). Quoted in *Gillett v Holt* [2001] Ch 210 (CA) 232.
[198] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 209.

would be inequitable to allow the promisor to act inconsistently with it.'[199] McFarlane has said that it is 'clear,' on the basis, for instance, of the detriment not being immediate but initially only a 'significant risk' of detriment in *Crabb v Arun District Council*,[200] in addition to a statement of principle by Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*,[201] that the reliance act 'need not be immediately detrimental' and will amount to detriment if the party who may seek the benefit of the estoppel (B) 'adopted a course of conduct on a particular basis or condition and, if that basis or condition were removed, B would then be in a worse position than B would have been in had B not adopted that course of conduct.'[202]

It is submitted that the preferred option, and hence once that ought to be incorporated within the model, would be to consider the presence or otherwise of the substantial 'detriment' quality at the time of reneging, and to consider this detriment independently of unconscionability. We have seen that unconscionability is capable of a number of meanings in equitable estoppel. The position by the time of trial falls to be assessed under unconscionability in its fourth meaning identified in the previous chapter. Here, the court is asking whether it is unconscionable to insist upon strict legal rights, which it is suggested is in reality a construct for the real question, which is whether liability is established at the point of trial. The fifth meaning asks whether conscience dictates granting the minimum remedy, the sixth meaning asks how to carry this out. The definition of the discrete quality of detriment, meanwhile, can be as expansive as the courts wish but should be considered objectively, using easily understandable terms such as 'substantial', 'quantifiable' or 'non-quantifiable' as a court may prefer. The latter involves a broader assessment and is what actually decides whether there is an equity to which the court will give effect. While it is potentially possible to view one's past actions, or inactions, as becoming increasingly or less detrimental by the time of trial, and hence increasing or reducing the required unconscionability, it is the fact that they are

[199] Mark Lunney, 'Towards a unified estoppel – the long and winding road' [1992] Conv 239, 242-243.
[200] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 4.49 referring to *Crabb v Arun District Council* [1976] Ch 179 (CA).
[201] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 4.46 referring to *Grundt v Great Boulder Pty Gold Mines* [1937] HCA 58, (1937) 59 CLR 641, 674-675, the final sentence of which reads that the claimant's 'action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice.'
[202] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 4.50.

detrimental at the time of resiling that is relevant. Equally, the assessment of unconscionability at trial cannot suddenly convert one's past actions or inactions into relevant detrimental past actions or inactions.

Inequitability has been viewed as the 'crucial aspect' of promissory estoppel in the sense that '[a] representor will only be estopped from enforcing his rights inconsistently with his representation where it would be inequitable for him to do so,' a requirement which 'is closely connected with the question of the nature and degree of reliance required to bring the doctrine into play'[203] but which does not entail detriment in the writer's opinion. Thus, 'provided that the representee has relied upon the representation there is no additional requirement that he be shown to have acted to his detriment in so doing.' [204] Returning to *High Trees*,[205] we recall that there is some debate as to whether it involved detriment and we now add two views concerned with inequitability: on the one hand, it has been said not even to involve either detriment or inequitability,[206] and, on the other hand, this has been disputed for the reason that the inequitability there would have been of 'the highest degree' had the promisor been allowed to resile.[207] Such inequitability, it is suggested, is better described as detriment assessed at the time of resiling, which in turn is proof of reliance. The confusion here is possibly due to the fact that the act of reliance itself involved an advantageous change of position, as the tenant of a block of flats was only required to pay half-rent for a period of time.[208] In *WJ Alan v El Nasr*,[209] Lord Denning stated that, instead of the promise having caused detriment, inequitability (or, it is submitted, detriment as a preferable term) could also arise when resiling from a promise takes away an accrued benefit. [210]

[203] R Bradgate, 'Formation of Contracts' in M Furmston (ed), *The Law of Contract* (LexisNexis Butterworths 2010) para 2.119(iii).
[204] R Bradgate, 'Formation of Contracts' in M Furmston (ed), *The Law of Contract* (LexisNexis Butterworths 2010) para 2.119(ii).
[205] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB).
[206] Mark Lunney, 'Towards a unified estoppel – the long and winding road' [1992] Conv 239, 240.
[207] Spencer Bower, *The Law Relating to Estoppel by Representation* (Turner ed, 3rd edn, Butterworths 1977) 393.
[208] As MP Thompson, 'Estoppel and change of position' [2000] Conv 548, 560 highlights, the tenant was already bound by an obligation to pay rent and so could not have suffered any detriment at the time that the promise was made. However, Spencer Bower and Turner do see such a continuation of liability as a change of position, noting the tenant's choice to remain bound to some obligation in the particular war circumstances in that case: Spencer Bower, *The Law Relating to Estoppel by Representation* (Turner ed, 3rd edn, Butterworths 1977) 393.
[209] *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189 (CA).
[210] *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189 (CA) 280.

As we saw, this can be confusing and so a preferred option would be to distinguish detriment and unconscionability on twin bases: quality and timing. Further, the timing relates to the present argument that the detriment should be assessed at the time of reneging, even if we then say that the detriment commenced at a certain earlier point.

5.3.3 The injustice: detriment and representation

It is not possible to speak of the interaction between detriment and representation without speaking of reliance: reliance *is* the interaction. The clarity and substantiality factors establish that there is an evaluable expectation and detriment to begin with, and therefore do not bear any relationship to the remedy: they are threshold matters.

The need for the reliance act to be detrimental is proof of the extent to which the representation was taken seriously. It is submitted that the fact that the analysis typically treats reliance differently shows that what the court is looking for is inducement. The case law and commentary shows that a court requires the reliance to be reasonable. There is, however, division as to the extent to which reliance must be proved as a matter of the representee's mental state, and it appears that the detriment itself is often proof of the reliance step. What the court is, in fact, seeking is proof of inducement.

5.3.3.1 Proof of reliance

This section will outline a number of decisions showing the courts' treatment of the link between the representation and the detriment. It has been said that it is necessary to establish that a promise 'was in fact acted on.'[211] It has also been said that the reliance act means doing what one otherwise would not have done, which must be read subject to what was said above[212] In reality, significant cases have disregarded these views and indicate that reliance need not be specifically proven but inferred, with the presumption being in favour of the representee. Given what has been established above in relation to the importance of reasonableness, one would expect a greater emphasis on analysing the representee's actions in light of the representation itself and its context and judging whether those actions were reasonable. It has been said that there is a

[211] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 (KB) 134.
[212] *South Caribbean Trading Ltd v Trafigura Beheer BV* [2004] EWHC 2676 (Comm) [112].

rebuttable presumption that the promisee's act was done in reliance on the promise.[213] In one English case, it was added that there must be '[n]o alternative explanation'[214] for the behaviour. However, a claim that it is not proven that the promisee would not have so acted but for the promise is a weak defence. In *Brikom Investments v Carr*, Lord Denning stated that:

> [i]t is no answer for the maker to say: 'You would have gone on with the transaction anyway.' That must be mere speculation. No one can be sure what he would, or would not, have done in a hypothetical state of affairs which never took place.[215]

The impossibility of knowing what alternative course of action the promisee would have taken was also asserted to be a factor in *Greasley v Cooke*.[216] What is required is merely 'absence of evidence to the contrary' of the assumption.[217]

Spence, in an analysis of the Australian case law, divides those cases where there is such evidence into two categories: those in which it is impossible for the party to have acted otherwise, and those in which other action is improbable.[218] In English cases which appear to fall into either of the categories described by Spence, the promisor has been able to rebut the presumption. Impossibility is found in *Bhimji*,[219] where the acts were done before the promise had been made. Meanwhile, in *James v Heim Galleries,*[220] the fact that the promisees were relying on professional advice rather than the promise was held to negate the necessary reliance. That was arguably a situation in which the promisees were unlikely to act in any other way. In *Northstar Land*,[221] it was said that clear evidence that the promisee would have done the act anyway would have sufficed to rebut the presumption. A plea of promissory estoppel was rejected in *Emery*[222] in

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[213] *Brikom Investments Ltd v Carr* [1979] QB 467 (CA); *Greasley v Cooke* [1980] 1 WLR 1306 (CA); *Spence v Shell UK* (CA, 1 January 1980); Martin Hogg, *Promises and Contract Law* (Oxford University Press 2010) 184. In *Habib Bank Ltd v Nasira Tufail* [2006] EWCA Civ 374 [21], it was said that the burden was on promisee to prove the necessary facts, though this seems to refer to all facts beginning with the promise.
[214] *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129 (Ch).
[215] *Brikom Investments Ltd v Carr* [1979] QB 467 (CA) 482-83.
[216] *Greasley v Cooke* [1980] 1 WLR 1306 (CA) 1311.
[217] *Stevens and Cutting Ltd v Anderson* (CA, 19 July 1989).
[218] Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999) 43.
[219] *Bhimji v Salih* (CA, 1 January 1982).
[220] *James v Heim Gallery* (1981) 41 P & CR 269 (CA) 282.
[221] *Northstar Land v Brooks* [2005] EWHC 1919 (Ch).
[222] *Emery v UCB Corporate Services Ltd (No 2)* [2001] EWCA Civ 675 [30].

circumstances in which the court found it difficult to see the steps which could have been taken if no promise had been made. Improbability, it is submitted, may be an automatic inference in cases such as *ING Lease*,[223] when there was a significant passage of time between the promise and the act (there, two years) and 'much'[224] had happened in that period.

The position in proprietary estoppel is the most clear-cut, as detriment must be specifically alleged and proven.[225] In *Jennings v Rice*, Aldous LJ said that 'there can be no doubt that reliance and detriment are two of the requirements of proprietary estoppel.'[226] In *Gillett v Holt*, Robert Walker LJ also stated the importance of the element, saying that detrimental reliance is what makes a promise irrevocable and adding that both parties to the case agreed that detriment was 'an essential ingredient of proprietary estoppel.' He also said, however, that the detriment need not be financial or otherwise quantifiable.[227] Going further than this, the decision in *Greasley v Cooke* appeared to give less importance to detriment as a separate element, with Lord Denning MR asserting that it was sufficient to act on the faith of a representation, and not necessary to spend money or otherwise prejudice oneself, which indicates support for a broad view. Robertson has said that 'reliance is difficult to disentangle from other motives' for action.[228]

Lord Denning's judgment in *Greasley v Cooke* allowed for an inference that there was reliance in addition to detriment on the basis that the representations were sufficient. This is similar to the approach of the Court of Appeal in *Wayling v Jones*, in a judgment which overturned the court below on causation. The court said that a

[223] *ING Lease (UK) Ltd v Harwood* [2007] EWHC 2292 (QB), [2008] 1 All ER (Comm) 1150, affd [2008] EWCA Civ 786 [27]: for estoppel to have any chance of success, it had to be shown that the defendant's state of mind, 'at least when he signed the guarantee, was that he was relying on there being an understanding that no personal guarantee was intended to cover the Coin TV debt.' Waller LJ considered points 'which have an influence' as to that state of mind, '[i]n particular' the fact that he signed a letter from ING indicating their release of security and requesting, in consideration of them doing so, his agreement that the guarantee would remain in full force, after he had requested that a paragraph be added stating that an acceptance of him signing would not extend the guarantee, and this was refused. Thus, by his signature, he appeared to accept that the guarantee covered the debt in question ([27]-[29]).

[224] *ING Lease (UK) Ltd v Harwood* [2007] EWHC 2292 (QB), [2008] 1 All ER (Comm) 1150 [87], affd [2008] EWCA Civ 786.

[225] *Gillett v Holt* [2001] Ch 210 (CA) 232.

[226] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [21].

[227] *Gillett v Holt* [2001] Ch 210 (CA) 232.

[228] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 220.

'sufficient link' was required (the test being one of 'an inducement' rather than a sole inducement[229]) and that this was established if, proof having been supplied of promises and of conduct of such a nature that inducement might be inferred, and the onus thereby having shifted to the defendant to disprove reliance, the promises were at least part of the reason for continuing detriment. However, the trial judge in *Wayling v Jones* viewed the putative detrimental conduct as insufficiently linked to the effect of the promises on the plaintiff.[230] The Court of Appeal's approach was more akin to that in the later case of *Ottey*, in which the trial judge had said that '[n]ot to raise the cup is one thing, to dash it from one's lips is very different.'[231] Thus, the Court in *Wayling* asked, in Balcombe LJ's words, 'whether the defendants have established that the plaintiff did not rely on these promises'[232] and 'whether the plaintiff's conduct was of such a nature that inducement may be inferred,'[233] Meanwhile, Leggatt LJ considered what inference could be made from the evidence that, had no promise been made, the plaintiff would have stayed with the deceased, and, further, that, had the deceased reneged on his promise, the plaintiff would have left.[234]

Using this multiple-cause approach indicates that the autonomy of that party in entering the relationship might weigh less heavily than the fact that the party was seemingly induced to do so. The approach in *Wayling* has been criticised by both Cooke and McFarlane, both of whom suggest that it is unlikely to be followed.[235] Cooke suggests that the relevant question for Mr Wayling ought not only to have related to the effect of the promise upon him, but also to the hypothetical effect of a belief that the promise was unlikely to be fulfilled.[236] McFarlane has also criticised 'the *Wayling* test,'[237] which he notes had also been applied by the Court of Appeal in *Walton v Walton* – a Court that

[229] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 173.
[230] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 172.
[231] *Ottey v Grundy (Andreae's Executor)* [2002] EWHC 2858 (Ch) [36].
[232] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 173.
[233] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 175.
[234] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 176.
[235] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 111 and see also 111 n 158: this is 'in view of its inconsistency with the reasoning of Robert Goff J in *Texas Bank* and the other decisions on estoppel.'
[236] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 111.
[237] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 335-336, 341.

had also included Hoffmann LJ,[238] who had agreed but not offered any comments of his own in *Wayling*.[239] McFarlane views neither the 'indulgences' of the '*Wayling* test' in respect of causation,[240] nor the use of the 'so-called "presumption of reliance,"'[241] as tenable.

The attraction of a stricter causation test is clear. The result in the Court of Appeal was unaffected by the avowed fact that other factors weighed in Mr Wayling's decision to remain where he was for so many years, and so it does indeed appear to be unduly lenient. McFarlane states that the onus-shifting in *Wayling*, which was based on the decision in *Greasley*, comes from a false analogy with fraudulent misrepresentation and so ought to be abandoned.

The difficulty of proving reliance and of requiring proof thereof is noted by Smith, who says that this is because, in contractual situations, reliance 'is often "negative" reliance, in the form of the "opportunity cost" of not pursuing alternative opportunities.'[242] He suggests that an offer-and-acceptance test could, not unreasonably, create an assumption that there has been reliance, objectivity being consistent with a reliance theory of contract.[243] The irrelevance of a separate reliance element is clear from *Hammersmith and Fulham LBC v Tops Shop*, in which there was 'no direct evidence' of reliance or of a lack thereof, so it was said 'in those circumstances' that reliance may be presumed. It is noted of this case by the editors of *Wilken* that a reversed burden was used, the authors noting that, while that is normally associated with some proprietary estoppel cases since *Greasley v Cooke*, the present case could equally be characterised as one of proprietary estoppel or of estoppel by representation.[244] Warner J held that 'the only conclusion that can reasonably be reached' from the defendant council's actions in continuing to pay rent even though its lease was forfeited was that the council members

[238] Who, as is noted by Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 111, 'purported to follow' the causation element of *Wayling*.
[239] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 176.
[240] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 341.
[241] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 342.
[242] Stephen Smith, *Contract Theory* (Oxford University Press 2004) 90.
[243] Stephen Smith, *Contract Theory* (Oxford University Press 2004) 90-91.
[244] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 9.85.

could not have known of the legal significance of a forfeiture notice.[245] In *Franco v Sciaroni*,[246] a combination of acts done by the plaintiff such as contributions to the purchase price of a property, the taking out of a re-mortgage and spending considerable time and effort in organising the refurbishment of the property could only lead to the conclusion that he expected to receive a half-share in the property. In *Jones v Jones*, the court deduced the extent of the defendant son's expectation – to have an entitlement to a property for the rest of his life – from what he had done, which included giving up his work to work on the property, moving house, making improvements to the property and making a large payment which was stated to be for the purchase price, even though it was one-quarter of the full value of the property and it was made to the defendant's father.[247]

Inferences as to reliance have also been made in the Irish decisions. In *McDonagh v Denton*, O'Sullivan J held against the plaintiff's estoppel claim but remarked that it was 'obvious' that the plaintiff would not have made a sale agreement without clarifying an issue as to ownership, had a challenge been made at an earlier stage (*ie* had the defendant withdrawn his implied assurance that the land was not his beneficially). The estoppel claim failed, however, because the detriment was insufficiently substantial and had in any event begun before the assurance was made.[248] In *Owens*, Hardiman J, in holding that an estoppel had been established by the existence of sufficient detriment, noted that the defendant 'may well' have anticipated objections from the plaintiff or that the plaintiff would have acted differently in requesting certain conditions.[249] In *A v C*, conversely, in which there had been not been an assurance or expectation to the effect that there would be a future grant of property, Laffoy J inferred other, 'reasonable' motives for the plaintiffs' incurring some detriment.[250]

It may be concluded from the foregoing that certain cases allow, as commentators have explained, for an inference of prima facie reliance to be made. The trial judge in *Ottey v Grundy* stated that '[t]he revocation of a promise is in terms of human reaction likely to have a far more devastating effect than the failure to make that

[245] *Hammersmith and Fulham BC v Tops Shop Centres Ltd* [1990] Ch 237 (Ch).
[246] *Franco v Sciaroni* (Ch, 12 December 2002).
[247] *Jones v Jones* [1977] 1 WLR 438 (CA).
[248] *McDonagh v Denton* [2005] IEHC 127.
[249] *Owens v Owens* (HC, 2 April 2004).
[250] *A v C* [2007] IEHC 120.

promise in the first place,' and added: '[n]ot to raise the cup is one thing, to dash it from one's lips is very different.'[251] A reliance element in a three-part test is unhelpful in any event. If the reliance is uncertain, then the court must investigate into reliance and does so by making inferences. If there is no question as to reliance, then consideration of this element is unnecessary.

It seems that, in cases such as *Wayling v Jones*, it ought to be difficult to prove that there was detriment caused principally by a belief in a future grant of property, and it ought to be easier to accept that such detriment may have been motivated by other, personal, affective reasons which should not, of themselves, lead to the grant of relief in court. It might therefore be dangerous to analyse substantial detriment in isolation. If an inference test were to be combined with a substantiality test of detriment such as that in *Gillett v Holt*,[252] a first step towards objectivity might be reached.

The inference test has a number of advantages: it provides a shortcut to the reasonableness inquiry, which has been argued above to be the core of equitable estoppel. It equally focuses to a greater extent on the question of causation by focusing not only on proof of the representation and the detriment, but on the probable link between them.

5.4 Chapter conclusions

Two problems have been identified with the three-part test.

First, there are simply too many possible ways of assessing a claim in equitable estoppel. While inducement is emerging as a threshold concept, reasonable reliance exists as a possible limiting factor with two identified meanings. These co-exist with intention, which is capable of three meanings – only the first two of which are relevant in this context – and the three-part test itself.

It is, however, possible to characterise this confusing plethora of concepts as simply a side-effect of there being some unification in England.[253] Thus, the appearance of, and debate about, reasonable reliance (section 5.2.2) may be seen as part of inchoate

[251] *Ottey v Grundy (Andreae's Executor)* [2002] EWHC 2858 (Ch) [36].
[252] *Gillett v Holt* [2001] Ch 210 (CA).
[253] Suggested in section 3.4.

attempts to find overarching principles for equitable estoppel. If this is the preferred interpretation then, perhaps, it ought not to be construed as a criticism of the idea of separate estoppels. This would be particularly so in view of the points in favour of such separation in section 3.3.1.2. Nor, perhaps, would the confusion highlighted then be an indication that the three-part test ought to be abandoned. However, it is submitted that, if there is half-unification, then we should not leave it half-completed. A choice needs to be exercised.

Secondly, it is submitted that the three-part analysis is slightly antiquated. The reliance element is either necessary, but inferred on the basis of the representation or the detriment, or unnecessary and therefore separate consideration of it is irrelevant. The representation element asks threshold issues which may be subsumed: whether there is clarity is the same question as whether the reliance was justifiable. It may be, therefore, that reliance is actually a part of the representation and the detriment inquiries. In turn, the representation inquiry is concerned with inducement. What is sought to be shown is that something was induced: and that something is the detriment.

This is a solid basis for requiring proof of detriment as the first element of a unified equitable estoppel. The absence of such proof would dispense with the case, and no liability would arise. This would be a first step towards achieving the simplicity that is a selling-point of a unified doctrine.

Given what has been found in this chapter, the next logical step would be to require inducement as the catch-all threshold factor, thus dispensing with the multiplicity of tests, and difficulty separating the three traditional elements as they exist. However, reasonable reliance may have some additional helpfulness as a defence, thus a role needs to be found for it strictly as part of the liability inquiry. Given that, where reliance is a cause for concern, the courts have sometimes used a disproof test, this may be a useful starting-point.

We can now define steps (A) and (B) to include, respectively, detriment and inducement, with reasonable reliance as an additional, negative, limiting factor under (B)(i).

Chapter 7 will outline a fuller proposal as to the content of (A) and (B), which meet the requirements for (C).

The final stage is to decide what ought to form part of the remedial inquiry. Thus, the next chapter will explore the best approach to what will become the second and third sub-elements of (C).

A Proposal for a Single Model of Equitable Estoppel

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(Ph.D.)

Volume II

Chapter 6: The remedial response to equitable estoppel

6.1 Introduction

The existence of equitable estoppel reveals a clear willingness on the part of the judiciary to provide redress to claimants who have incurred detriment in reliance on a belief. One would expect that equitable estoppel should fill this gap because of the emphasis that the cases place on establishing detriment. However, a paradox of equitable estoppel is that the remedy is not properly designed for the compensation of the detriment loss. The principle of proportionality, which is extant in England and Ireland, effectively means that the court only assesses the remedial relevance of the detriment if the remedy actually sought by the claimant seems unmeritorious, or at least excessive. Usually, however, the sought remedy does amount to enforcing the expectation. Seeking an expectation measure in estoppel means seeking the making good of the assumption and becoming better off, as opposed to gaining back what one has lost through detriment, which is not becoming worse off, and which (put simply) is expressed by the reliance measure or the restitution measure. The popularity of awards of the expectation measure in estoppel could be interpreted as claimants simply aiming for the best possible prospect of relief, yet the actual remedies granted would suggest that this best possible prospect is in fact standard. While lip-service is paid to ideas of 'minimum equity' or the fulfilment of 'justice,' it will be seen that this in itself does not guarantee that a reliance or a restitution measure will be considered to be appropriate. The High Court of Australia has recently disengaged the remedy in equitable estoppel from the minimum equity principle, which at least gives legitimacy to the frequency with which expectation awards are made there, but does not solve the underlying problems.

Fuller and Perdue defined the three possible measures of relief in contract law as being expectation, reliance and restitution measures. In equitable estoppel, the choice is typically between the first two of these measures. This choice has been expressed as follows:

> [t]he broad choice in remedies is between a reliance-based remedy on the one

hand and expectation-based relief on the other. The former is aimed at putting the plaintiff in the position he or she would have been in if the representation had not been made and relied upon. The latter is designed to fulfill the expectation relied upon by the plaintiff.[1]

Craswell distinguishes reliance damages from expectation damages in the estoppel context on the basis that 'the remedies that are available in tort law seem similar to the reliance remedy in one respect, for both can be described as looking 'backwards,' to return the promisee to the position he would have occupied if he had never had his unfortunate interaction with the other party' while the expectation remedy 'seems more 'forward' looking, as it seeks to move the promisee to the position he would have reached if that interaction had been successfully completed.'[2] Interestingly, he points out that there are 'plausible claims that promissory estoppel - in which the enforceability of promises rests on reliance rather than consideration - grew out of tort law rather than contract, or (at least) out of rules that arose during a time when tort and contract were not distinct.'[3]

A preliminary issue is the doctrinal inconsistency of emphasising a minimum equity principle while tending to hold that the minimum equity means full enforcement, and implicitly stating that this is proportionate. The proportionality principle will be shown to be of dubious value, and a return to the minimum equity as the prime standard will be argued for, at least as a first step towards consistency. This will be developed further in section 6.2.

The tendency to award the expectation measure may initially appear to be linked to estoppel's background as a preclusive doctrine with an all-or-nothing operation. However, it is arguably more closely connected with the way in which conscience has been permitted to operate in this area. Excluding a trend in favour of the maximum remedy, if this can be justified, will lend itself to a unified doctrine on common principles. In stating a preference for a remedy of the minimum equity in a truly minimum sense, redressing reliance loss, two advantages may emerge.

[1] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [77].
[2] Richard Craswell, 'Against Fuller and Perdue' (2000) 67 University of Chicago Law Review 99, 127-128.
[3] Richard Craswell, 'Against Fuller and Perdue' (2000) 67 University of Chicago Law Review 99, 127-128.

The first is that it would enable redress corresponding to detrimental reliance, which was highlighted in section 2.2 as an area requiring further development and which is associated with equitable estoppel. It is suggested that allowing equitable estoppel to develop on a more explicit basis of detrimental reliance would answer some of the questions raised in 1.3.2. This would, it is hoped, enable equitable estoppel to become more useful, and perhaps less susceptible to fallback claims because of knowledge that redress will be limited. The unjust enrichment comparison raised in section 2.2 is taken up again below in section 6.3.1.

The second possible advantage is that the unification of the estoppels that would be achieved by universally mandating a detriment-based remedy would enable simplifying the doctrine, as well as allowing for a more incisive distinction to be made between the preclusive doctrine and the other equitable estoppels, particularly in cases in which they may be pleaded together (see further 7.3.1 and some discussion of the position in cases such as *Collier* below, section 6.3.2).

6.2 The significance of proportionality and comparative views

The remedy in equitable estoppel is consistently emphasised as being for the purpose of doing justice. A comparative analysis between the remedial rule in various jurisdictions will show that potential relief is not limited to enforcing the expectation or reversing the detriment, although the former seems to be preferred by the courts. Nonetheless, the rule in each jurisdiction is generally more narrow and centres on one achievable measure. In England, contrary to what is suggested by the principle of proportionality, the reality is that it is the expectation measure that is more popular. In Australia, where the minimum equity principle is more often emphasised than proportionality, the same position prevails as in England and has no impetus to change, now that remedies have been held in *Sidhu v Van Dyke*[4] not to be fettered by the minimum equity principle. In the US, where the liability in §90 promissory estoppel is reliance-based, empirical studies have shown that expectation damages are more often

[4] *Sidhu v Van Dyke* [2014] HCA 19.

awarded. Thus, the comparative study shows a major defect: this is an inconsistency between measures of compensation which, although coherent with the flexibility which a justice-based rather than principle-based remedy should have, does not shed much light on how the justice basis operates. The inconsistency is so stark that it suggests that justice is perhaps not the operative idea in the remedial analysis.

6.2.1 The remedial basis: a comparative study

6.2.1.1 England and Ireland

That there should be proportionality in principle, '[i]n itself, says nothing about the scale of relief.'[5] Gardner adds that what the term means is 'probably that there must be proportionality between the expectation, the detriment *and the outcome*.'[6] The principle of proportionality had appeared in *Commonwealth of Australia v Verwayen*[7] and it was favoured by Robert Walker LJ on numerous occasions, the most celebrated of which is *Jennings v Rice*.[8] While the principle has been used in proprietary estoppel cases, nothing ought to prevent its application to other equitable estoppels. It may seem self-evident that with promissory estoppel the redress sought is the honouring of the promise, yet this is not necessarily the only way in which a claimant can be satisfied. The same might be said of estoppel by convention with respect to an assumed state of affairs. In situations in which either of these estoppels is pleaded against the background of an incomplete contract, nothing ought to prevent that the achievement of a proportionate response should find favour with the courts, rather than one that allows for the resuming of a promise, a convention, or an assumption which may operate unfairly on the party now seeking to resile. In fact, it is argued that equity favours this response above an expectation-fulfilling response. The same argument equally applies to estoppel by representation. Given, in particular, the equitable nature of non-proprietary estoppel, a remedy which purports to effect equitable ideas of fairness and justice should not at this point of the doctrine's development be excluded.

[5] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 498.
[6] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 498.
[7] *Commonwealth v Verwayen* (1990) 170 CLR 394, 95 ALR 321.
[8] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8.

In *Sledmore v Dalby*, Hobhouse LJ referred[9] to the definition of the principle of proportionality in *Verwayen*[10] by Mason CJ: '[a] central element of that doctrine [equitable estoppel] is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption.' Hobhouse LJ commented: '[t]his is to say little more than that the end result should be a just one having regard to the assumption made by the party asserting the estoppel and the detriment which he has experienced.'[11] The cases of *Bawden v Bawden*[12] and *Campbell v Griffin*[13] were decided respectively before and after *Sledmore*[14] and likewise showed support for proportionality. However, it was not until *Jennings v Rice* that the principle came to the fore.

From that case, it is apparent that proportionality does not strongly limit the available remedy. It arises at two distinct stages. First is the determination whether the expectation was 'uncertain, extravagant or out of all proportion'[15] to the detriment. If this condition is met, proportionality is applied again and it is asked whether the equity 'should be satisfied in another (generally more limited)' way.[16] Mee's statement that 'the proportionality issue requires a comparison of the extent of the (net) detriment with the extent of the expectation remedy'[17] arises at this second stage. The outcome according to Gardner, who argues that the aim of proportionality is to redress unconscionability, 'will therefore normally (it should perhaps be, rather than necessarily) lie between the two in value.'[18] Robertson, on the basis of a survey of English and Australian cases decided between 2002 and 2008,[19] states that in a small number of cases reliance-based relief was granted, commenting that this was done using either a 'mathematical' or a 'broad-brush' formula, and that such cases 'show that the proportionality principle is

[9] *Sledmore v Dalby* (1996) 72 P & CR 196 (CA) 208-209.
[10] *Commonwealth v Verwayen* (1990) 170 CLR 394, 95 ALR 321 [36].
[11] *Commonwealth v Verwayen* (1990) 170 CLR 394, 95 ALR 321.
[12] *Bawden v Bawden* [1997] EWCA Civ 2664.
[13] *Campbell v Griffin* [2001] EWCA Civ 990, (2001) 82 P & CR DG23.
[14] *Sledmore v Dalby* (1996) 72 P & CR 196 (CA).
[15] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [50].
[16] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [50].
[17] John Mee, 'Proprietary estoppel and inheritance: enough is enough?' [2013] Conv 280, 292.
[18] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 500.
[19] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295 n 3.

playing an important role in the determination of relief in proprietary estoppel cases.'[20] Such 'more limited relief' was 'necessary' in this limited number of cases 'in order to give effect to the minimum equity principle.'[21] A high threshold is suggested by the words 'uncertain, extravagant or out of all proportion.' This at least prevents claiming an entitlement to an exaggerated or inflated remedy merely on the basis that there has been some detriment. However, situations that do not reach this extreme will not trigger proportionality. The language used in *Jennings v Rice* is equivocal. Robert Walker LJ states that, if the expectation is disproportionate in this way, the court 'can and should recognise' that the remedy 'should be satisfied in another (generally more limited)' way,[22] but that even this permission to consider a remedy less than the expectation does not mean that a court should abandon expectations completely and look only to the detriment. This comment appeared to relate to the acknowledgement by Robert Walker LJ that it can be difficult to quantify detriment,[23] yet, in view of the other language used, it obviously does not restrict the imposition of an expectation measure only to those situations in which the detriment is difficult to quantify.

Proportionality, it is argued, really involves an assessment of the reliability of the representation. Although it is possible for an expectation to seem unreasonable for estoppel purposes, it seems odd to answer this question once the equitable estoppel has already been established and to hold that what was a sufficient representation to induce justifiable reliance – on a reasonable expectation – in one part of the inquiry is actually 'uncertain, extravagant or out of all proportion' in the later part of the inquiry. However, Lord Walker has written extra-judicially that 'the more ambiguous the quid pro quo… the more likely the court will be to grant a remedy less generous than the expectation interest,' but this is only as the quid pro quo itself tends towards disproportion with the detriment actually suffered.[24] In theory, the presence of a sufficient representation has already been established at the liability stage, which should make it unlikely for a claimant at the remedial stage to exaggerate the representation as such. Further, Gardner states that it is 'perfectly possible for a successful estoppel claim to arise in

[20] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 300.
[21] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 300.
[22] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [50].
[23] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [51].
[24] Robert Walker, 'Which Side "Ought" to Win?–Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229, 239.

circumstances where the claimant's detriment, or expectation, or both, cannot be valued.'[25] As Roberston says, '[t]he move towards a concern with fulfilment of equities, and towards flexibility in the fulfilment of an equity, began in the cases where the representor's assumptions or expectations were uncertain, and so expectation relief could not easily be determined.'[26]

The emphasis here is that uncertain or disproportionate expectations are unlikely to arise in so-called bargain cases, hence proportionality enters the equation in other kinds of case: as Bright and McFarlane put it, '[p]roportionality has a more prominent role in these cases as the parties have not planned that B should receive his expected right as part of an actual or eventual agreement.'[27] Thus, not only is there a problem in that proportionality measures the reliability of the representation while only being said to apply to the appropriate remedy, but, also, the accurate valuation of the remedy may not even be a realistic goal in some cases. On a close reading of *Jennings v Rice*, the incompatibility threshold would seem to be rarely achieved. The language is permissive rather than prescriptive: when the expectation is utterly unreal, the court then has the option of considering other possibilities, despite the 'move away from the automatic enforcement of expectations'[28] which *Jennings v Rice* represented.

It needs to be asked whether proportionality is compatible with the 'minimum equity to do justice' idea brought about in *Crabb v Arun District Council*.[29] In that case, Lord Denning MR said that, once an equity has been raised, the following options are possible to 'prevent a person from insisting on his strict legal rights':

> If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights — then, even though that promise may be unenforceable in point of law for want of consideration or want of writing — then, if he makes the promise knowing or

[25] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 498.
[26] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805, 810.
[27] Susan Bright and Ben McFarlane, 'Proprietary estoppel and property rights' [2005] CLJ 449, 462.
[28] Susan Bright and Ben McFarlane, 'Proprietary estoppel and property rights' [2005] CLJ 449, 454.
[29] *Crabb v Arun District Council* [1976] Ch 179 (CA).

> intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise… Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights — knowing or intending that the other will act on that belief — and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement, but on words or conduct.[30]

The 'minimum equity to do justice' was meanwhile stated by Scarman LJ to be the correct principle.[31] The remedies awarded did not greatly differ amongst the Lords Justices. While *Crabb* only represented one step in the elucidation of the minimum equity principle, it has been subject to further interpretation. Bright and McFarlane have said that the use of proportionality 'supports the view that the purpose of proprietary estoppel is to protect B's reliance: making a proportionate award, like finding the 'minimum equity to do justice to [B]' entails recognizing that B has a right which adequately protects his reliance, but goes no further.'[32] The two principles are thus linked to each other as well as to the reliance measure. However, providing the expectation measure as the starting-point may well be a way of minimally doing justice. As Robertson has said, the reference in *Crabb* to the minimum equity 'could be construed as a reference to the minimum relief necessary to prevent the representee suffering detriment as a result of his or her reliance, or as the minimum relief necessary to fulfill the representee's expectation.'[33] He has later said, though, that 'the minimum equity principle requires the courts to go no further in granting relief than is necessary to prevent reliance loss.'[34]

Further, while expectation-based relief appears from *Jennings v Rice* to be the standard in proprietary estoppel, the possibility of equating the expectation with the

[30] *Crabb v Arun District Council* [1976] Ch 179 (CA) 187.
[31] *Crabb v Arun District Council* [1976] Ch 179 (CA) 198.
[32] Susan Bright and Ben McFarlane, 'Proprietary estoppel and property rights' [2005] CLJ 449, 453-454.
[33] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805, 816, citing J Heydon, W Gummow and R Austin, *Cases and Materials on Equity and Trusts* (2nd edn, Sydney: Butterworths 1982) 307; *Waltons Stores* (1988) 164 CLR 387, 19-27 (Brennan J); *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472 (Priestley JA) for the first point (n 79).
[34] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 303.

minimum equity was not expressly made. It is therefore perhaps an indication that the idea of a class of cases in which a default minimum remedy is appropriate was not considered at all in that case. However, Robert Walker LJ said of the minimum equity idea in *Crabb* that it 'must no doubt be read in the context of the rather unusual facts of that case, but it does not stand alone.'[35] Robertson refers to 'the minimum equity or proportionality principle,' according to which 'the purpose of the remedy is to prevent the claimant from suffering harm as a result of his or her reliance'[36] and the remedy 'goes no further than is necessary to protect against detriment because the prevention of detriment removes an essential element of the equity, and thereby extinguishes the claim.'[37] Thus, since the minimum equity operates to prevent detriment, it seems that it is the meaning of preventing detriment in each case which varies the minimum equity, and so it is not necessarily tied to reliance-based relief, although this would be possible were the meaning of preventing detriment to be construed less favourably to the claimant. In other words, the prevention of detriment need not mean granting more than is necessary to put the claimant in the same position she would have been in had it not been for her reasonable reliance.

It is submitted that the minimum equity is inconsistent with proportionality to the extent that the operation of proportionality has a tendency to lead to the award of an expectation-based remedy. In *Naylor v Maher*, the defendant submitted that the relief must be the 'minimum required to satisfy the plaintiff's equity to the lands which had been established,'[38] which, being opposed to the plaintiff's expectation-based claim, indicates that the expectation is the maximum. Pawlowski states that 'the *maximum* extent of the equity is to have made good the expectations of the claimant.'[39] Thus, either the minimum equity standard no longer applies, or it is an awkward alternative to proportionality. The former cannot be said to be true in Ireland. In *Naylor v Maher*,[40] the

[35] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [48]. Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805, 816 n 80: 'on the facts of *Crabb*, the detriment suffered by the representee as a result of his reliance on the representation probably exceeded the value of the expectation, justifying the grant of expectation relief even on a reliance based approach' citing J Heydon, W Gummow and R Austin, *Cases and Materials on Equity and Trusts* (4th edn, Sydney: Butterworths 1993) 421.
[36] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 296.
[37] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 296.
[38] *Naylor v Maher* [2012] IEHC 408 [358].
[39] Mark Pawlowski, 'Satisfying the equity in estoppel' (2002) 118 LQR 519, 520 (emphasis in original).
[40] *Naylor v Maher* [2012] IEHC 408.

reference to the correct measure (albeit according to the defendant's submission) was in terms of 'the minimum required' on the basis of *Gillett v Holt*,[41] and the appropriate award was considered to be to 'implement the promise in respect of the remaining lands' that had not been sold to third parties or been part of the land by which the total had been reduced since the promise was first made,[42] while, in *Coyle v Finnegan*,[43] Laffoy J referred[44] to the holding in *Gillett v Holt*[45] that the minimum equity required a transfer of the freehold of a farmhouse in addition to a lump sum. The relief awarded in *Coyle v Finnegan* involved two of Robertson's examples of reliance-based remedies:[46] in Laffoy J's view, 'equity require[d]' in the instant case reasonable remuneration for the plaintiff's services and that he obtain some kind of security over land. She referred with approval to the suggestion in *McCarron v McCarron*[47] that, in her words, 'a charge or lien on the lands for a sum equivalent to reasonable remuneration for services rendered might constitute adequate compensation'[48] and held that this was appropriate in the instant case.[49] On the other hand, the possible inconsistency of an expectation-based award made pursuant to a minimum equity standard in *Pascoe v Turner*[50] was said by Robertson to be based on the English principle of the minimum equity, distinguishable from the Australian principle because in England it conferred a broad discretion to do justice as opposed to the Australian principle, which allows for 'the minimum necessary to prevent detriment being suffered by the representee as a result of his or her reliance on the representor's conduct.'[51]

The importance of defining a clear and consistent meaning of proportionality is a constant in this chapter. The influence of *Jennings v Rice*, it is submitted, ought to be attenuated as academic writings continue to question some of the legitimacy of the judgment, not least by Lord Walker himself. Mee notes that the dichotomy which Robert

[41] *Naylor v Maher* [2012] IEHC 408 [358].
[42] *Naylor v Maher* [2012] IEHC 408 [412].
[43] *Coyle v Finnegan* [2013] IEHC 463.
[44] *Coyle v Finnegan* [2013] IEHC 463 [26].
[45] *Gillett v Holt* [2001] Ch 210 (CA).
[46] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805.
[47] *McCarron v McCarron* (SC, 13 February 1997).
[48] *Coyle v Finnegan* [2013] IEHC 463 [35].
[49] *Coyle v Finnegan* [2013] IEHC 463 [35], [39].
[50] *Pascoe v Turner* [1979] 1 WLR 431 (CA).
[51] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805, 845.

Walker LJ proposed in *Jennings v Rice*, that between cases involving a bargain and cases in which there is disproportion, is 'a strange one' and compares it with dividing 'the class of all animals into (i) cats and (ii) those animals which are not mammals.'[52] Lord Walker has since written extra-judicially that a class of cases with an initial 'clear bargain' of assistance for an expectation would be rare: noting Gardner's assertion that very few cases fit nearly into either category,[53] he added that the making of such clear bargains in the assistance context 'is not how human nature works.'[54] Nonetheless, given that the English courts have not expressly rejected the minimum equity principle, [55] it remains the case that the proportionality principle needs to be employed in tandem with the idea of the minimum equity to do justice. A reliance measure, although potentially minimal as well as just in many cases, was ruled out in *Jennings v Rice* as representing the only possible measure in England.

To sum up, the standard essentially remains the expectation measure, with proportionality coming into effect at two distinct stages of the remedial inquiry: first, to rule out expectations that perplex the court, and, secondly, in such cases to give permission to the court to vary the remedy downwards from the expectation. Other than stating that the remedy 'should be satisfied in another (generally more limited) way,' the courts have full discretion, or stated another way they have very little guidance. This presents the potential for proportionality to be inconsistent with the minimum equity to do justice, because the statement of what proportionality means is too equivocal on which circumstances will lead to an award of something other than the expectation measure.

6.2.1.2 Australia and New Zealand

Two Australian cases provided the inspiration for the emergence of proportionality in England and hence in Ireland, while more focus has been given in Australia to the minimum equity principle. Robertson states that the latter is restricted to

[52] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 393-394.
[53] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 495.
[54] Robert Walker, 'Which Side "Ought" to Win?–Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229, 239.
[55] Hilary Biehler, 'Remedies in cases of proprietary estoppel: towards a more principled approach?' (2015) 54 Irish Jurist 54, 94.

what is necessary to prevent detriment[56] but, again, his view is that in the 'great majority' of Australian as well as English cases[57] 'it is necessary to fulfill the claimant's expectations in order to ensure that he or she suffers no reliance loss.'[58] Australian and English law thus suffer from the same problem. The minimum equity requires, in Robertson's view, remedying the reliance loss, which in most cases must be done instead by giving effect to the expectation rather than by compensating the detriment. This will often happen, Robertson says, because the latter is of unknown value. However, he says, there remains an ability to choose a remedy corresponding instead to the minimum equity or reliance loss, which is enabled by the operation of proportionality. A recent change is that the minimum equity has been ruled as being non-mandatory by the High Court of Australia, but, given the results found by Robertson, what this will mean in practice is uncertain.

It has been said that 'the minimum equity principle meant that courts would not go beyond what was necessary to counter the unconscientiousness.'[59] The *Verwayen* decision was said to introduce the 'significant development' of a reliance-based approach.[60] Pawlowski has asserted that proportionality was a 'key feature' of the 'detriment-orientated' principle propounded by Mason CJ in *Verwayen*.[61] That detriment-orientated principle meant that the purpose of this doctrine is 'protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted.'[62] The key feature of proportionality, according to Pawlowski, means that 'there must be a proportionality between the remedy and the detriment which is its purpose to avoid.'[63] The plaintiff in *Verwayen*[64] had suffered injury in a collision between naval vessels and he sued the Commonwealth for damages, alleging in this respect that the Commonwealth was estopped from reneging on its previously stated position that it would waive its right to rely on the Statute of

[56] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805, 845; Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 303.
[57] Of those he surveyed in 2008.
[58] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 303.
[59] Wei Wen, 'Contractual damages and post-*Sidhu* proprietary estoppel: A further blow to the Statute of Frauds?' (2015) 5 Property Law Review 32, 35.
[60] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805.
[61] Mark Pawlowski, 'Proprietary estoppel – satisfying the equity' (1997) 113 LQR 232, 236.
[62] *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7, (1988) 164 CLR 387, 419 (Brennan J).
[63] Mark Pawlowski, 'Proprietary estoppel – satisfying the equity' (1997) 113 LQR 232, 236.
[64] *Commonwealth v Verwayen* (1990) 170 CLR 394, 95 ALR 321.

Limitations for the purposes of the litigation. The last judgment, given by Mason CJ, repeated the detriment-prevention idea extant in the case law while acknowledging that equitable estoppel (rather than the common law kind with which Dixon J had been concerned) had evolved to provide a remedy 'which will often be closer in scope to the detriment suffered in the narrower sense.'[65]

The High Court case of *Giumelli v Giumelli*[66] made several references to *Verwayen* yet it did not mention proportionality at any stage. The appellants in *Giumelli* sought to vary the relief ordered, which was for the creation of an interest in the portion of land promised to the respondent by his father and the transfer of that interest to him. The appellants claimed that, on the basis of *Verwayen*, the court below should not have ordered relief which went beyond the reversal of detriment.[67] The High Court stated that *Verwayen* was 'not authority for any such curtailment of the relief available in this case'[68] but it did extensively quote from that case, and ultimately restricted the relief available to the respondent. It set aside the orders of the court below awarding the lands which were the subject of the promise, and it ordered the payment of a sum representing the value of the lands.[69] In 2008, Dodds-Streeton JA remarked in *ACN*[70] that 'nothing which their Honours said in *Giumelli* suggests that there was any change from the view expressed in *Verwayen* that the doctrine of equitable estoppel enables a court to do what is required to avoid detriment to the party who has been induced to act upon an assumed state of affairs, and thus that the relief required in a given case may be less than making good the assumption.'[71] He continued, 'since *Giumelli*, in the majority of commercial cases not involving the acquisition of a real interest in property in which the doctrine of equitable estoppel had been invoked, the relief accorded it has been no more than was necessary to avoid detriment.'[72] While in *Donis v Donis*[73] the view on the

[65] *Commonwealth v Verwayen* (1990) 170 CLR 394, 95 ALR 321.
[66] *Giumelli v Giumelli* [1999] HCA 10, 196 CLR 101.
[67] *Giumelli v Giumelli* [1999] HCA 10, 196 CLR 101 [33].
[68] *Giumelli v Giumelli* [1999] HCA 10, 196 CLR 101 [33].
[69] *Giumelli v Giumelli* [1999] HCA 10, 196 CLR 101 [58].
[70] *ACN 074 971 109 v The National Mutual Life Association of Australasia* (2008) 21 VR 351.
[71] *ACN 074 971 109 v The National Mutual Life Association of Australasia* (2008) 21 VR 351,394 (Dodds-Streeton JA). See P Radan and C Stewart, Principles of Australian Equity and Trusts (2nd edn LexisNexis 2012) para 12.65.
[72] *ACN 074 971 109 v The National Mutual Life Association of Australasia* (2008) 21 VR 351,394 (Dodds-Streeton JA). See Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (J D Heydon, M J

remedy in proprietary estoppel was that the only way to fulfill the assumption was to make it good, subject to the effect of this on third parties,[74] in *Young v Lalic*[75] a charge on property for the claimant's contribution to its construction was said to be enough, a remedy which Robertson attributed to 'the limited, quantifiable nature of the claimant's reliance and the clear disproportion between the reliance and expectation interests,' making this a 'neat example of an uncontroversial application of the minimum equity principle.'[76]

Sidhu v Van Dyke[77] has introduced some uncertainty by allowing a court not to employ the minimum equity principle. The editors of *Meagher, Gummow and Lehane* say of the position prior to this decision that '[t]he assumption is that a prima facie entitlement to fulfiment of the expectation or promise applies only in the case of proprietary estoppels,' but that *Sidhu* 'may require that assumption to be revised.'[78] The following statement in *Waltons Stores*, referring in turn to the *Grundt* case,[79] was cited:[80] 'The protection which equity extends is analogous to the protection given by estoppel in pais to which Dixon J referred in *Grundt v Great Boulder*, ie, protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted.'[81] The Court then noted[82] that the statement of Dixon J on 'the basal purpose of the doctrine,' that is, 'to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting,'[83] had been applied in Australia as well as in *Gillett v Holt* in England. The Court further noted that '[t]he requirements of good conscience may mean that in some cases the value of the promise

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Leeming, P G Turner eds, 5th edn, LexisNexis Butterworths 2015) para 17-285; P Radan and C Stewart, *Principles of Australian Equity and Trusts* (2nd edn LexisNexis 2012) para 12.65.

[73] *Donis v Donis* (2007) 19 VR 577.

[74] *Donis v Donis* (2007) 19 VR 577, 582-83, quoted in P Radan and C Stewart, *Principles of Australian Equity and Trusts* (2nd edn LexisNexis 2012) para 12.62.

[75] *Young v Lalic* [2006] NSWSC 18.

[76] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 304.

[77] *Sidhu v Van Dyke* [2014] HCA 19.

[78] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (J D Heydon, M J Leeming, P G Turner eds, 5th edn, LexisNexis Butterworths 2015) para 17-285.

[79] *Grundt v Great Boulder Pty Gold Mines* [1937] HCA 58, (1937) 59 CLR 641.

[80] *Sidhu v Van Dyke* [2014] HCA 19 [79].

[81] *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7, (1988) 164 CLR 387, 418-419.

[82] *Sidhu v Van Dyke* [2014] HCA 19 [81].

[83] *Grundt v Great Boulder Pty Gold Mines* [1937] HCA 58, (1937) 59 CLR 641, 674-675.

may not be the just measure of relief,'[84] referring to the statement of Deane J in *Verwayen* that '[t]here could be circumstances in which the potential damage to an allegedly estopped party was disproportionately greater than any detriment which would be sustained by the other party to an extent that good conscience could not reasonably be seen as precluding a departure from the assumed state of affairs if adequate compensation were made or offered by the allegedly estopped party for any detriment sustained by the other party.'[85] It then contrasted a situation in which '[i]f the respondent had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of the appellant's assurances, then it might not be unconscionable for the appellant to resile from his promises to the respondent on condition that he reimburse her for her outlay'[86] with that to which the following statement of Nettle JA in *Donis v Donis* related: 'here, the detriment suffered is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature ... beyond the measure of money and such that the equity raised by the promisor's conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent's actions were based.'[87]

The Court appeared to view the operation of conscience as invalidating the enforcement of expectation in rare cases but mainly requiring the enforcement of an expectation. Conscience arose at two stages: first, to support the basis for expectation relief, and, secondly, as a justification for potentially varying such relief. The comparison with proportionality under *Jennings v Rice* is therefore compelling, and it is notable that that case was nowhere cited in *Sidhu*. The first stage can be seen in the following statement:

> [t]he appellant's argument sought no support from the discussion in cases decided before *Giumelli v Giumelli* of the need to mould the remedy to reflect the 'minimum relief necessary to 'do justice' between the parties.' There may be cases where '[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption'; but in the

[84] *Sidhu v Van Dyke* [2014] HCA 19 [83].
[85] *Commonwealth v Verwayen* (1990) 170 CLR 394, 441 (Dixon J).
[86] *Sidhu v Van Dyke* [2014] HCA 19 [84].
[87] *Donis v Donis* (2007) 19 VR 577 [34].

> circumstances of the present case, as in *Giumelli v Giumelli*, justice between the parties will not be done by a remedy the value of which falls short of holding the appellant to his promises. While it is true to say that 'the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct', where the unconscionable conduct consists of resiling from a promise or assurance which has induced conduct to the other party's detriment, the relief which is necessary in this sense is usually that which reflects the value of the promise.[88]

The second stage followed when the Court stated that 'no reason has been identified by the appellant to conclude that good conscience does not require that the appellant be held to his promises.'[89] The clarity and the 'categorica[l]' nature of the promises were emphasised as rendering this presumption of expectation relief particularly strong.[90] Thus, conscience in Australia operates in a similar fashion to the proportionality principle in England, and appears to run counter to the minimum equity principle. This reinforces the suggestion that the better view is that the minimum equity relates to something approximating the reliance measure.

In tandem with Australian developments, the New Zealand Supreme Court has upheld an expectation-based order by the Court of Appeal in the *Wilson Parking* case. The Court of Appeal upheld the judge's finding that 'there was detrimental reliance'[91] on the part of the defendant, who had 'reasonably relied'[92] on a letter by the plaintiff waiving its right of first refusal in relation to a sale by one of the defendants of a property to a finance company.[93] That sale had been subject to a right for a company associated with the defendant to repurchase it, which he made arrangements to do through another company.[94] Counsel for the defendant submitted that 'any element of unconscionability could be satisfied if equitable damages were awarded to reimburse [the company] Fanshawe for the expenditure and liability incurred in reliance on the waiver letter'[95]

[88] *Sidhu v Van Dyke* [2014] HCA 19 [85].
[89] *Sidhu v Van Dyke* [2014] HCA 19 [86].
[90] *Sidhu v Van Dyke* [2014] HCA 19 [85], [86].
[91] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [64].
[92] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [66].
[93] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZSC 173 [2].
[94] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZSC 173 [3].
[95] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [69].

and, further, that the order of specific performance made by the judge was disproportionate.[96] The Court alluded to the 'change'[97] from focusing on 'the removal of detriment (if that term is construed in a narrow sense) to an inquiry into what is necessary in all the circumstances to satisfy the equity arising from a departure from the expectation,'[98] which had been emphasised in the case of *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd*.[99] The Court also referred[100] to the New South Wales Court of Appeal decisions of *Delaforce v Simpson Cook*[101] and *Milling v Hardie*,[102] both of which applied the same approach. In the former case, Handley AJA stated that there was no principled starting point other than the expectation,[103] while Allsop P said that the apparent disregard by the High Court of a minimum equity requirement in *Giumelli* 'does not make irrelevant matters that can assuage the detriment… It does mean, however, that relief in such cases is not to be measured by weighing detriment too minutely in order that it be converted into some equivalent of cash or kind, as if one were measuring the consideration for a commercial bargain.'[104] The Court then added that, first, 'the clearer and more explicit the assurance is, the more likely it is that a court will be willing to grant expectation-based relief.'[105] Secondly, the Court said, 'the greater the degree and consequences of detrimental reliance by the claimant, the more likely it is that the court will be prepared to hold the defendant to the promise rather than make an award (generally of a more limited nature) designed to compensate for reliance-based losses,'[106] and, finally, unconscionability seemed to be regarded as imposing a measure of control as the Court said that the 'aim is not to satisfy the claimant's expectation (although that may be what the relief requires in appropriate cases) but to satisfy the equity that has arisen in the claimant's favour.'[107] It was emphasised that some authorities still maintained the minimum equity view with 'more recent cases' looking at

[96] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [70].
[97] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [74].
[98] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [73].
[99] *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA) 549.
[100] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [100]-[102].
[101] *Delaforce v Simpson Cook* [2010] NSWCA 84.
[102] *Milling v Hardie* [2014] NSWCA 163.
[103] *Delaforce v Simpson Cook* [2010] NSWCA 84 [90]-[92].
[104] *Delaforce v Simpson Cook* [2010] NSWCA 84 [3].
[105] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [115].
[106] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [115].
[107] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [116].

a broader idea of relief.[108] The Court supported the arguments made here in relation to the true position where proportionality is applied; hence, it said that expectation-based relief was unlikely where an expectation 'is seriously disproportionate to the detriment suffered' because this risked overcompensation.[109]

The Court did 'not consider it is appropriate to adopt a presumptive or prima facie approach one way or the other' as this would 'not be consistent with the flexible approach to equitable remedies consistently emphasised in the cases,'[110] while acknowledging that a prima facie detriment-based remedy was the Australian position at the time.[111] The Court did not accept any of the grounds outlined in *Butler's* textbook supporting a detriment-based remedy.[112] The Court noted the detriment acts of incurring $40,000 in expenditure on consultants and assuming an obligation of $500,000 in respect of financing costs, in addition to the co-defendant's 'considerable time and effort.'[113] Meanwhile, the plaintiff's conduct had been 'plainly opportunistic.'[114] The Court held that a payment of equitable compensation would not address the unconscionable conduct of the plaintiff because of the substantial losses, the circumstances including time and effort which rendered a mathematical approach inappropriate, the value of the expectation not representing a windfall but an equity in the property, and the injustice of allowing the plaintiff to take advantage of the situation.[115] The Supreme Court refused leave to appeal:[116] while they 'recognise[d] that there is scope for debate about aspects of the underlying principles, and particularly as to whether the starting point should be the avoidance of detriment,' they viewed this case as 'primarily turn[ing] on the application of broad principles to some very particular facts.'[117] Because of this and the lack of any

[108] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [117].
[109] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [118].
[110] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [119].
[111] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [120].
[112] James Every-Palmer, 'Equitable Estoppel' in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd edn, Thomson Reuters 2009) para 19.6.2. These are consistency with the need to show detrimental reliance and the ability of the representor to avoid estoppel by giving sufficient notice to avoid the detriment; the threat of blowing away the doctrine of consideration by 'elevat[ing] non-contractual promises to the level of contractual promises,' as Brennan J cautioned against in *Waltons Stores v Maher* (1988) 164 CLR 387 [32]; and a concern with an 'unjustifiable windfall' as mentioned in *National Westminster Bank plc v Somer International (UK) Ltd* [2001] EWCA Civ 970, [2002] QB 1286 [30] (Potter LJ).
[113] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [128].
[114] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [129].
[115] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [132].
[116] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZSC 173 [11].
[117] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZSC 173 [10].

'point of general or public importance or of general commercial significance,'[118] there was no basis on which to grant leave to appeal.

It is submitted that the result in this case, and particularly the Supreme Court's assessment of whether leave to appeal should be granted, would not have been altogether different from that advanced in this thesis in view of the special facts, which include the plaintiff's egregious conduct. The Court of Appeal's nuanced approach in enumerating a list of relevant factors is to be welcomed, even if its denial of any prima facie basis of relief is not convincing. Its statement of principle is interesting in that it considered a wide range of authority and seemed to indicate that a flexible approach was preferable to a prima facie detriment-based approach, on the basis that the former would allow expectation-based relief where this was fair, while the latter, it is implied, would be less likely to do so. Further, the latter was said to be inconsistent with the usual flexible treatment of equitable remedies. Under the model proposed here, this lesser likelihood arises because fairness may not in every case require expectation-based relief. The approach here is one which more easily applies to a wider range of contexts beyond the typical *Gillett* or *Thorner* scenario and so is capable of including all estoppels in equity within its reach.

6.2.1.3 United States

In general, damages are available on a discretionary basis as an award in respect of §90 promissory estoppel. It has been said that the relief should be that which 'minimally avoid[s] injustice,'[119] applying the 'justice' requirement of §90. However, it is the expectation basis that is most often enforced.[120] The relief is often a choice between expectation damages and reliance damages, which choice has been said to be based on corrective justice.[121] DeLong has stated that, '[a]lthough plaintiffs rarely succeed, when they do they can recover expectation damages.'[122] Courts have, however, awarded

[118] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZSC 173 [10].
[119] *Cohen v Cowles Media Co* 479 NW2d 387 (Minn 1992).
[120] Edward Yorio and Steve Thel, 'The Promissory Basis of Section 90' (1991) 101 Yale Law Journal 111, 113-114.
[121] Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89(1) St John's Law Review 55.
[122] Sidney W DeLong, 'The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22' [1997] Wisconsin Law Review 943, 980.

reliance damages on the basis that the expectation would be too speculative,[123] or even on the basis that the award in §90 was intended to lead to relief in the reliance measure rather than in the expectation measure.[124] The explicit reference to 'justice' as grounding the remedy in §90 has been criticised for its vagueness:

> [w]hen does "justice" require the partial enforcement of the promise? The Restatement's answer is fuzzy and this has bothered some commentators. From the comments and illustrations, one concludes that the court must mold 'justice' to fit the particular transaction in context and that there is a predisposition toward partial enforcement.[125]

Jiménez, writing in 2010, has argued that the well-known articles by Farber and Matheson,[126] and Yorio and Thel[127] 'may no longer accurately reflect the way judges decide promissory estoppel cases today' on the basis that those authors had been writing about §90 of the *Restatement (First) of Contracts*.[128] The *Restatement (Second)*, as Jiménez notes, incorporated two significant changes: the first was the removal of the requirement that the reliance be of 'a definite and substantial character,' while the second was the addition of the new flexible basis for relief: '[t]he remedy granted for breach may be limited as justice requires.'[129] It is noteworthy in this regard that Hogg has pointed out[130] that §90 of the *Restatement (Second)* was passed subsequent to the decision in *Hoffman v Red Owl Stores Inc*,[131] in which reliance damages were awarded in respect of promissory estoppel: thus, as Fried has said, 'Red Owl was held liable not in

[123] Sidney W DeLong, 'The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22' [1997] Wisconsin Law Review 943, 980, citing Farber and Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake" (1985) 52 University of Chicago Law Review 903 and Edward Yorio and Steve Thiel, 'The Promissory Basis of Section 90' (1991) 101 Yale Law Journal 111, 147-148.
[124] Sidney W DeLong, 'The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22' [1997] Wisconsin Law Review 943, 978 n 113 citing *Neiss v Ehlers* 899 P 2d 700 (Or Ct App 1995).
[125] Richard E Speidel, 'The Borderland of Contract' (1983) 10(2) Northern Kentucky Law Review 163, 178.
[126] Farber and Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake" (1985) 52 University of Chicago Law Review 903.
[127] Edward Yorio and Steve Thiel, 'The Promissory Basis of Section 90' (1991) 101 Yale Law Journal 111.
[128] Marco J Jimenez, 'The Many Faces of Promissory Estoppel: An Empirical Analysis under the Restatement (Second) of Contracts' (2010) 57 UCLA Law Review 669, 707.
[129] Marco J Jimenez, 'The Many Faces of Promissory Estoppel: An Empirical Analysis under the Restatement (Second) of Contracts' (2010) 57 UCLA Law Review 669, 682-683.
[130] Martin Hogg, *Promises and Contract Law* (Cambridge University Press 2010) 186 n 27.
[131] *Hoffman v Red Owl Stores Inc* 26 Wis 2d 683, 133 NW 2d 267 (1965).

order to force it to perform a promise, which it has never made, but rather to recompense Red Owl for losses he suffered.'[132] McFarlane explains that *Hoffman* is an example of a noncontractual promise enforcement role of §90,[133] in contrast with a contractual role that, he argues, the principle additionally plays in supplementing the *Restatement*'s version of consideration.[134] Hogg notes that the court in *Hoffman* referred to a number of promises and assurances made and 'emphasised that it was not the case that any promise would have to be so comprehensive as to meet the requirements of a contractual offer.'[135] Yet the novel permission in the *Restatement (Second)* 'to award *less* than full expectation damages'[136] appeared not to have been taken up with enthusiasm. Jimenez's survey data 'not only strongly support the expectation hypothesis, but indicate… that these earlier studies may have underestimated the extent to which judges award full contractual damages.'[137] The average percentage of cases in which expectation damages were awarded was 72 compared with Farber and Matheson's finding of 83 percent, in their 1985 study,[138] which Jimenez said actually represented a trend in favour of expectation damages given the new basis for reliance-based relief in the *Restatement (Second).* [139]

The similar trend in estoppel cases in the US, albeit those focused on promises generally (provided they meet the §90 requirements) as opposed to promises or other conduct relating the land, indicates that a similar thought process is at play. Yet it has been argued that §90 has a distinct doctrinal basis, arising in a context in which consideration under the *Restatement* is given a narrower meaning than in English law:

[132] C Fried, *Contract as Promise* (Harvard University Press 1981) 24.
[133] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 112.
[134] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 111; see also Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 630.
[135] Martin Hogg, *Promises and Contract Law* (Cambridge University Press 2010) 186.
[136] Marco J Jimenez, 'The Many Faces of Promissory Estoppel: An Empirical Analysis under the Restatement (Second) of Contracts' (2010) 57 UCLA Law Review 669, 683.
[137] Marco J Jimenez, 'The Many Faces of Promissory Estoppel: An Empirical Analysis under the Restatement (Second) of Contracts' (2010) 57 UCLA Law Review 669, 708.
[138] Farber and Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake" (1985) 52 University of Chicago Law Review 903, 909 n 24: 'The courts addressed the issue of the extent of recovery in 72 of the cases in our data group. In only one-sixth of those cases was recovery limited explicitly to reliance damages. Full expectation recovery was granted in the remaining five-sixths of the cases.'
[139] Marco J Jimenez, 'The Many Faces of Promissory Estoppel: An Empirical Analysis under the Restatement (Second) of Contracts' (2010) 57 UCLA Law Review 669, 709.

McFarlane has pointed out that the 'original purpose' of §90 in the *Restatements* 'was to supplement the limited definition of consideration espoused by Oliver Wendell Holmes and adopted in section 75 of the *Restatement*'[140] and hence (citing Cardozo[141]) became an 'equivalent for consideration.' He contrasts the English version of consideration on the basis that it 'focus[es] not only on whether B had furnished the "price" for A's promise, but asking more generally if A has received some benefit as a result of his promise or if B's action, expressly or impliedly requested by A, has caused B to suffer some detriment.'[142] Similarly, Collins has said that the differences between English and US reasoning in promissory estoppel 'all flow from a greater disposition to accept promissory estoppel as a species of contractual liability equivalent to consideration' on the part of the latter.[143] Both ideas are consistent with Robertson's description of the doctrinal distinction between equitable estoppel and the §90 doctrine that 'the former is based on an induced assumption whereas the latter requires a promise'; he adds that '[i]t is unclear whether this is a difference of substance and whether it has any practical effect on the relative scope of the application of the doctrines.'[144] These arguments raise two propositions for our purposes: first, the tendency seen in this section which operates in favour of an expectation measure of relief is to some extent justified in the US; and, secondly, it may undermine the justification for the same trend in England. On the other hand, this justification, in English (and, by extension, Irish) proprietary estoppel cases has been shown to be based on unconscionability, which Collins points out is a concept which US courts tend to avoid in the §90 context.[145]

However, there is, similarly to the other jurisdictions studied, equally an element of flexibility in the determination of the adequate remedy, and this is by virtue of the 'justice' addition to the section.[146] The courts in the US thus have a discretion to vary the

[140] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 111; see also Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 629-630.
[141] Allegheny College v National Chautaugua County Bank of Jamestown 159 NE 173 (1927) 175.
[142] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 111; see also Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 630.
[143] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 78.
[144] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 211.
[145] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 79.
[146] From §90: '…[t]he remedy granted for breach may be limited as justice requires.'

remedy downwards from the expectation, and this discretion must be exercised in a way that does justice. Essentially, although 'promissory estoppel generally awards expectation damages similar to breach of contract damages, … because of its equitable nature, it gives the court discretion to award reliance damages.'[147] Orit Gan has suggested that the US courts do not have sufficient recourse to this 'justice' addition. He notes that 'the court is not required to actively promote justice in contract formation, but rather to minimally avoid injustice.'[148] This echoes Biehler's division of three recent proprietary estoppel cases into one (*Henry v Henry*[149]) which applied proportionality as a positive principle and two (*Suggitt v Suggitt*[150] and *Bradbury v Taylor*[151]) which applied it negatively.[152] Some of the cases cited by Gan interpret the justice element as giving permission to the court to make a policy decision where this is required. Thus, it appears that the justice jurisdiction in §90 is to be used sparingly. Gan's analysis leads him to call it 'redundant.'[153]

6.2.1.4 Comparative study conclusions

In his article 'Against Fuller and Perdue', Richard Craswell argues that the measures merely represent arbitrary points on a spectrum (of damages) formed of all the interests that the law could feasibly protect, depending on what one wishes the law to do. Even in practice, he says, the three measures are not 'the *only* items on the menu.'[154] Slawson has stated that there is no need for 'symmetry' between the liability aim and the remedy aim,[155] while Craswell goes further than this in stating that 'it is fallacious to suppose that defining the relevant right is itself sufficient to define the appropriate remedy.'[156] This contradicts a core premise of Fuller and Perdue's celebrated article which 'opens with the thought that the law of damages does not really 'measure' something that independently exists; rather, it constitutes a further pursuit of those

[147] Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89(1) St John's Law Review 55, 69.
[148] Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89(1) St John's Law Review 55, 60.
[149] *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988.
[150] *Suggitt v Suggitt* [2012] EWCA Civ 1140.
[151] *Bradbury v Taylor* [2012] EWCA Civ 1208.
[152] Hilary Biehler, *Equity and the Law of Trusts in Ireland* (6th edn, Round Hall 2016) 867.
[153] Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89(1) St John's Law Review 55, 62.
[154] Richard Craswell, 'Against Fuller and Perdue' (2000) 67 University of Chicago Law Review 99, from 137.
[155] W David Slawson, 'The Role of Reliance in Contract Damages' (1990) 76 Cornell Law Review 197, 209-210.
[156] Richard Craswell, 'Against Fuller and Perdue' (2000) 67 University of Chicago Law Review 99, 126.

purposes upon which liability itself is founded.'[157] More than a decade after Craswell's article, however, Zamir's perspective is that 'courts, scholars, and legal educators keep referring to the different interests as useful organising principles of contract remedies' and that 'as Craswell concedes, legal reasoning cannot function without some points of reference' with the apparently arbitrary proportion of 100% expectation (or reliance) damages being 'a natural focal point.'[158] He points out, however, that '[i]nterestingly, none of the major theories of contract law, such as the will theory, economic efficiency, and corrective justice, unequivocally supports any of the interests.'[159]

In the estoppel context, Gardner echoes Craswell in stating that the possible proportionality objective of pitching the remedy somewhere between the expectation and the detriment 'is achieved equally well by the choice of any point between the two poles: there is nothing to make any particular point the "best" one.'[160] More than a method of choosing the appropriate remedy in a particular case, proportionality thus seems to be on Gardner's view, and based on the foregoing case survey, a fourth measure of ill-defined content. It is apparent from Gardner's cited comment that proportionality might only achieve a cursory or purely discretionary remedy, in light of the fact that (as Craswell finds) there is no particular normative need to cement the expectation and reliance measures. The mistake others make, Craswell says, is to take as their 'baseline' the points represented by the expectation and reliance measures without asking what normative assumptions lie behind the choice of baseline. If the three measures identified by Fuller and Perdue can be doubted, the nebulous and (it has been argued above) incorrectly-used idea of proportionality is even more dangerous.

The retention of discretion by the courts in this area obviously allows for the most just and equitable remedies to be given. Given the purpose of redressing unconscionability, Gardner says, 'it is legitimate for the law to make use of a discretion, rather than a rigid rule.' [161] It would be incompatible with the focus placed on

[157] Todd D Rakoff, 'Fuller and Perdue's *The Reliance Interest* as a Work of Legal Scholarship' [1991] Wisconsin Law Review 203, 205.
[158] Eyal Zamir, 'Loss Aversion and the Law' (2012) 65 Vanderbilt Law Review 829, 865.
[159] Eyal Zamir, 'Loss Aversion and the Law' (2012) 65 Vanderbilt Law Review 829, 854, referring (n 106) to Eyal Zamir and Barak Medina, *Law, Economics, and Morality* (Oxford University Press 2010) 294-301, 305-10.
[160] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 499.
[161] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 511.

unconscionability to eliminate this discretion. On that basis, it appears that the basis and quantum of relief should remain in principle discretionary in equitable estoppel. As Gan remarks, '[c]ourts should have broad discretion to award the remedy that justice requires' and they 'should have full [sic] range of contractual remedies to choose from to tailor to the specific case before them,' adding that remedies should not be confined to the binary choice between expectation and reliance damages.[162] But while the need for discretion seems clear, a separate question is whether and to what extent it can be delimited, guided or even, in exceptional cases, removed. Greater principle in this area would lead to further certainty about the purpose and role of equitable estoppel, and would assuage concerns that the doctrine has become so powerful[163] that it needs to be omitted from the discussion altogether.

6.3 Propositions

The survey in this chapter reveals the current state of thought about the principles at work in the remedial stage of an estoppel inquiry, and yet it also shows some of the malaise surrounding it, of which Robert Walker LJ's acknowledgement that his judgment in *Jennings v Rice* was imperfect is particularly noteworthy. Concrete ideas about the appropriateness of a reliance-based remedy will now be outlined.

A default reliance-based remedy is not part of English law, or, as Mee puts it, 'the English courts have been hostile to this approach.'[164] The objections tend to be practical rather than theoretical. Mee has said of the hostility of the English courts to this idea that it 'is presumably based, in part at least, on the complexity of trying to quantify C's detriment, which may not be financial in nature.'[165] That the detriment need not be financial has been seen to derive from *Gillett v Holt*, although it may be noted that much of the detriment in *Gillett v Holt* was indeed quantifiable in financial terms. Mee made the following comment of the flexibility proposed in *Crabb v Arun District Council* in

[162] Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89(1) St John's Law Review 55, 95.
[163] Martin Dixon, 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30(3) Legal Studies 408 has remarked that this might explain the result in the estoppel claim in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752.
[164] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 416.
[165] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 416.

relation to quantum: '[i]t might be argued that, because the relevant issues are complex and the courts were not in a position to state a convincing set of principles to govern the determination of remedies, they fell back on a wide discretion which would allow them to avoid counter-intuitive results without having to explain their reasoning too closely.'[166] It seems that the Court in *Gillett v Holt* may have been doing something similar to this; that is, reserving for itself a future discretion upon which it did not immediately need to rule. One specific proposal is that a default reliance-based remedy might be *made to fit in* with the current law as espoused in *Jennings v Rice*. Mee has said that 'it might not be much of a stretch to recast the court's traditional discretionary approach in terms of the court being required to grant a remedy which is appropriate in light of C's detriment, viewed in conjunction with any other relevant factors of the sort identified by Robert Walker LJ, and which is subject to an upper limit based on the level of the expectation.'[167]

A second proposal that also accords with flexibility is that the eventual remedy may depend on a point on a bargain-to-non-bargain (and possibly therefore an expectation remedy-to-not-disproportionate remedy) spectrum. We saw that a category of estoppel cases which might be said to involve a bargain tended to involve expectation-based awards, and that an alternative basis emerged when estoppels based on uncertain expectations began to appear.[168] The characterisation made by Robertson[169] of *Dillwyn v Llewellyn*[170] and *Ramsden v Dyson*[171] as the forerunners of assumption-based relief was echoed in *Giumelli*.[172] The bargain-based view easily applies to §90 promissory estoppel, which is a contractual doctrine the 'original purpose' of which was 'to supplement the limited definition of consideration espoused by Oliver Wendell Holmes and adopted in section 75 of the Restatement.'[173] This may explain why it has been said that bargain-

[166] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 392.
[167] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 417.
[168] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805, 810-813.
[169] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne Law Review 805, 810-813.
[170] *Dillwyn v Llewellyn* (1862) 4 De GF & J 517.
[171] *Ramsden v Dyson* (1866) LR 1 HL 129.
[172] *Giumelli v Giumelli* [1999] HCA 10, 196 CLR 101 [6]. This was remarked upon in *Sidhu v Van Dyke* [2014] HCA 19 [2].
[173] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 111.

based cases will be rare in cases involving assistants or carers.[174] The English definition of consideration, it has been noted, is 'relatively wide.'[175] Carter has said of contractual 'concepts such as consideration, certainty of agreement and intention to contract' that '[t]he narrower the definition of these concepts under the law of contract the more likely the conclusion that there is no contract.'[176] He adds that 'Australian law may have made two mistakes: in adopting too narrow a definition of consideration; and in the refusal to enforce implied promises to negotiate.'[177] Further to this, Robertson has distinguished his version of 'equitable estoppel' from §90 on the basis that 'the former is based on an induced assumption whereas the latter requires a promise', and he adds that '[i]t is unclear whether this is a difference of substance and whether it has any practical effect on the relative scope of the application of the doctrines.'[178] It has been said that it may be more useful to refer to a spectrum between a bargain and a lack thereof, which indicates that English courts in reality are concerned with a murkier, subcontractual 'regulative penumbra'[179] than are courts in the United States. It is clear that when there is not some fair exchange, a court is free to substitute for the defendant's side something which it was not envisaged that the defendant would give. In theory, the relief need not be the detriment loss: this is not strongly urged by the Court of Appeal in *Jennings v Rice*, by the ability of Australian courts to depart from the minimum equity standard, or by the US commentators who suggest that the reliance measure is potentially arbitrary, as is the expectation measure.

Five years after his decision in *Jennings v Rice*, Lord Walker suggested extra-judicially that in that case he 'would have done better to refer to a spectrum rather than

[174] Robert Walker, 'Which Side "Ought" to Win?–Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229, 239.
[175] Ben McFarlane, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 111, adding that it is similarly wide in New York, in both jurisdictions 'stretching beyond that set out in the Restatements.'
[176] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 40.
[177] John Carter, 'Contract, Restitution and Promissory Estoppel' (1989) 12 University of New South Wales Law Journal 30, 40.
[178] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 211.
[179] James A Henderson Jr, 'Contract's Constitutive Core: Solving Problems by Making Deals' [2012] University of Illinois Law Review 127, 128.

a dividing line.'[180] In *Jennings v Rice* as Robert Walker LJ, in discussing the appropriate remedies for two hypotheses put forward by Gardner[181] he commented that the remedies might be, respectively, fulfilling the expectation as far as possible, and if possible with specific property. Thus, 'the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate.'[182] In his later article critiquing the decision in *Jennings v Rice,* Gardner refers to a category of estoppel cases in which 'it is hard to say whether there was a bargain at all' and in which, 'although the defendant does not require the claimant's acts, he is benefited by them, and freely accepts them.'[183] These cases, he says,[184] include *Greasley v Cooke*,[185] *Re Basham*,[186] *Wayling v Jones*,[187] *Gillett v Holt*,[188] *Campbell v Griffin*[189] and *Jennings v Rice.*[190] Gardner's language is actually suggestive of an unjust enrichment scenario: there does not seem to be much on this basis to distinguish the two other than the idea, more operative in estoppel, that the defendant there 'makes his promise expressly or impliedly in recognition of the claimant's having performed them and continuing to perform them.'[191] Hobhouse LJ in *Sledmore v Dalby* commented that restitution 'is often present in proprietary estoppel,' and, again, that that doctrine 'bears a close relationship to restitutionary principles where one party has acquiesced in or encouraged another in conduct whereby that other at his own expense would have, if no remedy were granted, unjustly enriched the former.'[192]

The discussion of expectation as an element of a 'bargain' in equitable estoppel has therefore come full circle, with Lord Walker later reflecting critically on his bargain-

[180] Robert Walker, 'Which Side "Ought" to Win?–Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229, 239.
[181] Simon Gardner, 'The remedial discretion in proprietary estoppel' (1999) 115 LQR 438.
[182] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [45].
[183] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 496.
[184] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 496.
[185] *Greasley v Cooke* [1980] 1 WLR 1306 (CA).
[186] *Re Basham* [1986] 1 WLR 1498 (Ch).
[187] *Wayling v Jones* (1995) 69 P & CR 170 (CA).
[188] *Gillett v Holt* [2001] Ch 210 (CA).
[189] *Campbell v Griffin* [2001] EWCA Civ 990, (2001) 82 P & CR DG23.
[190] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8.
[191] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 496.
[192] *Sledmore v Dalby* (1996) 72 P & CR 196 (CA) 208, citing *Ramsden v Dyson* (1866) LR 1 HL 129.

or-not dichotomy in his decision in *Jennings v Rice*. Unfortunately, his revised conclusion was that there was no conclusion: so while it would be preferable to aim at making detriment good in some cases (at the non-bargain, more-disproportionate end of the spectrum), it 'may be extremely difficult to quantify in money terms.' [193] What complicates the matter further is that the proportionality doctrine does not seem to correspond to any particular benchmark, [194] but rather represents a variable point between acceptable benchmarks, one that reflects the judge's view of the case and the interests other than those of the person claiming the benefit of an estoppel. However, as Gardner indicates, this point is not classifiable as a benchmark in itself. [195] Such a normative basis as 'the justice of the case' does not correspond to an identifiable point on the line as Craswell's example of '76% expectation interest' does. Even if the courts used an easily identifiable benchmark, this is complicated by the fact that there is a 'factual overlap' between the reliance and restitution interests, or losses.[196]

6.3.1 Justifying the conclusions to the remedial approach

In section 2.2, an outline was provided of the conceptual and practical overlap between equitable estoppel and unjust enrichment, by way of introducing what is arguably a space for further development in terms of redressing loss that is unconscionable, but not recoverable under either tort or contract. In section 3.2.7.2(c), it was seen that a unified doctrine could be considered to be more acceptable were the remedy to be confined to the minimum.

It may not seem that the intuitive response to an inappropriately wide remedial scope in equitable estoppel, requiring more correlation with a reliance measure, is to draw analogies with a doctrine associated with the restitution measure. However, the wide range of comparisons made between the two, seen above, would indicate that unjust enrichment is probably the most appropriate doctrine from which to draw some

[193] Robert Walker, 'Which Side "Ought" to Win?–Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229, 239.
[194] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 498.
[195] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 498.
[196] D Y K Fung, *Pre-contractual Rights and Remedies: Restitution and Promissory Estoppel* (Sweet & Maxwell Asia 1999) 113. Fung notes further that both kinds of losses 'co-exist' in the majority of cases of failed pre-contractual negotiations. Quantum meruit, he says, 'does not indicate unequivocally what type of a remedy it represents.'

enlightenment as to how a (mainly) reliance-based remedy could be influenced by other factors.

Can the theoretical and practical advantages of a reliance-based remedy overcome the preference for an expectation remedy? To answer this question requires examining the reasons for this preference. First, there may be a purely precedential element: the courts have, for various reasons, supported the grant of such remedies in proprietary estoppel (which is here favoured as an influence upon a single doctrine) and if this is more often than not the case it in turn supports further grants of expectation remedies into the future. Secondly, the first element is aided by an understanding of the equitable dimension that tends towards compassion and, even, overcompensation. Writing in 2008, Robertson favoured overcompensation as (in Mee's later words[197]) a proxy for detriment. This understanding is not the only possible understanding of equity's role, and certainly this thesis takes the view that it can equally be informed by an understanding that it is more limited than this. Thirdly, the granting of an expectation remedy is sometimes understood to be easier than at least a detriment-based remedy. The cited concerns about the difficulty of quantifying detriment belong in this category. Mee has said that an approach favouring the grant of the expectation in every case 'would be as certain and easy to apply as one could reasonably hope.'[198]

Given the clear similarities between equitable estoppel and unjust enrichment, and this identification of their possible future development in tandem, inspiration may be taken in appropriate cases from factors identified in relevant unjust enrichment cases, such as those addressing the rendering of services such as *Countrywide Communications*.[199] It is submitted that the analogy between equitable estoppel and unjust enrichment is such that a unified equitable estoppel could function as a cousin of unjust enrichment and which redresses, for its part, reliance-based loss. Such loss would be related to detriment in the senses explored in sections 5.3.2.1 and 5.3.2.2.

[197] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 391.
[198] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 397.
[199] *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324 (QB).

Gordley has stated that US promissory estoppel and contract formation are largely explained by the principle that '[a] promise will not be enforced that *enriches* the promise at the promisor's expense unless the promisor is likely to have made a prudent decision to *enrich* him.'[200] The idea of unjustified enrichment as a basic principle that something should not be given for nothing unless the expectation of exchange is waived is wide enough to explain what occurs in several equitable estoppel cases, particularly those in which a constructive trust analysis is also possible. Chadwick LJ's pronouncement in *Banner Homes* describes constructive trusts as depending on a choice between, essentially, benefit and reliance: '[i]t is the existence of *the advantage to the one, or detriment to the other*, gained or suffered as a consequence or the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it.'[201] Although *Cobbe* could be characterised as heralding a stricter, less justice-based approach, Lord Scott's favouring of a remedial constructive trust explanation of the remedy contradicts this. Moreover, the arguments advanced by counsel on the basis of proprietary estoppel were vague at best.[202] All of this, as was suggested in section 2.2, indicates a need in the law which is not fully addressed by a single doctrine, rather by a choice of doctrines which roughly cover the same extracontractual domain. It is submitted that a unified equitable estoppel with a minimum equity remedy would fill some of the gap and create a more prominent role for the remedying of detrimental reliance. If contained within a limited sphere of application, it could address the imprecision, impatience, and equally desire for development discovered in section 1.3.2.

As Gardner states, '[r]elief is about giving concrete effect to a well-founded claim, so the factors determining its scale must be those upon which the claim itself rests.'[203] It has been seen that proportionate responses of fulfilling the expectation, or in other words the lack of ability or willingness to give relief only for the detriment loss, tends to arise where the detriment loss is difficult to narrow down. Robertson's 2008 survey demonstrated the following four most common types of non-pecuniary detriment (which

[200] James Gordley, 'Enforcing Promises' (1995) 83 California Law Review 547, 613 (emphasis added).
[201] *Banner Homes Holdings Ltd v Luff Developments Ltd* [2000] Ch 372 (CA) 398 (emphasis added).
[202] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [15].
[203] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 501.

of itself is more difficult to quantify than pecuniary detriment): the performance of services in the expectation of benefit,[204] emotional investment in a home,[205] lost opportunities,[206] and life-changing decisions of a personal nature.[207]

Both Robertson's list above and the *Jennings v Rice* list below thus apply to the elaboration of relief, but in different ways. Gardner has said that the discretionary factors listed in *Jennings v Rice* 'could all intelligibly bear upon the mode of estoppel relief.'[208] Those factors 'include, but are not limited to… misconduct of the claimant' or 'particularly oppressive conduct on the part of the defendant;'[209] 'the court's recognition that it cannot compel people who have fallen out to live peaceably together, so that there may be a need for a clean break; alterations in the defendant's assets and circumstances, especially where the benefactor's assurances have been given, and where the claimant's detriment has been suffered, over a long period of years; the likely effect of taxation; and (to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate.'[210] Robert Walker LJ felt that '[i]t would be unwise to attempt any comprehensive enumeration of the factors relevant to the exercise of the court's discretion, or to suggest any hierarchy of factors.'[211] Thus, to summarise, there are four suggested *quantification* factors and (at least) six[212] suggested *contextual* factors. Finally, the New South Wales Court of Appeal has provided a succinct list of useful factors. While remarking that the minimum equity was not an operative principle and that equity's role has included 'keeping parties to representations and promises,' Allsop P in the case of *Delaforce v Simpson-Cook*[213] has provided the following factors that might be relevant in the inquiry into whether the expectation ought to be enforced:

[204] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 305-309.
[205] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 309-312.
[206] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 312-314.
[207] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 314-315.
[208] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 501.
[209] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [52]. These two factors had been proposed in Simon Gardner, 'The remedial discretion in proprietary estoppel' (1999) 115 LQR 438.
[210] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [52].
[211] *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [52].
[212] At least seven in *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 [52], but Gardner amalgamates the first two into 'the parties' conduct': Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 501.
[213] *Delaforce v Simpson Cook* [2010] NSWCA 84.

> [e]quity will look at all the relevant circumstances that touch upon the conscionability (or not) of resiling from the encouragement or representation previously made, including the nature and character of the detriment, how it can be cured, its proportionality to the terms and character of the encouragement or representation and the conformity with good conscience of keeping the party to any relevant representation or promise made, even if not contractual in character.[214]

It is submitted that, contrary to the Australian position which appears to start from the expectation, these factors should fall to be considered when a court is deciding whether to vary the minimum equity.[215]

To these must be added *juridical* factors. Bright and McFarlane have criticised the occasional deployment of proprietary remedies in cases in which a personal right would have been more appropriate. They argue that 'proprietary estoppel, like wrongs, unjust enrichment and other non-consensual sources of rights, always gives rise to an underlying personal liability which may, in some circumstances, be coupled with a property right'[216] and that '[t]he simple fact of land being the subject matter of the claim is not sufficient to support a property right being given.'[217]

Jimenez points out that 'a plaintiff bringing a cause of action (under any theory of recovery) is little concerned with the label slapped on their remedy by a court or academic commentator. What they *are* concerned about, however, is the total quantum of their recovery, and whether this quantum is maximized.'[218] The court should aim for the lowest possible measure which would sufficiently compensate the claimant. The minimum equity has been obscured by being linked to proportionality, which is expectation-fulfilment by default. A method of finding a remedy should accord in some way with the doctrine's focus on detriment loss, notwithstanding comments that the liability and the remedy basis need not be the same. The bases should, however, have

[214] *Delaforce v Simpson Cook* [2010] NSWCA 84 [3].
[215] Under step (C)(iii).
[216] Susan Bright and Ben McFarlane, 'Proprietary estoppel and property rights' [2005] CLJ 449, 455.
[217] Susan Bright and Ben McFarlane, 'Proprietary estoppel and property rights' [2005] CLJ 449, 466.
[218] Marco J Jimenez, 'The Many Faces of Promissory Estoppel: An Empirical Analysis under the Restatement (Second) of Contracts' (2010) 57 UCLA Law Review 669, 710.

some connection. The ability to vary the remedy according to discretionary factors should be limited: these factors need to be spelled out in order to give equitable estoppel greater clarity. It is submitted, on the basis of proprietary estoppel cases as well as §90 cases, that the archetypal relief in equitable estoppel should be reasonable remuneration granted according to equitable principles. It will ordinarily be monetary and will ordinarily redress the detriment loss. This standard remedy can then be varied under step (C)(iii) to what would address conscience.[219]

That non-proprietary estoppels may have only temporary effect was remarked upon by Hobhouse LJ in *Sledmore v Dalby*, although he stated that 'in so far as such terms are valid as a source of distinction, the differences probably reflect no more than the difference of subject matter.'[220] Gan refers[221] to the *Restatement* comment which provides that 'relief may sometimes be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance rather than by the terms of the promise'[222] and thus envisages the possibility of restitution of the detriment loss being awarded as an alternative to awards for that loss in the shape of reliance-based damages or specific performance. However, he adds, neither specific performance nor restitution tend to be ordered in this context.[223] The awards of 'reasonable remuneration' in *Gillett v Holt*[224] and *Coyle v Finnegan*[225] provide some precedential justification for the approach adopted here.[226] The analogy with unjust (or unjustified) enrichment is thus taken to its logical conclusion, since the default remedy in equitable estoppel is being argued to be one of restoration of reliance loss, as conceived in the meaning of detriment in section 5.3.2.

6.3.2 Further comments on the appropriate remedy

Determining a unique liability basis for equitable estoppel requires discarding what may seem like obvious characterisations. Thus, some equitable estoppel cases actually involve some intention to exchange or bargain. Gardner describes a clear such

[219] Under step (C)(iii).
[220] *Sledmore v Dalby* (1996) 72 P & CR 196 (CA) 208.
[221] Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89(1) St John's Law Review 55, 69.
[222] Restatement (Second) of Contracts §90 cmt d (1981).
[223] Orit Gan, 'The Justice Element of Promissory Estoppel' (2015) 89(1) St John's Law Review 55, 70.
[224] *Gillett v Holt* [2001] Ch 210 (CA).
[225] *Coyle v Finnegan* [2013] IEHC 463.
[226] See *Coyle v Finnegan* [2013] IEHC 463 [36].

case as one in which 'the defendant required the acts which constitute the claiamant's reliance as payment for her promise' but he says that clear, distinct cases of that nature are 'relatively few.'[227] This chapter has proceeded on the basis that the rules in equitable estoppel largely take note of those in proprietary estoppel, which is the most developed version of equitable estoppel. Moreover, the converse dependence of proprietary estoppel on the earliest rules of estoppel that have been refined over decades cannot be discounted. In other words, while it is desirable that the doctrine move forward, it has been developed on the basis that the three-part test applies, and consequently the philosophy behind the doctrine has (unfortunately, without much questioning) been dependent on a test which ascertains whether one can deny a state of affairs. The lack of any value content apart from the need to prove something, or not prove it – that is, the fact that estoppel initially emerged as a rule of evidence[228] – has, it is argued, deprived the general law of the opportunity to redress deserving disappointment in a coherent way. Instead, some commentary on reliance (represented more practically by the requirement of substantial detriment), together with the lip service paid to unconscionability, have been allowed to supplement the lack of a guiding principle that would give equitable estoppel a role in the law of obligations, or which would create another doctrine entirely.

What the minimum equity should mean is that the default remedy for equitable estoppel ought to restore the detriment loss, unless there are exceptional circumstances which justify making a different award. In *Collier*, it was accepted by counsel that 'the doctrine is generally suspensory *because* the courts do the minimum necessary to satisfy the equity,'[229] thus there has been judicial recognition of the minimum equity entailing temporary enforcement.

Thus, while the relief in estoppel by convention is often to uphold the convention itself, which has been explained on the basis that reliance is not always easy to calculate and '[t]here is no obvious baseline against which to measure the position the plaintiff

[227] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 495.
[228] Note, however, the US view that estoppel by representation (there called, confusingly, *equitable* estoppel) originated in tort and existed there until the publication of the First Restatement: W David Slawson, 'The Role of Reliance in Contract Damages' (1990) 76 Cornell Law Review 197, 202.
[229] *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 [34] (emphasis in original).

would have been in if the assumption had never been created,'[230] a stricter application of the minimum equity will require the court to look at other alternatives in awarding something to redress the broad detriment, which can sometimes be to uphold the convention. In *Wilson Parking*, the New Zealand Court of Appeal referred[231] to the observation in *Meagher, Gummow and Lehane* that 'equity is concerned with good conscience, not a sentimental urge to render sinners virtuous.'[232] This was cited in support of the proposition that '[w]hile flexibility has been emphasised and supported, a principled approach is nevertheless required.'[233] The line between conscience and attempting to make sinners virtuous, it is submitted, has moved too far in including within the reach of simple conscience a preference for enforcing the expectation.

Robertson prefers to separate the cases according to whether it is possible to quantify the detriment and argues that the 'recognition by the courts of a prima facie right to expectation relief in proprietary estoppel cases, which is displaced only where the representor can demonstrate that the claimant's reliance can adequately be protected in some way that is less onerous to the representor' is justified.[234] Gardner also says that, while in order '[t]o pitch the outcome between the reliance and the expectation, each of these must be quantifiable,' nonetheless 'a valid estoppel claim may arise even though they are not.'[235] Interestingly, Robertson is still speaking of the fulfilment of expectations best protecting the *reliance* interest.[236] There is a potential for overcompensation. Robertson acknowledges this and gives the example of one scenario in which 'the claimant may have acted on the basis that the promised benefits were more valuable than the detriment suffered,'[237] which is where a domestic carer claimant 'may well view the promised property as worth more than the wasted time and effort and the distruption [sic] of his or her life occasioned by the reliance.'[238] In this thesis, the minimum approach is preferred because the justice element enables the varying of the

[230] James Every-Palmer, 'Equitable Estoppel' in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd edn, Thomson Reuters 2009) 638.
[231] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [75].
[232] Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (RP Meagher, JD Heydon and MJ Leeming eds, 4th edn, Butterworths Australia 2002) para 17-075.
[233] *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407 [75].
[234] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 319.
[235] Simon Gardner, 'The remedial discretion in proprietary estoppel – again' (2006) 122 LQR 492, 498.
[236] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 318.
[237] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 317.
[238] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 317.

default reliance-based remedy in accordance with factors which might make the risk of undercompensation particularly unfair, while at the same time discouraging the notion that equitable estoppel is a 'wild card'[239] to be played with a reasonable chance of being more than generously compensated. Robertson's view that it is best to choose overcompensation instead of undercompensation,[240] it is submitted, takes insufficient account of the injustice that might simultaneously be worked upon the defendant, notwithstanding the fact that it is the representor's own 'inconsistent conduct' which created the situation in the first place.[241] A default standard discourages litigation and the failure to protect oneself by ensuring that formalities are complied with, while at the same time fully respecting the jurisdiction of the courts to remedy unconscionability.

6.3.3 The significance of proportionality in public law

There have been indications that promissory estoppel and the public law doctrine of legitimate expectations are developing in tandem in Ireland in particular.[242] Elements of the latter doctrine have been equally suggested to be appropriate for the purpose of influencing equitable estoppel,[243] and part of an entirely separate doctrine which has no business influencing equitable estoppel.[244] Could legitimate expectation, which has been linked to proportionality, have something to add to the adequate remedial proposition in equitable estoppel?

The doctrine of legitimate expectation allows an individual to challenge a reversal in the conduct or policy of a public authority, or an action that is otherwise contrary to a 'legitimate expectation' of that individual.[245] The Irish Supreme Court in *Webb v*

[239] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [46] (Lord Walker).
[240] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 317.
[241] Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' [2008] Conv 295, 317.
[242] Bryan McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) para 10.178: 'Irish law has already developed in such a way as to challenge the traditional division' between private law and public law; Hilary Biehler, 'Legitimate expectation – an odyssey' (2013) 50 Irish Jurist 40, 55.
[243] Greg Weeks, 'Estoppel and public authorities: Examining the case for an equitable remedy' (2010) 4 Journal of Equity 1.
[244] R *v East Sussex County Council ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2003] 1 WLR 348 [33]-[34].
[245] The expectation itself 'may be as to a benefit which the decision-maker will in fact confer when it comes to exercise its discretionary power (generally referred to as substantive expectation) or as to the procedure which the decision-maker will adopt before taking the decision how to exercise its discretionary power (generally referred to as a procedural expectation)': Philip Sales and Karen Steyn, 'Legitimate expectations in English public law: an analysis' [2004] Public Law 564, 565. The decision in *R v North and East Devon Health Authority ex p Coughlan* [2001] QB 213 (CA) has been said by Weeks to be the 'watershed' case for the recognition in England of the latter, substantive branch of legitimate expectation: Greg Weeks,

Ireland[246] said of legitimate expectations that 'the doctrine connoted by such expressions is but an aspect of the well-recognised equitable concept of promissory estoppel (which has been frequently applied in our courts).'[247] Finlay CJ defined promissory estoppel thus:

> [w]hen the parties to a transaction proceed on the basis that an underlying assumption - either of fact or of law – and whether due to misrepresentation or mistakes makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.[248]

'Estoppel and public authorities: Examining the case for an equitable remedy' (2010) 4 Journal of Equity 1, 55.

[246] *Webb v Ireland* [1988] IR 353 (SC). The facts of the case are interesting. The plaintiffs were a father and his son who, in the course of an expedition to search for objects in bogland using metal detectors, by chance uncovered 'the find of the century' (Geraldine Kennedy, 'Chalice to bear name of parish' *The Irish Times* (Dublin, 28 March 1980)) in archaeological terms: 'a chalice, silver paten, silver and bronze paten stand, gilt bronze strainer and a bronze basin' which dated from the eighth and ninth centuries and were believed to have been hurriedly buried by Viking invaders. The elder Mr Webb delivered the items to the National Museum of Ireland, whose director expressed the view that the items probably constituted treasure trove but would have to consult that matter with the Attorney General in order to be certain, and that in respect of the delivery Mr Webb 'would be honourably treated.' The proposed award of IR£10,000, however, was considered to be too low and, indeed, 'derisory' by Mr Webb, who brought proceedings against the State seeking the return of the objects. The two owners on whose land the hoard had been found had also made a claim to an award, and after some correspondence agreed to accept IR£25,000 each in respect of an award. The High Court held for the plaintiffs on the basis that the royal prerogative of treasure trove was not carried into Irish law, that the State had merely received the hoard as a bailee and was therefore estopped from denying the plaintiffs' title to the hoard, and that this was unaffected by the fact that the objects were uncovered in the course of trespassing on a neighbouring landowner's land. The Supreme Court reversed the findings as to bailment and the effect of trespass on ownership, and also held that the sovereignty of the State required the 'ownership by the State of objects which constitute antiquities of importance which are discovered and which have no known owner,' a principle which by virtue of the 1922 Constitution replaced the 'much more limited' treasure trove prerogative derived from the Crown. However, it ultimately held for the plaintiffs on the basis of the expectation of a reward for the return of the hoard and it held that they were entitled to a reward in the same amount as that which had already been granted to the neighbours. In addition to the representation of the museum's director, the plaintiffs had also referred to evidence, 'some of it undoubtedly being hearsay but apparently without objection' about the kinds of rewards in respect of antique objects which had been given in the past.

[247] *Webb v Ireland* [1988] IR 353 (SC) [67] (Finlay CJ, Henchy and Griffin JJ concurring).

[248] *Webb v Ireland* [1988] IR 353 (SC) [68]. In *Abrahamson v Law Society of Ireland* [1996] 1 IR 403 (HC) 404, McCracken J said it was an established principle that, '[w]here the legitimate expectation was that a benefit would be secured, the courts would endeavout to obtain that benefit or to compensate the applicant, whether by way of an order of mandamus or by an award of damages, provided that it was lawful to do so.'

The 'equity of the case' here required 'a monetary award of an amount which is reasonable in the light of all the circumstances.'[249] The possibility of a justice-based remedy was raised by Fennelly J in the Supreme Court in *Glencar*, referring to *Amalgamated Investment*.[250] He said that '[t]he damage may be done' and '[i]t may not be possible to restore the status quo.'[251]

Later, in *Daly v Minister for the Marine*,[252] Fennelly J remarked that the passage in *Webb* describing legitimate expectation 'as an aspect' of estoppel 'was clearly not intended to convey that the doctrine of legitimate expectation is coextensive with promissory estoppel' and emphasised '[i]t clearly is not.'[253] Clark wrote in 2016 that it was doubtful whether detrimental reliance was necessary to succeed on the basis of legitimate expectation.[254] On the other hand, the analogy was applied with particular emphasis in *Lett*,[255] in which O'Donnell J in the Supreme Court made a statement of principle to the effect that 'by analogy with the position of estoppel in private law, the issue for the court is that once a legitimate expectation or estoppel has been identified it is necessary to make good the equity so found.'[256] Biehler has said that there is in Ireland 'little evidence of a movement to distance the doctrine of legitimate expectation from its

[249] *Webb v Ireland* [1988] IR 353 (SC) [69]. There was no useful comparator for the quantification of such an award nor was there legislation covering the matter but, on the basis of factors including the objects' value, Finlay CJ held that IR£50,000 divided equally between the plaintiffs would be appropriate, while commenting on the benefits which legislation in this area would bring. Walsh and McCarthy JJ agreed with the sum of the award in a way that suggested that it was equally important not to treat the plaintiffs unfairly, in circumstances in which the owners of the trespassed land had already been rewarded IR£25,000 each.

[250] *Glencar Explorations plc v Mayo County Council* [2002] 1 IR 84 (SC) 162 referring to Lord Denning MR in *Amalgamated Investment & Property Co Ltd (in Liquidation) v Texas Commerce Bank* [1982] QB 84 (CA) 122. Fennelly J also laid down a test he said was 'provisional' (yet has subsequently often been cited; see *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6 [10.1] (Clarke J)) and would enable one 'to succeed in a claim based on failure of a public authority to respect legitimate expectations.' The test read: 'Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly, the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person and group and the public authority or that the person or group has acted on the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements or extensions of these propositions are obviously possible.'

[251] *Glencar Explorations plc v Mayo County Council* [2002] 1 IR 84 (SC) 162.

[252] *Daly v Minister for the Marine* [2001] 3 IR 513 (SC).

[253] *Daly v Minister for the Marine* [2001] 3 IR 513 (SC) [41].

[254] Robert Clark, *Contract Law in Ireland* (8th edn, Round Hall 2016) para 2-85.

[255] *Lett & Co v Wexford Borough Council* [2007] IEHC 195 affd [2012] IESC 14.

[256] *Lett & Co v Wexford Borough Council* [2007] IEHC 195 affd [2012] IESC 14 [23].

equitable origins.'[257] In *Cromane*, Charleton J remarked that the doctrine is related to promissory estoppel and he offered some general statements of principle, before adding that 'the harmony between legitimate expectation and promissory estoppel, or estoppel by convention, should be maintained.'[258]

By contrast, Lord Hoffmann in *Reprotech*[259] essentially shut down the question in England 'in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.'[260] While he acknowledged that 'of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power,'[261] he added that this was 'no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote.'[262]

The ability to claim for a breach of a legitimate expectation must be subject to the general principle that a public authority may not give effect to a legitimate expectation if to do so would be ultra vires.[263] This principle has been compared to the principle of apparent authority: that an estoppel cannot operate to deny the authority of the agent of a corporation to bind it to do something which its constitution does not allow it to do, or to deny that the corporation has conferred authority upon its agent to do such an ultra vires act.[264] The authors of *Wilken* cite *Freeman & Lockyer* for the proposition that apparent authority cannot allow a public authority to circumvent the rule that public authorities cannot act ultra vires,[265] and they note[266] the fact that an exception provided

[257] Hilary Biehler, 'Legitimate expectation – an odyssey' (2013) 50 Irish Jurist 40, 54.
[258] *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6 [35].
[259] *R v East Sussex County Council ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2003] 1 WLR 348.
[260] *R v East Sussex County Council ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2003] 1 WLR 348 [35].
[261] *R v East Sussex County Council ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2003] 1 WLR 348 [33].
[262] *R v East Sussex County Council ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2003] 1 WLR 348 [34].
[263] As was stated by McCracken J in *Abrahamson v Law Society of Ireland* [1996] 1 IR 403 (HC) 404 to be a matter of principle; see also *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6.
[264] *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA) 504. Although see Howard Bennett, *Principles of the Law of Agency* (Hart Publishing 2013) paras 4.3-4.4; Ji Lian Yap, 'Apparent authority: doctrinal underpinnings and competing policy goals' (2014) 1 Journal of Business Law 72 indicating that estoppel is merely a possible explanation.
[265] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 16.12.

in *Western Fish*, to the effect that an officer with delegated functions can bind the authority, seems not to have survived *Reprotech*, according to the decision of Sullivan J in *Wandsworth*.[267]

Both Clark on the one hand,[268] and McMahon and Binchy on the other,[269] have expressed views that a fully hybrid doctrine is potentially dangerous. McMahon and Binchy have said of the decision in *Webb* that it 'had the aura of an ad hoc solution to a troublesome "political" issue rather than developing the doctrine on a systematic basis.'[270] They take a cautionary view of its power, noting that if 'claims for damages for infringement of constitutional rights can happily be squeezed into a generic tort framework, the task facing courts in dealing with compensation for those who have suffered loss on the basis of a legitimate expectation seems daunting.'[271] It is submitted that these views must be correct. The characterisation of estoppel as belonging to such a 'generic tort framework' is possible in their view because of a potential correlation between negligent misstatement and the Irish jurisprudence on promissory estoppel, commenting that the absence of any discussion of estoppel in an Irish decision on the *Hedley Byrne* principle, *Hazylake Fashions v Bank of Ireland*, is 'striking.'[272] The last link in the chain would then be the 'constitutional tort'[273] first recognised in *Meskell v CIE*.[274] The premise on which this is based is inconsistent with the premise of the proposed model. The 'daunting' possibility they suggest, and which would involve a blurring not only within private law but across the public-law divide, in fact urges the development in Ireland in particular of a model of equitable estoppel on stricter principles.[275]

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[266] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) paras 9.138-9.139.
[267] *R (Wandsworth) v Secretary of State for Transportation, Local Government and the Regions* [2003] EWHC 622 (Admin) [21].
[268] Robert Clark, *Contract Law in Ireland* (8th edn, Round Hall 2016) para 2-82 indicating that he preferred Fennelly J's 'strong and clear view on the requirements for promissory estoppel' in *Daly*.
[269] Bryan McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) para 10.178.
[270] Bryan McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) para 10.182.
[271] Bryan McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) para 10.188.
[272] Bryan McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) para 10.134.
[273] Bryan McMahon and William Binchy, *Law of Torts* (4th edn, Bloomsbury Professional 2013) para 10.178.
[274] *Meskell v CIE* [1973] IR 121 (SC).
[275] In *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6 [10.5], Clarke J referred to *Lett*, in which O'Donnell J was 'reluctant' to express a view on whether damages should be awarded for breach of a legitimate expectation, and indicated that the 'tendency in the more recent case law has been to recognise that, at least in some cases, an award of damages for breach of legitimate expectation may be permissible.' The pleadings of breach of a legitimate expectation on the one hand, and negligence on the other, were considered separately by the Irish Supreme Court.

With that said, and given the current Irish position, there is space for a reliance-based, minimum-equity-granting equitable estoppel in this jurisdiction to draw upon legitimate expectation, at least for *justification* by analogy for its limitations. In fact, the proposed model stands to benefit from such comparisons, and, as such, they are generally applicable.

The doctrine of legitimate expectation could thus be a useful basis for the development of equitable estoppel in three ways: first, the use of proportionality in legitimate expectation could illuminate how it should be used in a single model of estoppel; secondly, the idea of a remedial solution in the shape of a minimum equity has been noted as a possibility in this area of the law; and, thirdly, in some jurisdictions a reversed burden of proof applies, the reasons for which may illuminate how the model ought to operate. It will be seen, however, that none of these comparisons is exempt from difficulty.

6.3.3.1 (a) A proportionality standard of review

In this context, proportionality is applied to determine whether or not a public authority is justified in frustrating the legitimate expectation of an individual. We have seen in the estoppel context that, conversely, the court is empowered to use the principle of proportionality to determine whether a claimant's expectation ought to be fulfilled. Further, if this is not the case, the court can again use proportionality to determine on what point between the expectation and the detriment the court ought to calculate the appropriate remedy. We have also seen that, while he holds the view that an expectation is less likely to be fulfilled – ie it is considered less proportionate – the less clearly it was part of a 'quid pro quo' with the detriment, Lord Walker has equally conceded that cases in which relevant ratio will be considered to be the most 'proportionate' will be rare.[276]

McDermott and Buckley,[277] and later Biehler,[278] have referred to the dicta of Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department*[279] which support the

[276] Robert Walker, 'Which Side "Ought" to Win?–Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229, 239.
[277] This is cited by James McDermott and Niall F Buckley, 'Managing Expectations' (2007) 42(1) Irish Jurist 29, 42.
[278] Hilary Biehler, 'Legitimate expectation – an odyssey' (2013) 50 Irish Jurist 40, 66.

use of a proportionality principle in resolving questions of legitimate expectation. Most interestingly for our purposes, Laws LJ said that

> [p]roportionality will be judged, as it is generally to be judged, by the respective force of the competing interests arising in the case. Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure…[280]

However, McDermott and Buckley refer to the 'unfortunate consequences'[281] of conflating legitimate expectations with estoppel. The doctrine of legitimate expectations is itself the subject of 'controversy',[282] being required to address the 'tension'[283] between 'the freedom the executive enjoys in the policy sphere and the discretion vested in public authorities.'[284] It must also contend with the executive's entitlement and requirement to have due regard to public interest and political considerations on the one hand, and the 'need to protect the interests of the individual citizen in the face of the exercise of public power, and the need to ensure that such power is not exercised capriciously' on the other.[285] As Sales and Steyn point out, private law analogies 'are apt to be unhelpful in the ultimate analysis' since 'at least part of the general function of government is to enable individuals to pursue their own ends' and so 'ensuring regularity in decision-making so as to enable them to plan their lives has a value in itself, albeit one which may conflict with other aspects of the public interest arising in the circumstances of particular cases.'[286] Meanwhile, Biehler contrasts with this the application of estoppel in the private law context, saying that 'in considering whether to allow a claim based on estoppel to

[279] *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.
[280] *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 [69].
[281] James McDermott and Niall F Buckley, 'Managing Expectations' (2007) 42(1) Irish Jurist 29, 33.
[282] James McDermott and Niall F Buckley, 'Managing Expectations' (2007) 42(1) Irish Jurist 29.
[283] Philip Sales and Karen Steyn, 'Legitimate expectations in English public law: an analysis' [2004] Public Law 564, 570.
[284] James McDermott and Niall F Buckley, 'Managing Expectations' (2007) 42(1) Irish Jurist 29.
[285] Philip Sales and Karen Steyn, 'Legitimate expectations in English public law: an analysis' [2004] Public Law 564, 569.
[286] Philip Sales and Karen Steyn, 'Legitimate expectations in English public law: an analysis' [2004] Public Law 564, 571, and again at 572: despite a 'parallel' which is even closer in legitimate expectation cases involving detrimental reliance by the individual, 'it is this tension with the need for consideration of the public interest which means that simple recourse to the law of estoppel is inappropriate in the public law context.'

succeed, the court will only weigh up the impact its decision will have on the parties to the matter before it and does not have to consider any wider context.'[287] Weeks, in stating that '[n]o specific doctrine of public law estoppel has developed in Australia', adds that '[t]he fact that public authorities are not truly the same as private individuals means that substantive enforcement of a government's representations to an individual must take account of the impact of that enforcement on the public at large.'[288]

6.3.3.1 (b) A remedy based on the minimum equity

Biehler suggests that the application of a proportionality principle in this context 'would allow the courts to grant a remedy of a proportionate nature with a view to doing justice inter partes while also supporting the overarching aim of preserving the principle of good administration in public decision-making.'[289] She adds that a 'blunt' all-or-nothing approach may thus be avoided.[290] Weeks has noted an incompatibility between unconscionability and the concept of 'abuse of power'[291] in the context of public-law litigation. He said that unconscionability without clear guidance could enable a decision by the court 'not made upon only objective considerations' and that an 'overriding public interest' may pale in comparison with the unfairness of a disappointment to a particular individual.[292] He adds, however, a point which makes for an apposite analogy. He proposes[293] that in litigation in Australia between an individual and a public authority, a court be enabled to grant a minimum-equity remedy where the expectation is impossible to fulfil. This is significant because substantive legitimate expectations will not be granted

[287] Hilary Biehler, 'Legitimate expectation – an odyssey' (2013) 50 Irish Jurist 40, 55, then referring to Lord Hoffmann in *Reprotech* [34], who said that 'remedies granted against public authorities also have to take into account the interests of the general public which the authority seeks to promote.'
[288] Greg Weeks, 'Estoppel and public authorities: Examining the case for an equitable remedy' (2010) 4 Journal of Equity 1, 8-9.
[289] Hilary Biehler 'Legitimate expectation – an odyssey' (2013) 50 Irish Jurist 40, 67.
[290] Hilary Biehler 'Legitimate expectation – an odyssey' (2013) 50 Irish Jurist 40, 44.
[291] See *R (Association of British Civilian Internees – Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397 [72], as cited by Philip Sales and Karen Steyn, 'Legitimate expectations in English public law: an analysis' [2004] Public Law 564, 574; *R v Department of Education and Employment ex p Begbie* [2000] 1 WLR 1115.
[292] Greg Weeks, 'Estoppel and public authorities: Examining the case for an equitable remedy' (2010) 4 Journal of Equity 1, 61-62. In *Coughlan*, Weeks says at 62, the court's weighing of the applicant's outcome against the public interest 'pits the immediately apparent disappointment of a severely disabled woman against the somewhat more abstract interest that the public had in the NHS being run efficiently and cost effectively.'
[293] Greg Weeks, 'Estoppel and public authorities: Examining the case for an equitable remedy' (2010) 4 Journal of Equity 1, 111.

in Australia where the action contrary to the expectation was intra vires.[294] His concern was a claim which would equally arise in private law if the public authority were a private person, and he was therefore suggesting a way in which redress has perhaps not been adequately recognised because of a perceived barrier based on Australian constitutional principles. However, the impossibility of fulfilling the expectation is based on those principles. It is therefore significant that Weeks proposes as an alternative to an impossible-to-fulfil expectation an equitable remedy based upon considerations of justice.

6.3.3.1 (c) A reversed burden of proof

Finally, the justifications for using a reversed burden of proof to determine whether disappointing a legitimate expectation would be proportionate may illuminate what the burden of proof ought to be in a single doctrine of equitable estoppel.

The editors of *De Smith* favour[295] the use of proportionality because it places the burden on the authority to justify its decision. Kenny notes that, in Ireland, the adoption of proportionality as a standard of review in public law, based on the *R v Oakes* test in Canada,[296] lost the element of requiring the executive to justify its action, and instead placed the burden of proof entirely on the plaintiff.[297] Thus, in this jurisdiction, the plaintiff must establish that rights are infringed and that there is a lack of justification for such infringement,[298] which Kenny states is a general rule of public-law litigation which did not change with the introduction of the proportionality test.[299] A court in Ireland will ask the question negatively even though the test is framed positively (and applied so in

[294] Greg Weeks, 'Estoppel and public authorities: Examining the case for an equitable remedy' (2010) 4 Journal of Equity 1, 12 notes that this is an effect of the Commonwealth of Australia Constitution Act, s 75(v): 'In all matters… in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth; the High Court shall have original jurisdiction.'

[295] Lord Woolf, Jeffrey Jowell QC, Andrew Le Sueur, Catherine Donnelly, Ivan Hare QC, *De Smith's Judicial Review* (7th edn, Sweet & Maxwell 2016). This is cited by James McDermott and Niall F Buckley, 'Managing Expectations' (2007) 42(1) Irish Jurist 29, 49.

[296] *R v Oakes* [1986] 1 SCR 103, in which it was held that the standard of review for limitations of rights contained in the Canadian Charter of Rights and Freedoms, which limitations fall to be examined under s 1 of that Charter,

[297] David Kenny, 'Proportionality, the burden of proof, and some signs of reconsideration' (2014) 52 Irish Jurist 141: this was by virtue of the decision in *Heaney v Ireland* [1994] 3 IR 593 (HC).

[298] David Kenny, 'Proportionality, the burden of proof, and some signs of reconsideration' (2014) 52 Irish Jurist 141, 144.

[299] David Kenny, 'Proportionality, the burden of proof, and some signs of reconsideration' (2014) 52 Irish Jurist 141, 145.

Canada): thus, if the plaintiff overcomes the initial burden of proof that rights were infringed, he must then prove that the law does not have an important objective.[300] Meanwhile, the Privy Council[301] in *Paponette v Attorney General of Trinidad and Tobago*[302] provided in 2012 the following statement of the functioning of the burden of proof:

> [t]he initial burden lies on an applicant to prove the legitimacy of his expectation. This means that in a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification. If he wishes to reinforce his case by saying that he relied on the promise to his detriment, then obviously he must prove that too. Once these elements have been proved by the applicant, however, the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest.[303]

It may be possible to set out a principle that a representor must show sufficient reasons for not fulfilling the expectation, and that if these are not given, applying the minimum equity approach as set out above would be a reasonable – one could say proportionate – way of ensuring that detriment does not go uncompensated. It is particularly appropriate, arguably, in a private law context to allow for such compensation since, as Barak[304] has pointed out, the parties owe to each other the same level of good faith, in contrast with the more onerous such level a state owes its citizens.

However, the shifting of the burden may not be particularly appropriate in this context. The justification for maintaining the current approach in Irish public law (which

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[300] David Kenny, 'Proportionality, the burden of proof, and some signs of reconsideration' (2014) 52 Irish Jurist 141, 148. This is despite the once-off approach in the High Court decision in *Bupa Ireland v Health Insurance Authority* [2006] IEHC 431: that it is, first, for the applicant to prove an infringement of rights, then, secondly, it is for the State to justify it. Kenny suggests at 146-147, however, that McKechnie J used this particular test due to 'inadvertence.'

[301] Cited by Hilary Biehler, 'Legitimate expectation – an odyssey' (2013) 50 Irish Jurist 40, 59-60.

[302] *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1.

[303] *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [2012] 1 AC 1 [37].

[304] Aharon Barak, Proportionality: Constitutional Rights and their Limitations (Cambridge University Press 2012).

Kenny says is 'perhaps likely') might be that 'our constitutional order regards other concerns – such as the separation of powers, and the respect owed to the legislature by other branches – to be sufficiently weighty to justify a burden of proof being placed entirely on the plaintiff even to the extent of having to prove absence of justification for rights restrictions.'[305] Barak has said that shifting the burden of proof to the state to justify its action is warranted for three reasons, two of which are related to the public-law and constitutional nature of the claim and one of which, the use of the necessity test, also imports a special public-law consideration.

First, Barak says, respecting the constitutional value of protecting human rights requires the state to bear what he calls the burden of persuasion, as well as the burden of producing evidence.[306] The state has, and probably had at the relevant time of adopting the legislation at issue, the necessary information to present to the court a factual framework to justify the limitation of the right.[307] Equally, in a legitimate expectation context, one would expect a public authority to have, and probably have had at the relevant time, the information to present a well-rounded framework justifying (or not) the departure from its policy or representation which affected the specific individual, while the individual could not be expected to have the same resources or 'access, within their available means.'[308]

Secondly, the burden of proving necessity – that no less restrictive means exist to advance the purpose to the same extent[309] – is divided in two according to Barak, with the individual needing to at least point to the existence of an alternative means and thus raise the question (the burden of pleading), and the state being required to produce the evidence, which 'information is usually at the hands of the state; it has already been

[305] David Kenny, 'Proportionality, the burden of proof, and some signs of reconsideration' (2014) 52 Irish Jurist 141, 151.
[306] This point is noted by Kenny, who describes Barak's arguments as 'trenchant': David Kenny, 'Proportionality, the burden of proof, and some signs of reconsideration' (2014) 52 Irish Jurist 141, 151 n 43.
[307] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 447-448.
[308] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 448.
[309] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 448.

examined by the state and established the legislative provision that limited the constitutional right.'[310]

Thirdly, Barak says that the judicial process in constitutional law entails that the state has 'both a duty of loyalty and a heightened level of good faith towards the citizens it is meant to serve', while an individual's duties to the state are 'different, and are often lesser in scope.'[311] The court, meanwhile, has heightened requirements because of the reach of its decision, which will affect other parties, as well as the fact that the decision will affect the rule of law and the very validity of the administrative action.[312] Kenny has also suggested that '[t]heorists of the proportionality principle do not seem to suggest that a shifting burden of proof is theoretically essential to the idea of proportionality.'[313]

6.3.4 Conclusions from the public-law discussion

It is difficult to imagine that jurists will accept a hybrid doctrine that makes no distinction between dealings of the individual with the state on the one hand, and dealings between 'individuals qua individuals'[314] on the other. However, a limited analogy may be made with equitable estoppel – and, indeed, the proposed model to be discussed in the next chapter – to illustrate the appropriateness of a remedy based on the minimum equity. At the stage of the remedial inquiry (in meaning six of unconscionability),[315] the court can use an idea of disproportion to assess the justice of the parties' relative positions. This is, it is submitted, proper for the court to do, given that meaning six has been argued to be an allowable space for the development of considerations strictly based upon unconscionability. This idea could, by analogy with the public law themes explored above, be a construct of disproportion, based on the notion that the expectation has been infringed in a way that is impermissible (or

[310] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 449.
[311] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 450.
[312] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press 2012) 451-452.
[313] David Kenny, 'Proportionality, the burden of proof, and some signs of reconsideration' (2014) 52 Irish Jurist 141, 148. Thus, he continues, 'it would be open to the Irish courts to maintain their past practice while adopting a proportionality test.'
[314] Stephen A Smith, 'Duties, Liabilities and Damages' (2012) 125 Harvard Law Review 1727, 1729.
[315] Or step (C)(iii).

disproportionate) and, further, the expectation is no longer possible to fulfil, therefore a limited equitable remedy might be appropriate.

This touches upon an important point to the effect that, outside of the court's remit, a defendant has either complied with the assumed expectation, in which case there is no basis for a claim, or a defendant has not, and there is a basis for some claim. In effect, the defendant no longer consents to the fulfilment of the expectation, in a way that (it is submitted) ought to be construed as similar to the fact that fulfilling a legitimate expectation can essentially be impossible for a public authority. It may be ultra vires for it to do so,[316] or the public interest may need to prevail, thus legitimising the authority's departure from the expectation even if such departure would not be ultra vires. The organising principle of an abuse of power adds credence to the analogy.

However, the recent Irish Supreme Court decision in *Cromane*[317] requires scrutinising this more closely. There, damages were sought for, alternatively, breach of a legitimate expectation and negligence. The basis upon which a legitimate expectation was to exist, that the appellants had permission to carry on commercial activity in a designated area of environmental protection, was flawed: the respondent Minister could not grant such permission because (as it transpired)[318] European law determined that it had never been within his remit to give. Clarke J held that, since a legitimate expectation could not in law exist in the first place, the issue of damages for breach of a legitimate expectation therefore did not arise.[319] Thus, the analogy with a legitimate expectation

[316] See, however, Greg Weeks, 'Estoppel and public authorities: Examining the case for an equitable remedy' (2010) 4 Journal of Equity 1, 12 comparing the rule with the principle that an estoppel cannot compel an unlawful act. Provided, however, that fulfilling an expectation is not unlawful, the analogy stands as being based upon impossibility.

[317] *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6.

[318] The appellants fished mussel seeds in a harbour which was later designated a special conservation area, pursuant to a statutory instrument transposing the Habitats Directive. Prior to designation as a special conservation area, the Directive required an assessment of any activities being carried out the area to be designated that were not connected to the site's management but were likely to have an impact upon the site, but there was some doubt as to whether that applied to activities being carried out before the designation or the coming into effect of either the Directive or the transposing regulations. In the event, no assessment had been carried out to meet the requirements, if they were such. Two rulings by the European Court of Justice subsequently determined that the prior assessment requirement would indeed apply to pre-designation activities. The Minister was therefore not empowered to grant any permissions to carry on pre-assessment activity in the harbour. The environmental concerns of the Minister's department subsequently led to a series of decisions which harmed the appellants' commercial activity.

[319] *Cromane Seafoods Ltd v Minister for Agriculture* [2016] IESC 6 [10.11], Charleton J agreeing [35]. Clarke J noted that, in *Atlantic Marine Supplies Ltd*, he expressed a view that damages could be available for breach of a legitimate expectation. However, he said in *Cromane* that he preferred not to express a definitive view

that an authority is not empowered in law to create does not, in Ireland, assist with justifying a minimum equity remedy for the purposes of the model. In view of this position, and of the model's potential applicability to Ireland, it is perhaps best to restrict the analogy with an impossible-to-fulfil expectation to expectations which are not ultra vires or which the authority is not empowered to give. Instead, the analogy ought to be made with legitimate expectations that ought not to be fulfilled because public-interest imperatives render their fulfilment undesirable.

The analogy leads us to a possible principle that, in equitable estoppel, the starting-point generally should not be the expectation but the detriment.

The analogy could also extend to an understanding of proportionality as a procedural idea that would enable a defendant to justify undermining an expectation. Further, the idea of a reversed burden of proof based on an imbalance of power may be noted as useful in this regard. However, the peculiarly public-law notions guiding these principles of justification limit the usefulness of the analogy.

6.4 Conclusions

The chapter has outlined the difficulties with applying a remedy that is based upon the minimum equity across equitable estoppel. We saw in section 2.3.2 that a minimum equity 'says nothing about what goal ought to be achieved'[320] but that it can be taxonomised within existing understandings of rights and remedies. It was concluded that it was preferably seen as a middle-ground, reflective remedy.

The discussion in the public-law section focused on the possible, yet limited analogy to be made with legitimate expectation which may allow a court to grant a minimum-equity remedy by default. It could construe the impossibility of fulfilling the expectation, by analogy with the way in which such impossibility arises in public law, by viewing the defendant as no longer consenting to such fulfilment. The claimant nonetheless requires a remedy in the interests of justice.

Some difficulties have been outlined with respect to such limited redress. It is submitted, however, that they are based on precedential notions which are, first,

on the matter until a case required expressing such a view. *Atlantic Marine Supplies Ltd v Minister for Transport* [2010] IEHC 104 affd [2016] IESC 43.

[320] Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 547.

unprincipled because the meaning of proportionality in private law is clearly not fixed, and, secondly, tend in any event towards overcompensation. Cooke wrote in 2000 that '[i]t may be that it is the very disparity between reliance and expectation that makes expectation relief so attractive, especially where a family home is at stake.'[321] It is submitted that a unified equitable estoppel would not be the proper area of the law in which to address the problems of such claimants, unless it were a more 'loosely'-unified doctrine in the sense suggested by Hopkins.[322] However, a unified and principled doctrine would require, it is submitted, the setting of a detriment-based minimum equity remedy by default. This, under meaning six, could be varied in tandem with such unconscionability principles as the courts develop.

We can now outline (C)(ii) which assumes that the consent of the defendant to complying with the expectation has been withdrawn, and asks whether conscience dictates the grant of a minimum remedy. This is another construct, based on a combination of the public-law analysis and meaning five of unconscionability. (C)(iii) corresponds with meaning six and asks whether any factors require varying the remedy downwards, or, exceptionally, upwards. The full proposed model sequence will be seen in the next chapter.

[321] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 168.
[322] Nicholas Hopkins, 'Proprietary estoppel: A functional analysis' (2010) 4 Journal of Equity 1, 86.

Chapter 7: The scope and application of the proposed model

7.1 Introduction

7.1.1 Confining the reach of the chapter

This chapter will consist of the application of the proposed model to examples, outlining the model's distinct steps and, where these are relevant, any practical issues that emerge. These examples are drawn from existing cases, which have been chosen with two factors in mind: their prominence and the effect of applying the model to the facts in those cases. In respect of the latter, the application of the model may produce different results, or else it produces the same result for different reasons. The jurisdictions from which these cases are drawn are England, Australia, and Ireland. Potential objections to the model, both doctrinal and practical, and jurisdiction-specific where this is relevant, will be woven through the model applications. For ease of reading, when a hypothetical case or an example is provided the party seeking the estoppel will be referred to as the 'claimant' and the party against whom or which the estoppel is claimed will be referred to as the 'defendant.' To the extent that 'equitable estoppel' exists in any of these jurisdictions, it will be occasionally be compared with the proposed model.

7.1.2 Resolving the thesis question

The thesis stems from the apparent difference between some perceptions and applications of estoppel on the one hand, and academia's fruitful debate on the other. The essential question is whether a model can be proposed which coherently unifies estoppel while achieving 'principle, not sympathy.'[1] A unified model that eschews strands and limitations is the thesis experiment. Those perceptions are probably due to the equitable influence on the doctrine, which can be summarised using two issues. First, there is an unwillingness that the ideals of equity be used as a 'joker or wild card'[2] and

[1] *Scottish Equitable plc v Derby* [2001] EWCA Civ 369 [48].
[2] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [46].

hence replace the principles of the law. Secondly, the 'second-order system' of law[3] to which equity has been said to subscribe means that estoppel is necessarily less useful, or less commonly-used, and more unpredictable than other methods. A unified doctrine ought to solve this tension by achieving predictability whilst being restricted in its application. This is understood in the thesis to be the preferable way for equitable influence to permeate such a doctrine: we call this 'equity-adjusted predictability.' Meanwhile, the thesis has identified and addressed the possible tensions attached to a unified doctrine of estoppel: that denying a cause of action in estoppel is illogical, that what is being sought is an inducement based on reasonable reliance, and the disparity of preferences as to the appropriate remedial parameters. The model borrows from proprietary estoppel, but it finds its basic legitimacy in those cases[4] which treat different estoppels as being the same doctrine in essence if not strictly in name. We have seen in section 1.3.2 that the English Court of Appeal has said that, absent a solution using contract law methods, 'the same result could be reached by relying on the doctrines of contractual estoppel, estoppel by convention, estoppel by representation or promissory estoppel.'[5] Conversely, this elision of estoppel 'types' could also be due to some imprecise idea of estoppel as the emergency antidote in equity. A model that is intended to achieve precision – equity-adjusted predictability – can answer this claim while responding to the evident perspective even of recent Courts that estoppel remains an evolving doctrine undergoing a phase of evolution that is not yet complete.[6]

In this section, as in the following sections, the proposed model will be assumed to contain the ability to create a cause of action, for the reasons for which this ability has been advocated in Chapter 3 in currently-prevailing ideas of equitable estoppel. Thus, while Handley has, for example, criticised as invalid the ellision[7] of 'the distinction between a temporary restraint of the inequitable enforcement of a legal right which is consistent with the traditional role of equity, and the enforcement of a non-contractual

[3] See Henry Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) <http://ssrn.com/abstract=2617413>accessed 20 March 2017.
[4] See eg *Brightlingsea Haven v Morris* [2009] EWHC 3061 (QB), *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472, *NRAM Plc v McAdam* [2015] EWCA Civ 751.
[5] *NRAM Plc v McAdam* [2015] EWCA Civ 751, [10(iii)].
[6] As we saw in Chapter 1, this is clear from comments in *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023, *Aquavita International SA v Ashapura Minechem Ltd* [2015] EWHC 2807 (QB), and *Mungalsingh v Juman* [2015] UKPC 38.
[7] In *Waltons Stores v Maher* (1988) 164 CLR 387.

promise by specific performance, damages of compensation',[8] Finn has maintained that the role of equity in this area is a restrictive one in that estoppel belongs to a wider doctrine of 'unconscionable insistence upon strict rights.' However, he has added that '[i]n most instances it is doubtless the case that all that is required is a defensive capacity' for promissory estoppel, it is nonetheless 'difficult to see why it should not be assimilated totally with the more general unconscionability doctrine, why it should not be accorded an offensive capacity even if the need to resort to it as a cause of action will not commonly arise.'[9] Further, McFarlane has argued (with Sales) that the reason for granting a remedy on the basis of a promise in proprietary estoppel is not that the content of the promise is 'specific property', and therefore the reason for promissory enforcement in this context must be something other than that the subject of the promise is land.[10] He has also proposed that there is an illogical difference between proprietary and other promise-based versions of estoppel on the basis that formalities are treated much less formally in the former kind of estoppel.[11]

Nonetheless, the proposed model goes further and in a slightly different direction by including estoppels not based on promises. This is on the basis that conventions and other forms of conduct ought to create an obligation for the same reasons which apply to equitable estoppel generally. For instance, Deane J in *Waltons Stores* described the principle in that case as 'an estoppel by representation implied by silence.'[12] Conventions are capable of inclusion in the model provided that they create justifiable reliance. They can therefore create an obligation when detriment is present, and it was induced by the effect of the convention.

It is maintained in the thesis that it may occasionally be difficult to distinguish between types of initial behaviour, and that in any event this distinction is not the central focus of equitable estoppel and thus should not be the central focus in the proposed model. Thus, equitable estoppel under the proposed model may arise on the basis of a 'representation' that is such for the purpose of estoppel by representation,[13] and of

[8] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 13-039.
[9] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 89.
[10] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 621-623.
[11] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 288.
[12] *Waltons Stores v Maher* (1988) 164 CLR 387, 443.
[13] That is, a clear and unambiguous representation of facts.

equitable and other estoppels to the extent that cases or authoritative comment involving these refer to representations. This accords with the equitable origin of estoppel by representation.[14] However, when a representation is also capable of giving rise to the defence under the preclusive doctrine, the proposed model is intended to be an alternative to this defence, which leads to a choice between outcomes for the claimant, to be assessed at (C)(ii). This is similar to the availability of a defence of estoppel by negligently keeping silent where such silence is 'in breach of the duty to speak' which may be an alternative to damages for breach of a duty of care.[15]

7.1.3 Locating the model within the equitable tradition

Smith states that the view of equity as working anti-opportunism is being effaced and he notes five features which are included in 'the equitable mode.'[16] These features are as follows: first, the operation of equity in personam; secondly, the ex post discretionary decision making that characterises it; thirdly, its emphasis on good faith and notice; fourthly, its employment of moral standards and, finally, its inherent vagueness.

We have also seen the six possible meanings of unconscionability and how only five and six require any further consideration of what unconscionability means. However, up to a point the three classic elements provide a threshold for a claim to have a minimally realistic chance of not being dismissed cursorily. Their use, however, has led to a perhaps excessive number of statements of principle, as seen in section 5.2.

7.1.4 Limiting the model

The proposed model requires the claimant first to prove the existence of detriment, as well as to indicate a subject-matter to which this detriment relates. The defendant is then permitted to disprove the required inducement by the claimant. Should the claimant succeed, a remedy of compensation for the detriment will be granted.

Step (0): there is a cause of action available.

[14] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-002: '[e]stoppel by representation originated in equity in the 17th century, and was adopted, without acknowledgement, by the common law by a process which culminated in 1837 in *Pickard v Sears*.'
[15] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 3-010.
[16] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 4 <http://ssrn.com/abstract=2617413> accessed 20 March 2017.

Step (A): is there detriment, framed appropriately?

Within this heading, the court can adopt the meaning of detriment in Chapter 5, brought to bear mostly in proprietary estoppel, in identifying whether and how much detriment was suffered. The court needs to check the relevance on the one hand, and plausibility on the other. This involves a further step,

Step (A)(i): has the claimant shown a subject-matter to which the detriment relates?

This will aid the court in relating the detriment to something on which the claimant could have relied.

Step (B): was the detriment induced by the defendant?

The burden is shifted here to the defendant to show that there was no inducement.

A court can use the construct of whether the belief was position P at date D, if necessary, for ease of understanding.

Should the defendant be unable to show that the detriment was not induced by him, a court may ask, and assess, the following

Step (B)(i): was it nonetheless unreasonable to rely?

Step (C): the determination by the court.

Step (C)(i) asks whether [it would be unconscionable for the court now to permit going back on the undertaking on the basis that] the court is satisfied that the elements of liability have been established.

The following two steps involve the court, first, assessing whether it believes a minimum equity should be recognised, and, secondly, whether it considers that any factors ought to change the amount identified.

Thus, If the answer to (A), (A)(i), and (B) is yes, and the answer to (B)(i) (if the question is asked) is no, then a liability is raised. If so,

Step (C)(ii): [since the consent of the defendant to complying with the assumption is withdrawn,] does conscience dictate the grant of a minimum remedy? If yes,

Step (C)(iii): are there any conditions requiring a higher or lower remedy?

The justification, in particular, of the entirety of Step C has been discussed in the conclusions to Chapter 4. Further refinement of the ideas behind this Step will be added below. First, however, the liability-establishing phases will be discussed in turn.

7.1.4.1 Step (A)

The first indication of reliance is relevant detriment. Assuming that the remedy is the minimum, we lessen the risk of general overcompensation, while easing task for the claimant reduces the risk of undercompensation. Thus, the new test can be summarised as looking for detriment, relevance, and justification by the defendant.

It is certainly possible to disavow Lord Denning's approach in *Greasley*, which would appear to undermine this argument since the only alternative approach seems to be that the claimant must prove each of the three elements. One authoritative criticism of this approach has been made in a previous existence by the current President of the UK Supreme Court. In *Steria v Hutchison*, Neuberger LJ stated that, contrary to the proposition that the onus shifts to the representor to show that a representation (once that is established by the representee) has not been acted on, in fact 'the onus must be on the person alleging the estoppel to establish unconscionability, or, to put it another way, to establish, in the case of estoppel by representation, the three essential ingredients of representation, reliance and detriment.'[17] He went on to suggest that *Greasley* only shifts the onus when the claimant's case is extremely clear: cases in which 'it can fairly be said that, once it is established that the representation was made, the representation together with all the other facts of the case enables the claimant to say that, unless the defendant can elicit some further evidence to the contrary, the claimant will have discharged the onus.'[18] If this was, however, a general principle and not confined to such cases, Neuberger LJ concluded, it was at least confined to proprietary estoppel. This, as his Lordship acknowledged, was due to his distaste for the *Greasley* principle: 'on the basis that it seems to me to be a questionable principle, I would limit its ambit to as narrow an area as respectably possible.'[19]

However, it is argued that a reversed burden is acceptable for the limited purpose of disproving the justifiability of the detriment. Even if this justifiability manages to be found in an unmeritorious case, a court can still decide under (C)(ii) that, on balance, an equity has not arisen.

The initial finding of detriment, it is submitted, highlights the existing relative importance of this element, which is what ultimately serves to establish that there is an

[17] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [129].
[18] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [130].
[19] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [130].

inequitability once it has been found that there was inducement of reasonable reliance. This is therefore the order in which the matter should be addressed. One further intermediate step will be discussed next.

7.1.4.2 Step (A)(i)

What is sought by means of the estoppel claim must be specific and relevant. This replaces the clear representation element and requires the claimant simply to show relevance and plausibility. The importance of (A)(ii) can be illustrated by reference to *Steria* and *Cobbe*.

In *Steria v Hutchison*, Neuberger LJ remarked that the alleged estoppel in reality would have no benefit for the respondent. This was in two ways: first, he intended to retire at the age of 55 so the right to retire at 62 which it was claimed the estoppel raised was not useful to him, and, secondly, his employment ceased in any event following the hearing before the Pensions Ombudsman.[20] This amounted to a decision that the respondent had not 'identif[ied] precisely the nature of the estoppel alleged.'[21]

The failure to identify the nature of the estoppel was a problem which also arose in *Cobbe*. There, Lord Scott noted the failure of the claimant to give satisfactory answers to the questions 'what is the fact or facts, or the matter of mixed fact and law, that, in the present case, the defendant company is said to be barred from asserting? And what is the proprietary right claimed by Mr Cobbe that the facts and matters it is barred from asserting might otherwise defeat?'[22] This, it is submitted, takes too narrow a view of how an estoppel operates. In addition, McFarlane has commented that this 'cannot explain the whole of proprietary estoppel' but only cases involving proprietary estoppel which also fit into the traditional idea of estoppel by representation.[23] On detriment, Neuberger LJ stated that the detriment in *Steria* was not 'relevant detriment'[24] and any disadvantage eventually caused by joining the scheme was implicitly balanced with 'the very substantial improvement' the respondent received as a result of joining the scheme.[25] Neuberger LJ added that, if such a threshold for detriment did not exist, 'the

[20] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [98].
[21] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [96].
[22] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [14].
[23] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 1.13-1.14.
[24] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [125].
[25] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [123]. Thus, the value of the detriment could be seen as being diminished, even if the detriment still stands. This, it is submitted, ought to be a

requirement for detriment in a claim for estoppel would be nugatory, because in every case where a claimant advances a claim on estoppel, he will, virtually by definition, be better off if the estoppel is established than if it is not: otherwise he would not be raising an estoppel.'[26]

7.1.4.3 Step (B): Inducement and reasonable reliance: the burden shifts

Using a reverse process to that in *Greasley*, the final step proposed here is to allow a defendant to disprove the presence of an equity, by disproving that the claimant had a right to rely on the basis of the nature of the representation made, or the context in which it was made. Thus, contextual factors such as the unlikelihood of making formal legal arrangements in *Thorner v Major* and *Coyle v Finnegan* would be taken into account under this heading. A defendant can also disprove that there was inducement by showing that the representation was of such a nature, or made in such a context, that there could have been no inducement. This is a more claimant-sided factor because it will take into account the ways in which a claimant is unlikely to have been induced to rely. Had the facts in *Cobbe* reached this stage, it could have been shown by the defendant that Mr Cobbe was unlikely to be induced into the belief that he would receive a certain interest in property. Equally, though, it could have been shown that it was not reasonable for him to rely on what he claimed to have relied upon. Usually, it will suffice to disprove any basis for reasonable reliance.

7.1.4.4 Step (C): The remedy

Step (C)(i) relates to the court's satisfaction that the elements of liability have been met under (A) and (B).

in (C)(ii), the court decides whether conscience requires, at the outset, the recognition of a minimum equity.

In (C)(iii), the court can decide whether to vary the equity if necessary, by considering factors which have arisen since the events of the detriment and the resiling took place. The model is proposed because it is suggested that it will not, in fact, open

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different question from whether the availability of an alternative claim might lead a court to hold that the model will not be given effect, considered below in section 7.3.1. Concurrent liability is a proper question for (C)(ii) and does not relate to whether the quality of the detriment was such that a claim could not be established. Separate claims should be considered separately, and this was not a problem in *Steria.* The problem for the purposes of establishing detriment in *Steria* is the lack of a subject-matter.

[26] *Steria v Hutchison Ltd* [2006] EWCA Civ 1551, [2007] ICR 445 [125].

the floodgates to a wide range of estoppel cases but it simply represents a logical progression based on the importance of finding some detriment which gives rise to a liability: this is, in theory, the process in which the court is already engaged in using equitable estoppel.

7.1.5 Ancillary doctrinal matters to be considered

7.1.5.1 Squaring the circle of reasonable reliance

Specific proof by claimant of 'representation' would still bring us back to initial position where a court begins to split the atom and ask what kind of representation, or what conditions, satisfy the required representation in one factual matrix but not another. This can be reduced to the idea that a court is seeking proof of inducement.

In view of the issues highlighted in section 5.2.2, reasonable reliance will be used as a limiting concept.[27] The limiting sense preferred in the thesis is inspired by the sense suggested by Robertson,[28] and analogous to one sense suggested by McFarlane,[29] and

[27] Thus in a different sense to that proposed by Andrew Robertson, 'Towards a Unifying Purpose for Estoppel' (1996) 22 Monash University Law Review 1, 18: that a 'reasonable expectations' approach indicates an emphasis on preventing unconscionable conduct rather than detriment. The model views unconscionable conduct as the trigger for intervention but equally sees unconscionability as requiring no more than the compensation of detriment, consistently with the attenuated idea of unconscionability suggested in Chapter 4. See also the discussion in Chapter 5 about the meanings of detriment and unconscionability adopted in this thesis, thus distinguishing itself further from the terms used by Robertson, for example in Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 209: '…B would suffer detriment if A did not adhere to it.'

[28] Andrew Robertson, 'Knowledge and Unconscionability in a Unified Estoppel' (1998) 24(1) Monash University Law Review 115, 120: he notes the 'abandonment of questions of intention' in favour of a more claimant-centred approach. Note that Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing 1999) 55 states that Robertson's approach to reasonable reliance is 'unsatisfactory' because of both Spence's and Robertson's views that 'equitable estoppel operates as an action to correct a civil wrong'; Robertson, however, has subsequently departed somewhat from his view: Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 208, and see the discussion in Chapter 2.

[29] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 3.20: the concept can 'be used to protect A and to reflect the fact, for example, that B has some responsibility for his or her own well-being and cannot expect A to be responsible for detriment arising from *any* action B takes in reliance on A's acquiescence or promise.' However, it is different from the idea that the extent of the detriment for which A may be held responsible can be limited, discussed at para 4.67. A further sense of the term identified by McFarlane at para 3.12 as being less helpful than the previous sense, but prevalent in Robertson's accounts of a unified estoppel, is simply a general reasonable reliance test focusing on the effect of A's conduct on B, which McFarlane says is less transparent than asking whether A made a promise of the kind required. Further, Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 212 suggested that 'a promise is required in practice.' McFarlane adds that reasonable reliance in the last sense outlined in this note additionally risks 'reinventing the wheel.'

consistent with the views of Collins.[30] Secondly, then, the detriment could raise a presumption that there was inducement, which the defendant can then rebut, and in doing so can draw upon information that would suggest to the court[31] that the reliance claimed was not reasonable. It is submitted that a court ought to be empowered to determine that a lower degree, or a lack, of reasonableness can extinguish any equity raised by the inducement.[32]

7.1.5.2 The effect of the equity

The unification must be principled but allow for some flexibility, consistently with the role of unconscionability identified in the thesis. This would allow for the flourishing of the positive elements identified in the Chapter 1 survey – an openness to development, an inferred recognition of the similarity between the estoppels – together with the diminishing of the negative elements, imprecision and, relatedly, the perception that estoppel is an all-purpose fallback claim.

An example of an expansive view of equity is clear in the survey conducted in section 6.2.1 as well as the discussion of Robertson's views in section 6.3.1. The operation of conscience can dictate retaining the expectation, provided the detriment is not out of all proportion to such expectation. This is in contrast again to the conclusion in 6.3.4 that estoppel can take inspiration from the emerging principle in public-law litigation that the operation of proportionality can dictate a limited remedy. This involves construing the expectation as something that the defendant can no longer fulfil. In public law, this is justified because of, first, the authority's discretion to effect a change in

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Certainly, reasonable reliance in this sense runs into the circularity problem identified by Pratt: thus, B acting in such a way was reasonable because A acted in a way that made such a reliance act of B reasonable.

[30] Described above in Chapter 5.

[31] We may recall Collins' definition, from section 5.2.2, which describes reasonable reliance as something which a court may perceive.

[32] This is therefore different from the view of reasonable reliance as limitation proposed by Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 3.19-3.20 and paras 4.67-4.76. He says (para 4.67) that the concept can be useful in determining the extent of B's detriment for which A is to be held responsible, or in excluding liability for B's detrimental conduct which could not reasonably have been expected by A to result from A's promise or acquiescence. On the other hand, Liew views the remoteness inquiry as lying within the 'minimum equity' principle: Ying Khai Liew, 'Reanalysing institutional and remedial constructive trusts' (2016) 75(3) Cambridge Law Journal 528, 539. Within the *Thorner* principle, McFarlane differentiates (para 2.93) three aspects of the concept and concludes (para 2.94) that the presence of the first two need not require that the third be answered in the positive: '(i) the question of whether it is reasonable for B to believe that A will act in a particular way; (ii) the question of whether it is reasonable (ie sensible or rational) for B to rely on that belief; and (iii) the question of whether A is subject to a legal liability, arising through proprietary estoppel.'

policy, and, secondly, the public-interest imperatives weighing against fulfilling the expectation; while, in private law, this is justified because, first, the defendant is not bound or under a duty to perform the expectation, and, secondly, the defendant no longer consents so to perform. Given that the expectation is necessarily undermined in both situations, there is authority in both spheres of law for the proposition that a limited, equitable remedy be provided by the court if it considers that justice requires it.

There cannot be a unified doctrine which, depending on the context, brings to bear different remedial considerations and consequently different remedies tend to be given. As the authors of *Wilken* presciently note (in arguing that there are too many difficulties with the idea of a unified doctrine and consequently it is unviable), '[f]or assimilation to occur, adjustment has to be made to the remedial approaches currently adopted in the various doctrines.'[33] One unified doctrine would with difficulty retain both the expansive and limitative remedial applications of unconscionability and, consequently, one should be chosen. It is submitted that this ought to be the limitative application in the sense described in this section.

7.1.5.3 Causation

The model leaves open the causation element. However, the but-for test ought to guide the finding of inducement under the model because the presumption of inducement mandates a reasonably strong threshold for holding the defendant liable.[34] Lord Hoffmann has written that the but-for test in negligence is grounded in common sense, but that it may be less useful in considering liability that does not depend on fault.[35] We saw in Chapter 4 that lability in equitable estoppel, ultimately, depends not exactly on fault, but on a court's assessment of the circumstances which includes, but does not depend on, some idea of objective wrong weighing on one's conscience.

[33] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.24.

[34] Balancing the possible objections to a but-for test as identified by McFarlane with the need highlighted in the main text for a reasonably strict test, a but-for test can be concluded to be appropriate for the purposes of the model. He identifies three possible objections: two of general application, indeterminacy – so a finding under the test is not a finding of absolute truth, and over-determination – that two but-for causes involving the same conduct by two different people can produce a 'false negative'; and, specifically in proprietary estoppel, the judge's invidious task in determining the types of proprietary estoppel claims that arise from intimate domestic relationships. Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 3.189-3.212; the latter of which he argues is preferably dealt with in legislation, para 3.212.

[35] Leonard Hoffmann, 'Causation in Tort Law' (2005) 121 Law Quarterly Review 592, 594.

However, the 'person' examining one's conscience is the court itself. Equitable estoppel does not require a finding of fault, but a factual finding of inducement in certain circumstances which then requires the court to state whether or not a liability has been raised. Nonetheless, the finding of liability and the granting of an associated remedy involve some element that the defendant is to be castigated: yet this is not to admonish the defendant but to restore to the claimant something which justice requires restoring. The finding of liability is weighed initially in favour of the claimant, and thus (where the defendant raises inferences indicating that causation will be a matter of dispute) requires a relatively strict test.

7.2 Applications of the model

7.2.1 Dual aims

The model will now be tested using a number of cases decided in England, Australia, and Ireland. This will allow, first, for a discussion of the advantages and disadvantages of the model, through its hypothetical application to real-life scenarios, and, secondly, for an explanation of elements which may, or may not, be immediately acceptable in each jurisdiction. The second point will in turn allow us to consider the practical usefulness of the model: while it may be viable as a matter of principle, it may simply not be possible to imagine its use in a particular jurisdiction. Proposals as to the remedy under steps (C)(ii) and (iii) will be suggested.

7.2.2 Application of the model using examples drawn from English law

In this section, the proposed model will be applied in turn to a number of significant English cases involving proprietary estoppel, estoppel by representation, and what could be described as either promissory estoppel or equitable estoppel. It will be seen that the model leads sometimes to more precision and better results, but that, conversely, the step involving the disproof of the presumption may complicate matters unduly. This is in addition to basic doctrinal barriers to adopting the proposed model in England, issues which will be discussed in the section conclusion.

7.2.2.1 Wayling v Jones

The proposed model will first be applied to *Wayling v Jones*,[36] a real-life example of a proprietary estoppel case involving a carer. In cases of this kind, the claimant will have worked as a carer for low wages and no other formalised, permanent provision for himself. This situation is typically interpreted as involving detriment to the claimant. There may, however, be a provision of free housing for the duration of the relationship. The subject-matter involves the claimant showing that he has been left out of the original promise as to a specific property. This establishes the content (expectation) and initial credibility, an interest in not being left without a house in view of the expectation and the detriment. The burden then shifts to the defendant to show that the detailed detriment is due to something other than the conduct of defendant such as would induce this detriment in view of the final expectation. The defendant can also point to other provisions he has made, or benefits that the claimant has incurred. The court must decide whether these are sufficient. Assuming that the defendant has not made other provision at this stage, he must show objective reasons why the claimant incurred detriment that are not attributable to any inducement by the defendant.

7.2.2.1 (a) Issues

At the outset and before applying the model, we first need to examine the issues surrounding the burden of proof actually used in *Wayling v Jones*. The phrasing used by the Court of Appeal in *Wayling v Jones* appears to support a reverse order, and a reversed burden of proof: so, the detriment is proven first, and this leads to a presumption of inducement. However, the decision of the Court of Appeal produced a different result than that which would occur if we applied the current model to the facts. The use of a reversed burden of proof appears to originate with the decision of Lord Denning in *Greasley v Cooke*,[37] which provided that influence could be presumed from representations which were calculated to produce such influence. The judge's decision, that the conduct of Ms Cooke did not result from her belief that the defendants were providing her with a home *despite* their having made statements calculated to induce such belief, was therefore overturned with this new proposition on causation. Thus, '[t]here was no need for her to prove that she acted on the faith of those assurances. It is

[36] *Wayling v Jones* (1995) 69 P & CR 170 (CA).
[37] *Greasley v Cooke* [1980] 1 WLR 1306 (CA).

to be presumed that she did so.'[38] The Court of Appeal decision has been interpreted as requiring the defendant to disprove reliance, once the claimant has proved that there was a valid representation for estoppel to operate.[39]

Returning to *Wayling v Jones*, Cooke notes that the Denning presumption of inducement from *Greasley* would have led to a negative result in this case for Mr Wayling due to his statements in cross-examination to the effect that there were reasons for staying with the deceased other than the expectation.[40] Cooke then rephrases the questions put to Mr Wayling as being 'if he had not made the promise, you would have stayed; but if you had not believed, either, that he was going to leave you the property, would you still have stayed?' to which she says the answer 'would clearly have been "yes" and the claim would have failed.'[41] She states on this basis[42] that the decision in *Wayling* was both incorrect and inconsistent with the dictum of Robert Goff J in *Amalgamated Investment*.[43] That dictum was, however, used by the Court of Appeal in *Wayling* to support its decision, while it appears that *Greasley v Cooke* was used in *Wayling* to establish the causal link between 'conduct from which his reliance on the deceased's clear promises could be inferred' and those promises.

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[38] *Greasley v Cooke* [1980] 1 WLR 1306 (CA) 1311.

[39] *Greasley v Cooke* [1980] 1 WLR 1306 (CA) 1313: Waller LJ cited Sir George Jessel in *Smith v Chadwick* (1880) 20 Ch D 27, 44-45: '…But unless it is shewn in one way or the other that he did not rely on the statement the inference follows.'

[40] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 111 cites the cross-examination transcript quoted by the CA in *Wayling v Jones* (1995) 69 P & CR 170 (CA) 173-74 as follows:
'Q. If he had not made that promise to you, would you still have stayed with him?
A. Yes …
Q. Just to continue on from that. So far as you are concerned, from that reply you gave, you would have remained with the deceased whether or not he made those promises?
A. Whatever business venture he would have had, yes.
Q. The promises were not the reason why you remained with the deceased?
A. No, we got on very well together. He always wanted to reward me.'
Cooke views *Wayling* as belonging to a 'variant' of a number of multiple-cause cases, for which she cites the example of *Taylors Fashions* which was referred to in *Amalgamated*. In this 'variant', 'the action component of reliance had already started when the representation was made' and so, 'if representation and action have been proved, and the belief and causal link asserted, the onus passes to the other party to disprove reliance.'

[41] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 111.

[42] Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press 2000) 111.

[43] *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank* [1982] QB 84 (QB) 104: 'There may be cases where the representee has proceeded initially on the basis of a belief derived from some other source independent of the representor, but his belief has subsequently been confirmed by the encouragement or representation of the representor. In such a case, the question is not whether the representee acted, or desisted from acting, solely in reliance upon the encouragement or representation of the other party; the question is rather whether his conduct was so *influenced by* the encouragement or representation [he then referred to *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 481] that it would be unconscionable for the representor thereafter to enforce his strict legal rights.'

In *Wayling v Jones*, the Court of Appeal dismissed counsel for Wayling's first submission that the questions and answers were directed only at the parties' living together and not at the business ventures.[44] The Court reversed the judge's finding that, because Wayling would have stayed regardless of whether Jones had made a promise, there was no reliance. As Leggatt LJ put it, '(a) if the deceased had made no promise, the plaintiff would have stayed with him; (b) the deceased did make a promise; and (c) if the deceased had reneged on his promise, the plaintiff would have left.' The last point sufficed, in the view of the Court of Appeal, to establish the necessary reliance link, and this was easily done by referring to the evidence that the promises had been made.

7.2.2.1 (b) Applying the model

Turning now to the application of the model, the first requirement proposed under step (A) is for the claimant to prove substantial detriment as it has already been defined in section 5.3.2.1(a). In this case, the detriment consists of a loss of wages and a failure to seek other life opportunities. Mr Wayling could have claimed that the detriment ran from the time he began helping with the running of the cafes and the hotel 'for what was little more than pocket money.'[45] He also entered into a leasing agreement, a point which, unfortunately, was not raised on appeal.[46] The additional element is step (A)(ii), showing that the detriment related to a specific subject-matter. Here, Mr Wayling would have claimed the subject-matter to be an entitlement to the business and the hotel.

The result under step (B) would end up being consistent with the High Court judgment. The model eliminates the need for the analysis to begin with the promises. Answering the question whether promises were made, and whether these were sufficient to establish the existence of a traditional proprietary estoppel, would in this case not assist either party. In this case, the acts of detriment would have arisen regardless of the existence of a pecuniary commitment. It would therefore be apparent that Mr Jones did not induce Mr Wayling into a situation of an imbalance of power but may equally have been reassured by his love and affection.

[44] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 175. It addressed itself to the second submission, that the questions were based on the hypothesis that no promises had been made when, as the submission recited and the Court agreed, promises had been made.
[45] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 173.
[46] *Wayling v Jones* (1995) 69 P & CR 170 (CA) 173.

This case is therefore a helpful example of the differences which the model would eventuate, not only for its production of a more coherent result but because it is a case involving promises in which the starting-point is not the existence of promises.

7.2.2.2 Baird Textile Holdings v Marks & Spencer plc

7.2.2.2 (a) Issues

A number of fault lines of the proposed unified model will now be closely examined using the English case of *Baird Textile Holdings v Marks & Spencer plc*.[47] Although a preliminary claim, the Court of Appeal decision contains a useful discussion of the relationship involved. Applying the model here will tests an alternative approach in a decision which eschewed the idea of a single cause of action. It will also show that a fairer and at the same time predictable result is possible. *Baird* has been chosen because of the potential difficulty of finding evidence of the detriment that is required under the proposed model and a reasonable belief or behaviour designed to induce it. The estoppel claim was held by Judge LJ to have no real prospect of success because of his view that English law as it then stood did not allow enforcing the estoppel sought, despite the possibility advanced by counsel that the House of Lords might eventually adopt the propositions in *Waltons Stores*.[48] The estoppel sought in *Baird* is perhaps most easily described in traditional terms as an estoppel by convention.[49]

As mentioned, an advantage of attempting to apply the model to the facts in this case is that the decision itself is seen as preventing any cause of action from arising in estoppels outside of proprietary estoppel,[50] thus it is particularly useful to examine the results using a cause of action.

7.2.2.2 (b) Application

Under steps (A) and (A)(i), Baird would need to show specifically what detriment it had incurred on the basis that M&S would carry on business with it in the same way. The facts show that the arrangements were made year to year, thus it would need to be stated that the detriment must have been incurred in the expectation of one more year's

[47] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274.
[48] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 [39].
[49] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 [33] referring to the decision of the High Court at [20] of that judgment.
[50] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.27.

worth of transactions. This is what step (B) would need to relate to. However, in the case itself, Baird claimed loss of profits for 3 years in the amount of £38.5m.[51] Nothing was advanced to state why this particular calculation was necessary and thus this seems to be a tactic that simply did not work. Due to the preliminary nature of this case, this sort of factor is difficult to outline in more detail. The inclusion of the subject-matter element eliminates this problem by defining what is sought with more precision and is thus perhaps a more likely element of the proposed model to be welcomed in England. The subject-matter element points out a flaw in estoppel generally and this is the lack of restriction in defining what the claimant wants, which, as we saw in section 1.3.2, enabled claims for some fallback relief arguably based on general principles of justice. Combined with a detriment-based remedy, it allows a court to decide whether or not a stated minimum amount of compensation is warranted.

It is clear that Baird had the disadvantage of potential exposure to some loss. Baird was one of four suppliers[52] although each of these is described as 'major' as regards their relationship and importance to M&S. There was no provision in respect of Baird for anything past the one-year mark nor even a guaranteed amount of work during that year. Instead, the parties had a 'partnership' of 'co-operation' which speaks to M&S's economic power, thus 'it is the pleaded case of Baird that M&S deliberately refrained from concluding any express contract because it could achieve greater flexibility without one.'[53] The High Court judgment refers to the relationship as being 'long term, terminable upon reasonable notice,'[54] during the subsistence of which it was claimed by Baird that M&S would acquire garments from Baird in quantities and at prices that were in all the circumstances reasonable, and the parties would deal in good faith.

The proposed model provides a new avenue: under (B), M&S claims that Baird was not induced because the nature of relationship was such that there was no contract, and further that it was not justifiable for Baird so to be induced. The specificity, however, of the detriment that Baird would be able to claim, would be difficult to defeat. The model would allow compensation but reduce it to the losses during the following year to which Baird was exposed and to which it would not have been but for the inducement.

[51] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 [11].
[52] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 [5].
[53] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 [14] referring to the judgment of the High Court at [13] of that judgment.
[54] *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 [12].

Collins has outlined two explanations for the result in *Baird*: first and in part 'because the obligation placed on the defendant was too uncertain,' and, secondly and mostly, 'because the facts of this case fell outside the kinds of situations that had hitherto been considered suitable for the application of the idea of estoppel or the reliance model as the basis for a claim for compensation.'[55] It is submitted that the model adequately addresses both concerns.

7.2.3 Barriers in English law to the application of the model

Most of the objections that could be raised to applying the model in a specifically English context have been raised throughout the thesis in considering the English statements of principle. For example, the objections to a unified doctrine (section 3.3.1.2) are of special significance in England since, it has been seen (section 1.3.2 and section 3.3.1) a unified doctrine has not yet been explicitly accepted in that jurisdiction. The same could be said of the recognition of a cause of action (section 3.2.7.1, although compare 3.2.7.2). Both factors militate against applying a model of this kind to a case such as *Baird* which tested the boundaries of English equitable estoppel.

Some confusion may exist as to the permissibility of a reversed-burden test in England. In *Wilken*, a comparison is made between estoppel by representation, in which it is said that the representee ought to prove causation, and proprietary estoppel, in which 'the normal burden is, in certain circumstances, reversed': however, the authors note[56] that in *Hammersmith and Fulham BC v Tops Shop Centres Ltd*,[57] in which the reversed burden was applied, it is unclear which of the two estoppels mentioned was actually at issue. In any event, the authors say, it is possible that 'where the action taken by the representee is the obvious and expected consequence of his having been influenced by the representation, a prima facie inference of causation may be drawn without adducing further evidence.'[58]

The three factors outlined, considered together, would seem to be fatal to the proposed model. Would a model based on a less-unified doctrine (for example, if only

[55] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 77.
[56] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 9.85.
[57] *Hammersmith and Fulham BC v Tops Shop Centres Ltd* [1990] Ch 237.
[58] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 9.85.

inducement based on promises could lead to liability), in which a cause of action is available, be more acceptable? This would still involve presuming inducement on the basis of detriment. Yet a promissory liability would seem to require specific proof of a promise.

The model is premised on the idea that beginning with such specific proof is less important than beginning with a questioning of the detriment. Thus, it may be possible to conceive of an altered model, still based on *Greasley* and requiring this to be accepted, but nonetheless emphasising proof of the lack of a commitment at the final stage. As counterintuitive as it may seem, the model could perhaps be most useful in England in dealing with cases involving promises, if it should occur that these are to be considered doctrinally distinct.

It may therefore be necessary for the practical implementation of an English version of the model to confine the proposed model to any belief as to future conduct. The problem here is that this may increase the impetus for recognising *only* promises or commitments, which would entail a less-unified doctrine. This could be solved by using the construct of whether the position was to be P at date D, P being the induced belief and D being a date by which the detriment would clearly be established, were P to be falsified.

Nonetheless, the doctrinal simplification the model promotes between and within estoppels is still argued to be a favourable basis for the application of the model in England, once a further boundaries-testing case appears of the kind[59] not seen since before the cases surveyed in section 1.3.2.

[59] That is, *Cobbe*, in which the claim would nonetheless have failed. Mr Cobbe did not establish a valid subject-matter. He nonetheless might have argued that his detriment became a loss on the basis that he expected it not to be, in turn on the basis that there would be a concluded contract which would solidify and add to the broad terms agreed in principle. Mrs Lisle-Mainwaring would thus have been found to have induced the detriment, but a court would nonetheless have been tempted to hold that the reliance was not reasonable (see Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 2.92, suggesting that the reliance was premature, or not reasonable). The restitutionary award ultimately granted would not have differed from the minimum equity. Thus, the case under the model would probably not have shifted the boundaries identified in section 2.2.5 as arising between unjust enrichment and equitable estoppel.)

7.2.4 Application of the model using examples drawn from Australian law

In order to show the operation of the disproof step, the model will be applied to *Sidhu v Van Dyke*,[60] a High Court case from 2014 which at first glance presents significant obstacles for the acceptability of the model.

7.2.4.1 Sidhu v Van Dyke

7.2.4.1 (a) Issues

In *Sidhu*, the claimant sought the promised transfer to her of a property which was jointly owned by the man with whom she had been having an affair, and his wife. The New South Wales Court of Appeal had allowed the claimant's appeal on the basis that the judge had erred in finding her reliance to be 'objectively unreasonable' and in failing to give her 'the benefit of the 'presumption of reliance.'' In other words, the Court said that not shifting the burden of proof to the defendant had led to the wrong result, with the effect that the property ought to be transferred to the claimant. The High Court dismissed the defendant's appeal, but disavowed the Court of Appeal's approach to the burden of proof. In the judgment of French CJ, Kiefel, Bell and Keane JJ it was stated that, even if applying the *Greasley* approach of disproving the course of action might not lead to different results,[61] the shifting of the burden of proof was in principle wrong, and contrary to authority.[62] It was said that to deploy a presumption on the basis of the proven promises that the claimant was, in fact, induced to act as she did would be to impute the fact of reliance 'on the basis of evidence which falls short of the fact,' and so estoppel would undercut 'the very foundation for equitable intervention' and 'outflank *Jorden v Money*' by enforcing promises without either consideration or detrimental reliance.[63] Meanwhile, Gageler J stated, based on the words of Dixon CJ in *Thompson v Palmer*,[64] that the onus was on the promisee to show belief and an act on faith of that belief, and also to show that the belief was a contributing but not necessarily the sole cause of such a course of action.[65] The High Court has thus ruled out the possibility of a

[60] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19.
[61] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [60].
[62] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [61].
[63] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [58].
[64] *Thompson v Palmer* (1933) 49 CLR 507, 547.
[65] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [90].

shifting of the burden and maintains the requirement that the claimant must first prove a promise (or a representation).

However, the model does not require a defendant to disprove the acts which constitute the detriment. Thus the High Court's insistence that 'it is the conduct of the representee induced by the representor which is the very foundation for equitable intervention'[66] is not incompatible with the model. The model therefore does not create the kind of illegitimate promise enforcement which the Court appeared to say was the consequence of using a presumption. In fact, the model reinforces the idea that the detriment 'is the very foundation for equitable intervention,'[67] provided again that inducement is present alongside the detriment. The model equally supports the proposition in the majority judgment that '[i]t is not the breach of promise, but the promisor's responsibility for the detrimental reliance by the promisee, which makes it unconscionable for the promisor to resile from his or her promise.'[68] This is true in the sense that the jurisdiction for intervention arises in unconscionability; however, it has also been seen that the preferable time to question whether conscience dictates the grant of a remedy is at the time of trial, and this following the finding that a liability has been raised, a point which is not made specifically clear in the quoted statement from *Sidhu*. Nonetheless, there is on the basis of that case no logical barrier to the operation of the model, and this ought to mitigate the Court's insistence that shifting the burden is in itself wrong.

An analysis of Gageler J's judgment, meanwhile, reveals an interesting gloss on the High Court's view of the proof requirements, which further bolsters the model's new approach. Gageler J agreed with the majority's conclusion that it was sufficient for a representation to contribute to the course of action in a significant way, but that it did not need to be the sole cause.[69] He referred[70] to *Thompson v Palmer*[71] for the general proposition [72] that the claimant needed to establish that 'she believed the representations and that, on the faith of that belief, she took a course of action or inaction which would turn out to be to her detriment were the appellant to be permitted

[66] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [58].
[67] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [58].
[68] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [58].
[69] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [72]-[73].
[70] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [90].
[71] *Thompson v Palmer* (1933) 49 CLR 507.
[72] This is as described in the earlier summary of *Sidhu*.

to depart from those representations.' He also cited *Newbon v City Mutual Life Assurance Society Ltd*[73] for the proposition that the claimant needed to establish that her belief was a 'contributing cause.' This, he said, involved establishing not only the belief and taking it into account, but that these two factors in turn 'made a difference to her taking the course of action or inaction: that she would not have so acted or refrained from acting if she did not have the belief.'[74] The question, in Gageler J's view, was correctly framed as follows: '[d]espite any other contributing factors, would the party seeking to establish the estoppel have adopted a different course (of either action or refraining from action) to that which [the party] did had the relevant assumption not been induced?' [75] In conclusion, Gageler J held that the finding that the claimant had not discharged her onus of proof (that she would not have remained in the property and incurred detriment in any event) did not contradict the separate finding that the representations had influenced her.

7.2.4.1 (b) Applying the model

That there was material detriment is clear. The claimant lost the opportunity to seek a property settlement in her divorce proceedings: she stated that the defendant had discouraged her from seeking legal advice and had told her that she did not need a settlement. [76] She had lost the opportunity to work in an alternative field, and she carried out unpaid work on properties while being employed in part-time work elsewhere.[77] She had paid rent to the defendant's wife, albeit at less than the market rate.[78] It seems that there was an advantage to the claimant although, as Mee suggests, it would not be entirely logical to account for this in a way that subtracts from the detriment, on the basis that '[c]ountervailing benefits do not generally undo detrimental reliance but rather constitute something which C has received in return.'[79] An equivalent salary would be difficult to measure because there was no proof that she had given up a specific role or that she would have had a good opportunity to take up a specific role: her options were

[73] *Newbon v City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723, 733.
[74] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [91].
[75] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [93].
[76] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [8].
[77] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [12].
[78] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [11].
[79] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 399.

'a natural resource catchment officer or a ranger.'[80] The proposed model ought to account for part-time work alongside the salary of a specific role. The subject-matter is the transfer of the property, so we ask whether (for the sake of argument) her giving up a specific job with a certain salary, and her improvements, were caused by the conduct of the defendant.

We turn to the model's disproof phase, and the initial difficulty is that the claimant was able to prove that five promises had been made to her in respect of a transfer of property (first, the cottage where the couple lived, and, when a fire resulted in its destruction, the land on which the cottage had stood). Although neither the defendant nor his wife gave evidence,[81] the High Court remarked that the claimant's evidence that she had relied on the promises in the way that she did 'was likely, as a matter of human probabilities, to be true.'[82] The claimant found it difficult in cross-examination 'to dissect' the operative reasons for her remaining in the property and doing the work that she did. However, she indicated that she 'may have looked at other options' for a place to live for her and her son 'if [she] had not been told certain things,' and that her work after the representation was made 'was way above' what she would have done as a regular tenant.[83] Barrett JA in the New South Wales Court of Appeal held that her equivocations did not go so far as to displace the presumption of reliance. Likewise, the majority in the High Court found it 'unlikely that she would have thrown in her lot with the appellant and exerted herself as she did over a period of eight and a half years if he had not made the promises which he in fact made.'[84] Disproof would require the defendant to give evidence, and it seems unlikely that the claimant's illusion of security would be severed in court from the defendant's conduct. The defendant might state that the claimant's actions were simply due to the fact that they were in a relationship and living together, and it is at this point that the claimant's equivocations might be adduced, and would cast some difficulty on the decision. Her evidence that she might have done something different, together with the defendant's bare statement, would not seem to be enough to displace the burden.

[80] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [12].
[81] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [24].
[82] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [69].
[83] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [30] citing the first-instance judgment, which had originally been cited in *Van Dyke v Sidhu* [2012] NSWSC 118 [197]-[198].
[84] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [69].

This shows that the model could provide a preferable method of intervention in a case in which it is clear that Australian law prevents the model from being considered. It is probably therefore safest to assume that any preference in Australia for a model of the kind suggested will only be on an abstract, principled level. Some further practical details on the operation of the model will now be noted against a celebrated case involving the establishment of a tacit reliance justification for equitable estoppel.

7.2.5 Barriers in Australian law to the application of the model?

7.2.5.1 So-called common law estoppel (the preclusive doctrine) and general comments on doctrine

The distinction between 'common-law' estoppel on the one hand, and a single equitable estoppel on the other, appears to remain in Australia. In *Legione v Hateley*, Mason and Deane JJ said in the High Court that common-law estoppel, together with all of its equitable cousins, are emanations of estoppel in pais:

> [e]stoppel in pais includes both the common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrines of proprietary estoppel and estoppel by acquiescence or encouragement.[85]

The position now, however, appears to be that equitable estoppel is to be considered as operating separately from what is sometimes known as its common-law counterpart. It ought to be noted in this respect that, while Robertson refers to evidentiary estoppel by representation as 'common-law estoppel,' Handley, by contrast, says that to name it thus is 'historically and legally inaccurate.'[86] In *Meagher, Gummow & Lehane* it is noted that, ever since the High Court expressly reserved the unification point in its decision in *Giumelli* in 1999, it has not provided an answer to the question of whether so-called common-law estoppel has been assimilated, and they state that 'it is

[85] *Legione v Hateley* (1983) 152 CLR 406, 430.
[86] K Handley, *Estoppel by Conduct and Election* (Thomson Sweet & Maxwell 2006) para 1-002.

clear that no single overarching doctrine of estoppel by conduct exists in Australia.'[87] Robertson indicated in 1996[88] that representations of existing, present fact if relied on, may[89] or may not[90] give rise to a choice between common-law and equitable estoppels, so the case law is not entirely clear on this point.

7.2.5.2 A cause of action?

The acceptability of a cause of action has wavered since the decision in *Waltons Stores*.[91] One consequence of this is clearly that the recognition of a single estoppel by conduct will be difficult. The variation is in some respects regional. So, while a dictum in the Victorian Full Court in the 1994 case of *Commonwealth v Clark* supported the view of the earlier High Court cases of *Legione v Hateley*,[92] *Waltons Stores*[93] and *Verwayen*[94] as supporting a cause of action in (it is submitted) a general estoppel, the editors of *Meagher, Gummow and Lehane* have since highlighted that Victoria does not accept a unified cause of action. Bryan remarked in 2012 that a 'new sobriety'[95] in the development of estoppel in Australia had developed in the years since the resurgence of interest in equity generally during the 1980s,[96] an 'exciting' time that was represented in the equitable estoppel context[97] by *Waltons Stores* and *Verwayen* as well as *Foran v Wight*.[98] He added that, instead, it was the 1999 decision in *Giumelli v Giumelli*[99] which

[87] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (JD Heydon, MJ Leeming and PG Turner eds, 5th edn, LexisNexis Butterworths 2015) para 17-059.
[88] Andrew Robertson, 'Towards a Unifying Purpose for Estoppel' (1996) 22 Monash University Law Review 1, 5-6.
[89] *Waltons Stores v Maher* (1988) 164 CLR 387, *Foran v Wight* (1989) 168 CLR 385, *Commonwealth v Verwayen* (1990) 170 CLR 394 (per Mason CJ and Deane J).
[90] *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466.
[91] See above, section 3.2.9.1.
[92] *Legione v Hateley* (1983) 152 CLR 406.
[93] *Waltons Stores v Maher* (1988) 164 CLR 387.
[94] *Commonwealth v Verwayen* (1990) 170 CLR 394.
[95] Michael Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 Journal of Equity 1, 5.
[96] Spence has also considered the 'considerable amount of interest in estoppel in the first half of the 1980s': Michael Spence, *Protecting Reliance* (Hart Publishing 1999) 16. It is interesting to note also that Spence regards the view of the High Court around this time as 'eager to develop a distinctly Australian common law.' These factors – alongside a third, the rediscovery of Dixon CJ's judgments on estoppel in *Thompson* and *Grundt* – are regarded by Spence as leading to the development of the distinct Australian version of equitable estoppel. (Spence also refers to Sir Anthony Mason's remark in 1987 that it was open to question whether English contract law principles were appropriate in Australia, which is, unlike England, not an 'international commercial or maritime centre.' Sir Anthony Mason, 'Future Directions in Australian Law: The Wilfred Fullagar Memorial Lecture' (1987) 13 Monash University Law Review 149, 153).
[97] Michael Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 Journal of Equity 1, 2.
[98] *Foran v Wight* (1989) 168 CLR 385.

was 'nowadays the High Court authority most often cited in estoppel decisions.'[100] So, '[i]n the post-*Giumelli* world of estoppel the terminology of the "shield or sword" debate has been transmogrified into the language of "positive" and "negative" relief,' of which only the first may apply to proprietary estoppel.[101]

For the purposes of the principles to be applied, however, it is significant that the formulation[102] of Brennan J in *Waltons Stores* has been referred to in the most recent edition of *Meagher, Gummow and Lehane* as '[t]he current state of authority in Australia as to *equitable* or promissory estoppel'[103] and has been cited in a number of post-*Giumelli* cases,[104] although one court said that these 'must be subject to qualification and refinement.'[105] The analysis of the likely hypothetical effect of applying the model to decided cases will therefore need to take account of whether the proposed model is compatible with the Brennan J formulation.

Thus, (1) is compatible with the 'position P at date D' idea in the model, while (2) and (3) on inducement and consequent action equally match the model. Item (5) identifies the detriment as becoming such if the belief is falsified, and (6) correctly (it is

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[99] *Giumelli v Giumelli* (1999) 161 ALR 473.

[100] Michael Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 Journal of Equity 1, 5.

[101] Michael Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 Journal of Equity 1, 8.

[102] *Waltons Stores v Maher* (1988) 164 CLR 387, 428-429. The formulation reads: 'to establish an equitable estoppel, it is necessary for a plaintiff to prove that: 1. the plaintiff assumed or expected that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; 2. the defendant has induced the plaintiff to adopt that assumption or expectation; 3. the plaintiff acts or abstains from acting in reliance on the assumption or expectation; 4. the defendant knew or intended him to do so; 5. the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and 6. the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.'

[103] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (JD Heydon, MJ Leeming and PG Turner eds, 5th edn, LexisNexis Butterworths 2015) para 17-260 (emphasis added).

[104] See the cases cited in *Meagher, Gummow and Lehane*, para 17-260 n 254, and, additionally, *Hamersley Iron Pty Ltd v The National Competition Council* (2008) 247 ALR 385, [2008] FCA 598; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 264 ALR 15 [557], [566] (*Meagher, Gummow and Lehane* cited [555] of this case and queried the extent to which the formulation was applied); *Fairfax Media Publications v Reed International Books Australia* (2010) 272 ALR 547, 582; *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 285 ALR 311, [2011] NSWCA 214; *Tipperary Developments Pty Ltd v The State of Western Australia* (2009) 258 ALR 124, [2009] WASCA 126 [142], in which the second, third and fourth elements identified by Brennan J were equated with the 'something more' required by Mason CJ and Wilson J in *Waltons Stores*, 406. Cf *S & E Promotions v Tobin Brothers* (1994) 122 ALR 637, 653, citing Priestly JA in *Austotel Pty Ltd v Franklins Self Serve Pty Ltd* (1989) 16 NSWLR 582, 615-616: 'It may be that those tests do not represent the view of a majority of the court, but even if not, they are useful as a check; if the facts of the case did not measure up to those tests, it would be necessary to think thoroughly about why not. If they do comply with those tests, that is some reason for thinking my conclusion right.'

[105] *DHJPM Pty Ltd v Blackthorn Resources Ltd* (2011) 285 ALR 311, [2011] NSWCA 214 [47].

submitted) identifies that the defendant has failed to act to avoid that detriment. However, perhaps (4) is difficult, as it requires the defendant to have known or intended that the plaintiff have acted in the way that he did. The discussion in Chapter 5 has made clear that such knowledge is not required for inducement (which is the trigger for action and persists as long as the action endures). However, in a case in which such knowledge is clearly absent, and a court considers that it ought to be required in order for the reliance to be unjustified, the model could provide limited assistance.

The comments in, and comments about, *Waltons Stores* provided an impetus for a more logical development of estoppel, and the ideas of a single cause of action focusing on the inducement, rather than being necessarily restricted to promises, are certainly incorporated into the model. It is nonetheless arguable that the case is not always helpful, particularly when *Giumelli* appears to be recognised as a better authority.

It is sought in the thesis to suggest a model that will provide greater doctrinal clarity, based on the problem identified in section 1.3.2 that pleadings of estoppel in England at least seem to use estoppel as a fallback option, indiscriminately conflating different kinds of estoppel or conflating other doctrines with estoppel. This could represent confusion or, conversely, a view that estoppel doctrines seek to resolve the same kind of problem in similar ways. Further, it was seen that equitable estoppel has recently been referred to in England as 'developing'[106] or 'evolving','[107] which lends credence to either of those views. In *Meagher, Gummow and Lehane* it is said that the 'inevitable' complexity brought about by the 'number of doctrines known as estoppel' is not to be 'mistaken for the confusion that is acknowledged to have occurred as the result of' *Waltons*, *Foran* and *Verwayen*.[108] The exact status of a unified equitable estoppel in Australia may therefore equally be said to be in some doubt.

There do not seem to be peculiarly Australian objections to the model. In reality, it is not necessary where the principles have already been revolutionised by *Waltons Stores*, and there may not be further appetite for change in the form of the liability-finding inquiry. On the other hand, the reasons identified in section 6.3 for preferring a

[106] *Dixon v Blindley Heath Investments Ltd* [2015] EWCA Civ 1023 [80].
[107] *Aquavita International SA v Ashapura Minechem Ltd* [2015] EWHC 2807 (QB) [66].
[108] Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (JD Heydon, MJ Leeming and PG Turner eds, 5th edn, LexisNexis Butterworths 2015) para 17-005.

minimum equity-based remedy apply with equal force to the Australian version of the doctrine.

7.2.6 Application of the model using examples drawn from Irish law

This jurisdiction has a relatively blank slate on estoppel and is thus a prime testing ground for the proposed model. It will be seen in this section that a number of points make this jurisdiction particularly receptive to the adoption of the proposed model.

As with the teasing out of the model in English cases above, this discussion will begin with a proprietary estoppel case, *Coyle v Finnegan*[109] and will apply the proposed model to the evidence and the conclusions found in the judgment.

7.2.6.1 Coyle v Finnegan

This case involves a scenario similar to that in *Gillett v Holt* and *Thorner v Major*, with a result more similar to that in *Gillett*. The terms of the estoppel claim, which was the fourth pleading, were that the defendants, devisees of the land at issue, were to be estopped from denying the plaintiff's entitlement to the lands.

The detriment element is fulfilled: the plaintiff had worked on the deceased's farm from 1991 until the work 'slowed down' in 2000, when the plaintiff, who was already doing other odd jobs, began getting more work from a third party. This work was done for no remuneration. The plaintiff worked other jobs in the interim, and an alternative opportunity for odd jobs led to his eventual disengagement from the deceased's farm. No further type of detriment was described by Laffoy J, even though this might have been possible: thus, one might have considered the available opportunities to work elsewhere and whether these might have paid more than the sum of the reasonable remuneration for the detrimental work and the amounts paid by the plaintiff's other odd jobs. A minimum remedy might be increased by any upward difference in the wages paid in definite opportunities elsewhere, which might be difficult to calculate only because the evidence for it may be minimal. No such evidence was mentioned in this case, while the expert evidence on reasonable remuneration was not challenged by the defendants.[110]

[109] *Coyle v Finnegan* [2013] IEHC 463.
[110] *Coyle v Finnegan* [2013] IEHC 463 [37].

The subject-matter is the nature of the gift under the will, and the fact that the plaintiff was excluded from the last will, to his surprise.[111]

The timing of the commencement of the detriment and the making of the will (both in August 1991) present a significant hurdle in disproving inducement. The defence does not allow for a wide-ranging analysis. The defendants had simply denied the plaintiff's entitlement to relief,[112] and had challenged the quantum assessment to the extent of questioning the degree of assistance provided by the plaintiff to the deceased and questioning the plaintiff's claim that he had been paid nothing, both of which were swiftly dismissed by Laffoy J.[113] Basing the analysis on what is provided, a possible target is the chequered history of the plaintiff's employment. The defendants might point out that the plaintiff carried out other work on his own farm between 1991 and 1997, that he had a 'busy' job with the ESB from 1998, that his cordial relationship with the deceased continued past 2000 when, according to the plaintiff, things 'slowed down' and it appeared that the deceased had got a contractor to help him. They might argue that this was evidence of a wider pattern of keeping himself busy with whatever work was available and carrying it out on a very informal basis. But none of this would suffice in view of the proof of detriment – that the work occupied a significant amount of time and it was unpaid, and additionally because of the existence of the first will and the evidence in relation to it that the plaintiff knew of its intended content. The plaintiff's evidence was that '[h]e worked for the Deceased because he was promised the farm. Otherwise he would not have done it; he would have got a job elsewhere.'[114] The detriment – the unpaid work – ended in 2000, three years before the deceased made the second of his three wills in which the plaintiff's gift of the farm was replaced by a gift of €5,000. The presumption would thus not be displaced, but it may fairly be questioned whether the model at this point has said anything useful about the plaintiff's belief and whether it was justifiable.

In this case, the publicly available manifestation of both the promises and their revocation narrow down the search. The legal assistant who drafted both the first and second wills said in relation to the former that the deceased had already informed the

[111] *Coyle v Finnegan* [2013] IEHC 463 [15].
[112] *Coyle v Finnegan* [2013] IEHC 463 [3].
[113] *Coyle v Finnegan* [2013] IEHC 463 [36].
[114] *Coyle v Finnegan* [2013] IEHC 463 [12].

plaintiff 'that he is leaving him the house and lands by Will and he said that he felt that it is better to tell Coyle this so that Coyle would assist him in the future.'[115] This alone may not be enough to save the presumption. It would be entirely possible for the defendants to argue for the plaintiff's ignorance of the will, and this would require the plaintiff then to give the same evidence, described early in the judgment,[116] that the deceased actually promised him the farm prior to the execution of the first will in August 1991, the same month that the plaintiff said he began to work for the deceased. The plaintiff's evidence as to what happened is therefore still needed: however, as in *Thorner*, a complete picture of the relationship may only be drawn using the evidence of various sources. Evidence from two sources, the plaintiff and the legal assistant, was required here as to the initial representations and to what degree these were continued. Thus, while this may not seem altogether different from requiring specific proof of promises as the first step in the traditional test, the helpfulness of the proposed model comes from the way in which reliance – formerly the second step – is considered. The aim is to arrive at a definite conclusion on what the party seeking the estoppel was intended to believe, and actually did believe.

The minimum remedy is easily calculable in this case under step (C). The expert evidence given was that the plaintiff's remuneration would have been €74,004.51, and the Court awarded a rounded number of €74,000, to be charged on the land in favour of the plaintiff.[117]

7.2.6.2 Re JR

The *JR* case[118] is another interesting case to consider as it provides a neat example of the effect of the subject-matter limitation as well as being a standard proprietary estoppel case. In that regard, Costello J's insistence on referring to the doctrine to be applied as 'promissory estoppel,' which, he said, may have the effect of creating a personal right in property 'if the subject matter of the representation is land.'[119]

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[115] *Coyle v Finnegan* [2013] IEHC 463 [6].
[116] *Coyle v Finnegan* [2013] IEHC 463 [4].
[117] *Coyle v Finnegan* [2013] IEHC 463 [38]-[39].
[118] *Re JR, a Ward of Court* [1993] ILRM 657 (HC).
[119] *Re JR, a Ward of Court* [1993] ILRM 657 (HC) 661: '[i]f the subject matter of the representation is land, no right or interest in the land results from this estoppel — a personal right is vested in the representee which will preclude the representor from enforcing a title to the land.' With respect, this seems to be too narrow a view. See, in particular, Susan Bright and Ben McFarlane, 'Proprietary estoppel and property

On detriment, Costello J stated on the basis of *Maharaj v Chand*[120] that 'detriment may exist when a representee leaves a permanent home on the faith of a representation that another will be offered in its place' and that he thought himself entitled to assume that the representee here had resided elsewhere and had given that up to go and live with the ward.[121]

Costello J usefully drew a line between what can be identified as the correct subject-matter and an additional subject-matter. His finding that the respondent had an equity entitling her to stay in the ward's house rent-free for as long as she wished[122] related to the representations made to her at the beginning of the relationship, by which the ward promised to look after her and that she could be sure of a home in his house for the rest of her life. However, he also held that the respondent did not have an immediate beneficial interest by way of constructive trust on the basis of the ward's handing to her a folder containing the will, and making the additional representation that it was now the respondent's house. This, he said, was because it was an unenforceable imperfect gift. Thus, there are two potential types of subject-matter in this case – the right to live in the house rent-free and the more drastic entitlement to a beneficial interest – but it is additionally by looking at the reason for seeking the enforcement of her rights that the correct subject-matter, and incidentally the minimum equity, can be ascertained.

Crucially, the will by virtue of which the respondent, who sought the estoppel, was to benefit, had not been changed. It was made before the onset of the ward's dementia, while he was still 'of sound mind, memory, and understanding.'[123] The ward's committee wished to sell the house in view of its advanced state of disrepair, which required IR£34,000 to reinstate, and it essentially said could not be met by using the ward's own limited funds.[124] The respondent argued that IR£3,000 would be sufficient to meet the necessary repairs.[125]

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rights' [2005] CLJ 449: '[l]ike any other means of acquiring rights, proprietary estoppel can give rise either to personal rights or to property rights.'

[120] *Maharaj v Chand* [1986] AC 898 (PC).

[121] The ward was incorrectly referred to by Costello J as the 'respondent': *Re JR, a Ward of Court* [1993] ILRM 657, 663.

[122] *Re JR, a Ward of Court* [1993] ILRM 657 (HC) 663.

[123] *Re JR, a Ward of Court* [1993] ILRM 657 (HC) 660.

[124] These amounted to IR£39,205, from which other outlays including the payment of sums due to the hospital had to be made.

[125] *Re JR, a Ward of Court* [1993] ILRM 657 (HC) 660.

If we understand step (A)(i) to be the respondent's wish that the house not be sold by the committee, this appears to be too remotely linked to her detriment of leaving her own house and failing to provide for herself. If we see it as not thwarting the expressed intention of the ward by virtue of the will, this appeared to be impossible in this case. The committee had decided to sell the uninhabitable house and the will, bluntly speaking, could not yet take effect as the ward was still alive. Impossibility does not, however, negate the effect of a subject-matter. What does negate it is the fact that the respondent's detriment continuously preceded the raising of this subject-matter by ten years. As Costello J remarked, the respondent could not show any detrimental acts in relation to the representation made to her (along with being given the will).[126] The subject-matter would then need to be one of either the respondent's right to live undisturbed in some dwellinghouse provided by the ward, or a right to live in the specific dwellinghouse originally envisioned.

A traditional approach, requiring the respondent initially to set out the representations on which she said she had relied, would therefore arguably be more useful in this case. As the representor had since been diagnosed with multiple-infarct dementia, and no evidence from parties other than the committee was referred to (and then only in relation to the matter of repairing the house), the evidence of the respondent would, in reality, end up being the only recourse for the court. It is worthwhile again to note that Costello J simply assumed that she had left 'a house or a flat' to live with the ward. In this case, therefore, there is not enough to establish a significant difference between disproofs on the basis of either form of subject-matter identified in the preceding paragraph.

In any event, Costello J held the equity to be satisfied by providing the respondent with enough money from the sale to buy a 'smaller one suitable for the respondent's needs' and in her name. This was said to be without prejudice to her eventual rights under the will were the ward to predecease her. Costello J remarked upon the large size of the house, the fact that the respondent did not use the basement, and the fact that it did not seem to him 'reasonable to spend the ward's limited resources in attempting to

[126] *Re JR, a Ward of Court* [1993] ILRM 657 (HC) 664.

repair it' when 'the respondent herself has no money to do so and no doubt it is declining in value all the time.'[127]

Under the proposed model, the minimum equity under steps (C)(ii) and (iii) would be satisfied by the order that was made. An entitlement to the house as it was, with its need for repairs which could not be paid for, was said to be 'unreasonable' which is, with respect, not a more helpful term than 'disproportionate.' Since the respondent had apparently given up a house, the minimum equity would seem to be exactly what Costello J ordered. On the basis of *JR*, then, the proposed model's precision in identifying the subject-matter does not necessarily lead to a fairer or indeed different result. On the other hand, this case is arguably an example of one that was fairly soundly decided. It is fair to say that inducement was taken for granted in this case, indicating either that nothing hinged on it or alternatively that it was so obvious that it did not need to be questioned.

7.2.7 Barriers in Irish law to the application of the model

The generosity of Irish courts in proprietary estoppel cases may be noted, and, as is the case with England, it presents problems for the adoption of the model. Does this require the adoption of a modified, less-unified model, with an exception made for proprietary estoppel cases in which the courts err on the side of overcompensation? The more principled approach, it was argued, is that it ought not to. It could further be argued in the Irish context that, to a much greater extent than is the case in England, the courts can be rather imprecise as to the basis for their decisions in estoppel.[128] If this view is correct, then such imprecision signals a need for a more principled approach, whether or not it is likely to be followed. Further, the recent High Court decision of Laffoy J (now of the Supreme Court) indicates that a remuneration-based approach to remedies in proprietary estoppel is possible. Perhaps the model's adoption in Ireland would require no more than an acknowledgement that proprietary remedies are, in appropriate cases analogous to proprietary estoppel, available: provided that the value they represent does not exceed the detriment loss.

[127] *Re JR, a Ward of Court* [1993] ILRM 657 (HC) 664.

[128] See the comments of H Biehler, *Equity and the Law of Trusts in Ireland* (6th edn, Round Hall 2016) 826: 'the courts in this jurisdiction have not been particularly careful about the use of different labels to describe various forms of estoppel'; and she adds: '[c]ertainly compared with the principles established in case law in England, where the scope of the doctrine of proprietary estoppel in particular has been explored in detail, the jurisprudence in this area in this jurisdiction is not well developed.'

In a way that suggests a realistic prospect of the model succeeding in this jurisdiction, Irish cases have referred to inducement as an alternative to the requirement of a representation. In *CF v JDF*,[129] it was said that 'in order to establish such an estoppel[130] there must actually be a promise or at least a reasonably clear direct representation or inducement of some kind.'[131] The *Prunty v Crowley*[132] decision of O'Malley J refers to 'an unequivocal inducement'[133] that was given to the plaintiff. The plaintiff in that case sought specific performance on the basis that there was a concluded contract, that there was part performance of a contract and, finally, that the defendants were estopped from denying that a contract had been concluded. Interestingly, the 'unequivocal inducement' took the form of a letter said to be 'subject to contract.' It is submitted that the emphasis on inducement in addition to the (in estoppel) more specific ideas of representation and promise indicates that the courts in this jurisdiction are not looking for precise definitions of the latter two terms, nor do they seek to make distinctions that would prevent the adoption of a model that is unified at least to the extent of the type of 'initial'[134] conduct sought.

A case described as resting on 'promissory estoppel' is *Courtney v McCarthy*.[135] The decision here by Geoghegan J is similar to that of the English Court of Appeal in *Ros Roca*.[136] Unlike in *Ros Roca*, the former case did not involve an oversight of which one party then seeks to take advantage but a common decision to treat the original contract as operative without prejudice to a rescission right in case of a default by purchaser. The vendor had agreed to complete after rescinding, following a number of problems with the purchaser. After one day's delay was agreed, the vendor then defaulted. The Supreme Court held that there was an estoppel which entitled the purchaser to specific performance.[137]

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[129] *CF v JDF* [2005] 4 IR 154 (SC).
[130] *CF v JDF* [2005] 4 IR 154 (SC) 166-167: the submission that the respondent had acquired a beneficial interest was expressed by McGuinness J as being 'through proprietary or promissory estoppel, or, as counsel for the applicant put it, through estoppel by representation.'
[131] *CF v JDF* [2005] 4 IR 154 (SC) 167.
[132] *Prunty v Crowley* [2016] IEHC 293.
[133] *Prunty v Crowley* [2016] IEHC 293 [79].
[134] Of course, on the analysis in this thesis, it is artificial to speak of inducement being the 'initial' conduct, since it exists and persists alongside the detriment.
[135] *Courtney v McCarthy* [2008] 2 IR 376 (SC).
[136] *ING Bank v Ros Roca SA* [2011] EWCA Civ 353, [2012] 1 WLR 472.
[137] *Courtney v McCarthy* [2008] 2 IR 376 (SC) 391 (Geoghegan and Kearns JJ), 408 (Finnegan J).

Applying the model, the detriment here under (A) is being left without a range of contractual rights and remedies, while (A)(i) consists of those rights and remedies. It is, however, difficult to attach an appropriate minimum equity to this, since, in the real-life decision, estoppel was used essentially as a vehicle for specifically enforcing the original contract.

The case is comparable to *Owens v Duggan*,[138] which is a particularly difficult case to analyse under the model because of its 'stark conflicts of evidence.' However, although Hardiman J said that he preferred the plaintiffs' evidence and thus resolved the case in their favour, a number of useful points on inducement may be identified. It will be seen that the model would produce a different result.

The plaintiffs, neighbours of the defendant, sought specific performance of an oral agreement under which the defendant would surrender to them a right of way over his land and, in addition, sell them a separate sliver of land. The plaintiffs alleged that they sent a note of agreement, together with a cheque for £1,000, to the defendant, and that a planning permission application that he later made and which they inspected was fully consistent with the alleged agreement.

The detriment under the model, and as Hardiman J explained, was the plaintiffs' refraining from objecting to the planning permission before it was accepted. The subject-matter, then, would be the existence of the contract and consequent entitlement to a number of remedies. The remedy would be the return of the £1,000 or at most establishing that situation was as if the plaintiffs had objected to the planning permission.

However, as in *Courtney v McCarthy*, in which specific performance of a contract for the sale of land was also granted, it was accepted that an entitlement to estoppel gave rise to an entitlement to contractual remedies.[139] The difficulty that this presents can be resolved in *Owens* by turning to the disproof phase. If it is asked whether, had the planning permission been inconsistent with what the plaintiffs wanted, they would have objected, the answer is yes, but this does not answer the additional question of whether they would have succeeded. Had they not, and if the only solution then were to

[138] *Owens v Duggan* (HC, 2 April 2004).

[139] The same idea – that estoppel can be used to set up a contractual relationship – was also taken for granted in *Haughan v Rutledge* [1988] 1 IR 295 (HC), although, there, Blayney J denied the claim in estoppel, finding that the belief and encouragement elements under the four-part test in Snell*, Equity* (RE Megarry, PV Baker eds, 26th edn, London Sweet & Maxwell 1982) were not made out.

somehow persuade the defendant to formalise the situation, then the failure to object cannot be said to have been induced. However, even assuming the planning permission objection would succeed, there is a further problem. As noted, Hardiman J preferred the evidence of the plaintiffs and essentially said that the defendant was an unreliable witness. This sufficed in his view for an order of specific performance. However, it must be asked whether estoppel was the necessary step for this result.

This jurisdiction does not present any specific obstacles to the adoption of the model. In fact, a number of elements which make it a particularly appropriate jurisdiction in which to implement the model can now be outlined. First, inducement is increasingly regarded as the goal and, further, has been accepted as providing a demanding causative appraisal in the shape of the but-for test. Secondly, a single cause of action is theoretically possible. In general, the similarity of purpose and operation of the different estoppels is acknowledged. Thirdly, the model's focus on detriment serves to limit the operation of estoppel, so it represents an orthodox and not unduly complicated position. The main obstacles appear to be the reversed burden as well as the minimum approach, but neither of these is unique to this jurisdiction nor present here to a greater extent. Because of the relative dearth of decided estoppel cases in Ireland, it may be easier to introduce these as new concepts. Consequently, the adoption of the model in its entirety is feasible in this jurisdiction.

7.3 Practical consequences of adopting the model

7.3.1 Concurrent liability

The practical consequence of adopting the model in terms of possible concurrent liability will now be addressed. The abstract operation of the model alongside, first, a contractual case, and, secondly, a case of preclusive estoppel, will be outlined. It will then be asked whether any distinct consequences prevail in Ireland.

When considering the possible operation of the proposed model alongside a contractual claim, it is submitted that the detriment under the model be considered on its own terms. Thus, there is theoretically a choice between a contractual claim and an estoppel claim. Where both arise on the same facts, the availability of the estoppel claim hinges on whether the court decides in (C)(ii) that conscience does not require the

granting of compensation based on the minimum remedy. For the sake of certainty, it is submitted that a court ought, first, to make a choice between claims, and, secondly, to prefer the contractual claim on the basis that there are common-law duties to which the parties must attend, unless there are truly exceptional circumstances warranting a preference for the minimum equity. It is acknowledged that the latter is subject to some speculation. The equitable claim on the basis of the estoppel, however, is 'secondary.'[140] The argument here is that it is nonetheless a distinct claim and, further, that it is important to isolate the detriment in (A) from the questions of unconscionability that arise in (C)(ii) and (iii), if only for the sake of clarity. The question in (C)(ii) can alternatively be framed as whether it would be unconscionable not to recognise and give effect to the contractual claim, which it almost invariably would not be. Where the claimant has a choice between equitable remedies, one being specific performance, the court should prefer giving an order of specific performance unless it would be unconscionable as against the defendant.

The decision in *Lloyds Bank v Carrick*[141] will now be considered. Detriment in (A) relates to the quality of conduct viewed in the light of the inducement and it can accumulate up until the point of undermining the belief or assumption. It was argued in sections 4.2.1.3, 4.3, and 5.3.2.2 that the point for assessing unconscionability is at the time of trial. It is submitted that the correct pigeonhole for the question of countervailing benefits, a question raised by McFarlane in discussing this case,[142] specifically related to the availability now of other claims, is the court's ability to evaluate unconscionability.

In *Lloyds Bank v Carrick*, the bank sought to enforce a charge over a maisonette in which the second defendant, Mrs Carrick lived. She had moved there after her brother-in-law, the first defendant Mr Carrick, had promised to give her his unregistered interest in the maisonette in return for paying him the proceeds of the sale of her matrimonial home. She paid the sum of £19,000 and moved in, and the lease remained in the first defendant's name. The first defendant charged the property to the bank four years later without informing the bank of the described arrangement.

[140] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632.
[141] *Lloyds Bank v Carrick* [1996] 1 All ER 630 (CA).
[142] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 4.150-4.156.

The bank had argued that the second defendant's interest was void under s 4(6) of the Land Charges Act 1972, which rendered void the contract between her and the first defendant. Thus, the second defendant needed to show that she had an interest in the property other than that which derived from this contract. On appeal, the second defendant accepted that if her interest in the property was limited to that under this contract, the bank was entitled to succeed.[143] She sought to assert a claim in proprietary estoppel, on the basis that she had paid the purchase price and carried out some improvements to the maisonette in the belief encouraged by the first defendant that she either did, or would, own it.[144]

The Court of Appeal held that the parties had entered into a specifically enforceable contract with the result that the first defendant became a bare trustee of the property for the second defendant. This bare trust meant that her claim in proprietary estoppel could not succeed. The Court found that, in so far as there was encouragement by the first defendant, this was to the effect that the second defendant was or would become the beneficial owner, which in reality was the case. The Court noted that it was not explored at trial whether the first defendant further encouraged her in the belief that she would become the legal owner, but in any event this would not assist her as it could not be unconscionable for the bank to rely on non-registration of the contract, and it could not be 'right' to allow her to circumvent by estoppel the statutory invalidation of her contract.[145]

McFarlane notes that the general rule[146] is that a claimant is entitled to choose between claims where more than one is possible on the same facts, but it requires being able to establish those claims in the first place.[147] Thus, he argues, in *Carrick*, the payment of the purchase price was not a detriment because it was a payment under the contract, and thus gave to the second defendant the right to enforce the contract. This is a benefit, he says, which falls to be assessed when considering whether any detriment arose.[148] Clearly, then, that the fact that the contract turned out to be void would not affect the decision on estoppel had it been on this basis. This is because, on this analysis,

[143] *Lloyds Bank v Carrick* [1996] 1 All ER 630 (CA) 637.
[144] *Lloyds Bank v Carrick* [1996] 1 All ER 630 (CA) 639.
[145] *Lloyds Bank v Carrick* [1996] 1 All ER 630 (CA) 641-642.
[146] Citing *Henderson v Merrett Syndicates Ltd (No 1)* [1995] 2 AC 145 (HL).
[147] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 4.153-4.154.
[148] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 4.154.

the second defendant enjoyed four years of a specifically enforceable contract, entered into when she paid the purchase price in 1982, at which stage there could have been no estoppel.

However, the model would take a different approach to this in *Carrick*, on the basis of the definitions of detriment and unconscionability adopted in this thesis. The result, it will be seen, would be the same for the second defendant and no liability would arise requiring the payment of a minimum equity. This is because the bank did not induce her belief, although the proof of such inducement is a problem. While it is clear from the case that the estoppel nexus is properly between the second defendant and the first defendant, who initially induced the belief, it is difficult to imagine how a situation would play out in a real-life adoption of the model in which the second defendant, for whatever reason, seeks an estoppel claim against the bank. Would the bank be able to rebut a presumption that it somehow induced her belief? It would be possible for the bank to argue that it had no dealings with the second defendant, that in fact it did not know of her existence,[149] and further that it must be assumed that whatever gave rise to her belief must have occurred before 1986, by which time it is clear she was in possession. This would be enough under the model for a claim not to succeed.

A second reason, and a more significant one, is that the Court of Appeal was very clear that Parliament, by voiding contracts of the type she primarily sought to claim under, had decided to rule out claims which would lead to the relief sought. It may further be asked what this relief was, and this is where the subject-matter question would assist: what did the second defendant justifiably believe? Was it an entitlement to the lease which her brother-in-law had owned, or more specifically the right to live undisturbed by unknown bank charges? In any event, for the reasons given, neither of these beliefs would have given rise to a liability under the model.

However, if we take for a moment a hypothetical case similar to *Carrick* but in which neither of those reasons applies, and if we further assume that it was the second defendant who had sought a claim under the model against the first defendant, then our assessment changes. For example, such a claim could be on the basis of a promise by him

[149] *Lloyds Bank v Carrick* [1996] 1 All ER 630 (CA) 634: Mr Carrick had, prior to the charge, signed a questionnaire 'to the effect that, to the best of his knowledge, there were no persons other than the mortgagor who would then or thereafter occupy the maisonette.'

that she would own the house and that he had no claim to it of a sort that would make the bank charge possible. The analysis of the detriment in *Carrick* under the model looks to the position from 1982, when the transaction was carried out, to 1986, when the charge was made and, therefore, the suggested promise was reneged upon and the contract became void. It becomes clear at this point within the confines of the possible claim under the model that the payment of the purchase price constituted a detriment.

On the one hand, the contract at this point was now void, the undermining of the induced belief was therefore complete, and the detriment raised a liability under (C)(i) upon the brother-in-law which Mrs Carrick could seek to enforce in court by seeking repayment of the purchase price (a court could determine in (C)(ii) that there was an equity, and in (C)(iii) that it mandated an inflation-adjusted payment). On the other hand, even in a case where a valid contractual claim subsists alongside a claim under the model, the point at which a court ought to take the former into account arises when it is considering whether the raised minimum equity ought to be granted. Thus, the claimant has a choice, and can assert both claims.[150] However, the court ought, for the reasons described above, to extinguish the minimum equity at this point.

[150] The analysis on countervailing benefits would be the same in a case such as *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369. McFarlane has argued that detriment is not established in Derby since the change in the parties' legal positions brought about by 'the reliance element' of the expenditure actually involves a benefit to the party in Mr Derby's position (B). B now has a change of position defence in response to a claim by the bank (A) in money had and received, which defence, 'whilst it does not consist of a claim-right held by B against A, is a countervailing benefit that precisely matches, and thus eliminates, B's detriment' (para 4.159). Therefore, B cannot rely on estoppel by representation but, instead, has a defence to A's potential claim for restitution which cancels out any detriment before the question of estoppel by representation may arise (para 4.159). Here, McFarlane considers the example suggested by Robert Walker LJ in *Derby* [46]: A pays £1,000 to B, telling B 'I have carefully checked all the figures and this is all yours.' B spends £250 on a party and puts £750 in the bank. A discovers that A made a mistake and did not owe B any money, so A demands the £750. The dialogue would then be:
'B: You are estopped by your representation on which I have acted to my detriment.
A: You have not acted to your detriment. You have had a good party, and at my expense, because I cannot recover the £250 back from you.'
Robert Walker LJ adds: 'The facts that B has spent £250 in an enjoyable way, and that A readily limits his claim to £750, put the argument in its most attractive form. But it seems to have some validity even if B had lost £250 on a bad investment, and A began by suing him for £1,000.' He continues [47]: 'I find this argument not only ingenious but also convincing.'
We can consider Mee's argument (John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 399) that, rather than subtracting any countervailing benefits from the detriment for the purpose of determining whether there is any detriment and in what amount, 'the principled approach might be to deduct the countervailing benefits from the expectation remedy.' What is the detriment? For simplicity's sake, let us assume that it is the possible exposure to £250 following a threatened claim by the bank. Using step (A)(i), we narrowly define what the detriment relates to as the belief that one was entitled to a specific amount of money which would justify the detriment. This would be found to have been induced: the bank had a

In *Courtney v McCarthy*,[151] a purchaser paid a deposit for lands which the vendor had agreed to sell her, and she was subsequently 'in delay throughout.' A completion notice was served upon the purchaser and interest was claimed in accordance with the conditions of sale. Even when the notice expired, the vendor indicated a willingness to proceed without prejudice to the notice. There was no completion and the vendor's solicitors informed the purchaser's solicitors that the vendor was rescinding the contract. However, a further letter from the vendor's solicitors requested completion at their office and payment of the interest. Further communications took place. The vendor's daughter finally asked the auctioneer to contact the purchaser to arrange to close the sale by 2:00pm on 11th July, 2005 at a face-to-face meeting. The purchaser's solicitor prepared to transfer the balance of the money but was told by a colleague of the vendor's solicitor at 11:30am of the fixed date that he could not complete that day but would do so the following day. At 12:30am on the 11th, the purchaser's solicitor was contacted by the vendor's solicitor to ask why he was not at the office, whereupon the vendor's solicitor decided it was time to rescind. This was communicated and the deposit was forfeited.

The Irish Supreme Court granted an order of specific performance, which was the subject of the plaintiff's counterclaim and was set up on the basis of estoppel,[152] with

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window of three years in which to discover its mistake ([8]-[11]) and Mr Derby described himself in court as 'naïve' in such matters ([8]). However, at the stage of assessing the minimum equity, a court would find Robert Walker LJ's example compelling and could easily hold that the equity was extinguished because of the associated benefits (particularly, it is submitted, because they were at the bank's expense). Thus, Mee's suggestion would not be necessary under the model to produce principled outcomes: this is done by the separation of detriment from unconscionability (in assessing the minimum equity in (C)(ii)). The loss was starker, however, in the similar case of *National Westminster Bank plc v Somer International (UK) Ltd* [2001] EWCA Civ 970, [2002] QB 1286, in which goods were delivered in purported exchange for what turned out to be a mistaken payment, in respect of which restitution was sought by the appellant bank. Although Somer only had to return the amount by which it had not changed its position, it nonetheless lost the value of such amount in terms of the goods representing that value. The inducement in *Somer* was quite clearly the bank's mistake: see [7]. The court would then look at (C)(ii) and whether other claims might preclude it from giving effect to a liability in the proposed model of estoppel. Here, it is perhaps unclear on what basis the Court of Appeal held. The Court noted that the defences of change of position and estoppel were distinct [46], but that the result of applying either defence in this case was the same [48] (see also *Derby* [30], [44]). Were it to be recognised that Somer had a defence to restitution of change of position under *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL), and further that it had an *alternative* claim under the proposed model (if we persist with hypothetical leaps), then Somer's loss on the estoppel analysis still persists. His potential detriment sufficed for step (A), while, in (C)(ii), a court would therefore be permitted to decide whether or not to provide a remedy.

[151] *Courtney v McCarthy* [2008] 2 IR 376 (SC).

[152] Thus, it fell within Halson's second category of a counterclaim, although it may more accurately be described as falling within his third category of allowing an estoppel to set up all the elements of a claim:

Geoghegan J remarking that it was 'irrelevant' whether this was an equitable estoppel or a 'common law' estoppel.[153] He said that either option would have the same effect: a 'promissory estoppel' would 'bind the vendor in equity' to her promise if the purchaser showed detriment, while a 'common law' estoppel 'would have had the same effect' in that there would be 'an agreed understanding that provided the closing took place in accordance with the conditions as stipulated as to date and time, the contract would be taken as alive and not rescinded.'[154] The consequent obligation arose not 'on foot of a new contract but rather on the principle of estoppel which can be applied to the facts of this case in different ways' but 'the simplest approach' was to preclude the vendor from asserting a rescission against the purchaser by way of defence to the purchaser's counterclaim for specific performance.[155]

The model, if applied to this case in isolation, would allow for the option of recovering the deposit from the vendor. Because the detriment is to be analysed in isolation alongside the contractual claim that was set up using the preclusive doctrine, the Supreme Court would have had the option to grant relief under the model. However, in its assessment under (C)(ii), the Court would have been obliged to consider the alternative, actually pleaded claims, which here include a claim in specific performance already established using a preclusive estoppel. It is difficult to make definite statements about this assessment, except to note that, were it to be found to be particularly and unjustifiably onerous to preclude the vendor from asserting a rescission, or to grant an order of specific performance, the court might consider that repayment of the purchase price would be preferable. However, such onerous circumstances did not seem to particularly arise on the facts of *Courtney v McCarthy*.

A further example of concurrent liability will be made by analysing the decision of the English Court of Appeal in *NRAM v McAdam*.[156] The claimant, previously Northern Rock until its nationalisation in 2008, sought clarification of its position in relation to around 41,000 borrowers with whom it had a redress dispute. Until 2008 when it was

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Roger Halson, 'The Offensive Limits of Promissory Estoppel' [1999] LMCLQ 256, 259-261. He said at 261 that this is what happened in *Pacol Ltd v Trade Lines Ltd (The Henrik Sif)* [1982] 1 Lloyd's Rep 456 (QB).

[153] *Courtney v McCarthy* [2008] 2 IR 376 (SC) 388 (Geoghegan J); Kearns J concurred in the judgment of Geoghegan J.

[154] *Courtney v McCarthy* [2008] 2 IR 376 (SC) 388.

[155] *Courtney v McCarthy* [2008] 2 IR 376 (SC) 391.

[156] *NRAM Plc v McAdam* [2015] EWCA Civ 751.

removed, there had been a ceiling of £25,000 and later £30,000 on credit agreements for which there were particular statutory protections under the Consumer Credit Act 1974. One such protection was that, if statements from the bank did not state the amount of credit originally provided, the borrower would have no liability to pay interest or default sums for the period in which such defective statements were provided. The bank had used the same documentation for pre-2008 loans over the ceiling, as well as those under the ceiling. The two defendants belonged to the class of 41,000 borrowers, all of whom had borrowed over the ceiling and had received such defective letters.[157] These letters were headed by statements that the agreement was 'regulated by the Consumer Credit Act 1974.'[158] This case, which was said to be in the nature of a test case, was to determine the potential liability of the claimant to make redress to the affected borrowers,[159] redress which had the potential to total about £258 million.[160]

At the outset, it needs to be emphasised that the availability of a claim in contract is in this case independent of the court's determination that it exists.[161] However, here, the defendants in *NRAM* nonetheless sought to claim in contract; thus a determination was required, which implies some indeterminacy to begin with. That a contract claim was considered first by the court ought not to rule out the decision that a claim under the model has arisen: at least not on the basis of detriment as it is defined in the thesis. The essential idea is that liability under the model is raised in the abstract and independently of the existence of other claims. A failure to discuss its separate reasoning, even as dicta, would appear to be a waste of litigation resurces. However, the principled approach, it is submitted, would be to disregard the contractual claim in favour of the minimum equity only if it would be unconscionable to require the defendant to comply with the contractual duty.

Turning to steps (A) and (A)(i), the repayments were in law excessive and became a loss (detriment) when the bank sought not to make redress unless the court compelled

[157] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [4].
[158] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [1].
[159] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [4].
[160] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [7].
[161] *Courtney v McCarthy* [2008] 2 IR 376 (SC), *Haughan v Rutledge* [1988] 1 IR 295 (HC), and *Owens v Duggan* (HC, 2 April 2004) can be distinguished because, in each of those cases, the court needed to make a determination on (it is submitted) preclusive estoppel in order to find that an equitable claim on the contract was available.

it to. The subject-matter was the potential availability of redress in the circumstances, it having been represented that there was statutory protection.[162]

On inducement, it can readily be seen that the defendant borrowers would not have made payments but for supposition that they were owed on the unsecured loan. It is not necessary to inquire into whether there was a convention or a representation: the defendant borrowers would produce the letters to help their case, but if they do not, the claimant bank could be compelled to do so in the disproof phase. In any event, the bank can only say that the supposition was incorrect, which does not answer the question. A liability would be raised, which means that the final questions to be asked fall under steps (C)(ii) and (iii). If the Court of Appeal had allowed a claim in contract, then there would be no such unconscionability, so the liability would be extinguished.

In the circumstances, the Court of Appeal held that there was no contractual obligation as a result of contracting into[163] or incorporating,[164] the statutory protections. There was not an agreement that the borrowers would be treated as if they were protected.[165] Neither was there an estoppel to the effect that the bank could not deny such an agreement[166] or, alternatively to the effect that the bank was to be prevented from denying that the borrowers were to be treated as if they were protected, or, again, that they were to have the protections of a party to a regulated agreement.[167] However, Gloster LJ found that the borrowers would have a cause of action under the Misrepresentation Act 1967 or in breach for contractual warranty,[168] but that such causes of action might be time-barred, an issue which she said did not arise for decision in any event.[169]

If the Court had turned at this point to the model, finding a liability, the main problem is that it would be difficult to argue that this satisfied the essentially test-case nature of this case. A personal liability would arise in respect only of the defendants. It is

[162] This seems to bring the claim back into preclusive estoppel territory: thus, if the potential redress is on a contract or on the applicability of the statute based on the effect of an estoppel, then one does not need to look at model, but important for the sake of clarity to consider separately.
[163] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [18].
[164] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [23]-[25].
[165] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [27], [30], [34].
[166] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [40].
[167] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [54]-[55].
[168] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [57].
[169] *NRAM Plc v McAdam* [2015] EWCA Civ 751 [58]. It was noted at [11] that finding that there had been a breach of warranty was the judge's 'first reaction', but that he made no decision on that basis.

difficult to undermine the idea that the fate of the 41,000 others rested on a finding that the statute applied in the case of the defendant borrowers and therefore in the case of all the borrowers. However, a finding of liability, pursuant to which the court recognises a remedy in (C)(ii), would mean that the bank owed money to the defendants on the juridical basis that it was unconscionable in the circumstances of their relationship. Thus, even if the other 41,000 cases were identical with courts having no room for manoeuvre on unconscionability on that basis, the effect on the 41,000 of a successful claim under the model would be different. The nature of the proposed model is that it gives rise to an obligation unique to the person claiming under it. The consequences of a finding for the defendants under the proposed model, but *not* under their alternative claims, in terms of overall litigation costs, can therefore not be overstated. Yet it would be essential to retain this basic nature of the proposed model.

Equally, had the possible causes of action for damages not been based on letters preceding 2008, this would have had enormous litigation consequences as it would not have been a finding that the 41,000 other borrowers were protected by the 1974 Act. Had such causes of action been available in the instant case, the reasoning underlying a separate consideration of the model on the basis that it arises independently of claims in tort or contract would be the same.

It thus becomes necessary to decide whether conscience required the bank to make redress of the disputed repayments.[170] The lack of any other possible avenue of

[170] The remedy under (C)(ii) presents an interesting problem in *Lancashire and Yorkshire Rail Co v MacNicoll* [1918-19] All ER Rep 537, in which estoppel by representation was used as a defence. MacNicoll received 14 drums of crude phenol by mistake, which were delivered to him from a train of the railway company near their proper destination. He had, as it happened, been expecting a delivery of crude phenol on another order at the same time. The note accompanying the delivery read that the consignment was of 25 casks. Both parties blamed the war for, respectively, this mistake, and what ensued when MacNicoll appropriated the drums, of which he used six. He returned the other eight to the company. The company was sued by the intended recipients for the lost goods and was required to pay them £82. The company then sued MacNicoll for conversion, and succeeded in the King's Bench. Lawrence and Atkin JJ held that, in delivering the drums to MacNicoll, there was no inducement such as would induce a reasonable person to convert the goods, and so his defence of estoppel by representation failed. Thus, the loss arose here because preclusive estoppel was unavailable. Could it be argued that there was detriment under the model – and would the model produce a better result, since this is the step we would first consider? MacNicoll was now exposed after trial to a duty to pay for the value of goods which he had used. Although potential detriment prima facie suffices, loss subsequent to (or consequent upon) trial is properly a question for the (C)(ii) minimum-equity stage, for the sake of clarity. However, the note renders any inducement question moot (applying a test of intention to induce, Atkin J said at 541-542 that 'it is obvious that the man who receives the advice note is in a position at once to form his own judgment about his own goods, and to decide whether they are his or not'). Under the model, this would mean that a defence could be raised that the reliance was not justifiable. Had MacNicoll been able to set up a defence under the preclusive doctrine,

redress in this situation is likely to seem unconscionable.[171] Arguably, though, the wider effects of exposing a successor to a troubled bank to further litigation as well as a maximum extent of compensation of about £258 million (the total amount of redress said possibly to be due, and hence the combined value of the detriments of each borrower) would give a court significant pause. In particular, it may not look favourably upon an attempt to obtain through equity what Parliament had already established the borrowers could not obtain in tort or contract. Of course, were the claims not time-barred, the availability of alternative causes of action in tort and contract would mean that it would not be unconscionable for the court not to grant a remedy in (C)(ii).

Finally, the status of 'promissory estoppel' in the *High Trees* sense under the model is that a liability under this heading gives rise primarily to compensation. It may be suggested that, in exceptional circumstances, the minimum equity could require the more usual solution of a suspension of the existing contractual relationship. It is

due for example to a note correctly describing the goods delivered, then MacNicoll would not have had to pay for the product that he consumed. Addressing the payment in (C)(ii), a court would be unlikely to find that conscience required MacNicoll to be repaid simply because he now had to pay for goods he had already used.

[171] Similarly, in *Hopgood v Brown* [1955] 1 WLR 213 (CA), a court would have difficulty adequately supplying a minimum equity remedy. Brown successfully set up a defence of estoppel by representation against Hopgood, the owner of an adjoining plot of land. The two plots had been originally conveyed in 1932 to one Turner by separate conveyances, which were similarly worded and did not precisely identify the dividing boundary between them. In 1949, Brown bought the southerly plot and a company of which he was the director bought the northerly plot. He sought to build a bungalow and garage on his plot, and agreed with the company where the boundary would lie for this purpose. Part of the garage, when built, encroached into the company's plot. A drain was also built that connected both properties. The northerly plot ended up being sold to another party, who sold it on to Hopgood. Both of these conveyances were identical to each other, and did not reflect the 'new' boundary as established by the encroaching garage. Hopgood started building on his land without being advised of the exact dimensions, and eventually found that Brown's garage blocked the way for Hopgood's car to access Hopgood's garage. Hopgood sought a declaration as to the boundary's position, along with damages. Evershed MR held that the company had originally represented to Brown that the boundary's position was as Brown thought it should be and built upon, and hence, since an estoppel by representation would be binding against the company, so also it was binding against Hopgood. An additional problem resulted from the drain, but the estoppel defence was not sought in that respect. Brown could not have sought to counterclaim against Hopgood under the model because, while Hopgood stood in the same position as the original company for the purposes of the preclusive doctrine, he did not personally induce the detriment and this is required under the model (see, additionally, the discussion of *Carrick* above). Had the agreement been with Hopgood, Brown would have been able to plead as alternatives the preclusive doctrine defence and the counterclaim under the model. Again, the availability of an established defence would not preclude a court finding that liability under the model had been established. If both are pleaded, this enables the court to choose the fairest outcome under (C)(ii) and (iii). It would look at Hopgood's 'substantial disappointment' (220) and decide whether conscience would require only allowing the defence, which would benefit Brown but put Hopgood in a difficult position, allow Brown's defence and order Hopgood to pay compensation, which seems entirely unbalanced, or, finally, reject the defence and allow Hopgood's claim in damages but order him to pay compensation for Brown's costs in building the garage, which is perhaps workable. Particularly considering the costs of litigation, however, it seems hardly worthwhile to choose this third option. The first, allowing the defence only, seems a more likely choice.

considered that the liability is raised in the same way as any equitable estoppel under the model.

7.3.2 More general practical issues

A general problem with requiring a party to quantify their detriment is that this task can prove difficult, as Robertson has pointed out. Specifically in the proprietary estoppel context, Lord Walker has written that it is very unusual for there to be expert, or indeed any, evidence as to remuneration and terms of service of full- and part-time carers.[172]

The model necessarily lends itself to litigation-dependent outcomes. B may be satisfied if A pays him the detriment cost, but if B thinks this is unsatisfactory, only a judge can determine whether a right to the detriment cost exists and persists by the time of trial, in which case it will be found that B has been compensated. A system that subverts the normal order of law and redresses expectation because it is proportionate to do so is in fact more likely to lead to increased litigation than one that proposes a court-ordered but default remedy. McFarlane's proposition in relation to the *Thorner* principle, and arguably Robertson's too in relation to equitable estoppel, occupy a middle ground by asking what is necessary to prevent detriment, which in some, or even many, cases will require the fulfilment of the expectation, which is in turn consistent with the way in which courts have approached unconscionability.

A potential problem can arise where the claimant cannot precisely identify the value of the detriment. It is possible to make a certain allowance consistently with the operation of the model. Since it is the claimant who proves the existence and quantity of detriment, and since the court can ultimately vary a remedy (if it is found) under (C)(iii), it can allow the claimant to suggest estimates. If the defendant is able to show that an estimate is unreasonable, and if in so showing it becomes obvious to the court that the defendant is able to succeed in (B)(i) because he has more resources and information than the claimant, then it ought to take this into account when shaping the remedy.

[172] Robert Walker, 'Which Side "Ought" to Win?–Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229, 239.

7.4 Possible objections to the model

The strongest possible objection to a unified model is that, whatever labels are applied in an estoppel case and however the resulting rights and obligations are described, there are indeed significant differences between the estoppels, and that the value of each separate body of jurisprudence would be lost.

A number of general problems with a reversed burden may be noted. In *Campbell v Griffin*,[173] it was said[174] that 'it would do no credit to the law if more candid evidence produced a more unfair result than untruthful evidence about what one would have done.'[175] This is relevant to a *Wayling*-type scenario: so, we saw that Mr Wayling admitted that his expectation was not the sole reason for incurring detriment, thus on the view expressed in *Campbell* the result in the Court of Appeal in *Wayling* (that Mr Wayling had an equity) was fairer. However, the view in *Campbell* also relates to the idea that, when one knows what the law is, one can use untruths to skew the process in one's favour. Even if equity is concerned with defeating opportunistic misuse of primary law,[176] at some point opportunistic misuses of equitable rules of liability will inevitably arise, meaning that the Court must use whatever discretion it has carefully (for example, if such misuse is clear, it can decide not to reward a claimant). The model would seem to clarify rather than obscure the rules, which would prove a welcome corrective to the imprecisions identified in Chapter 1. Further, Chapter 1 identified that estoppel is still 'developing.' This thesis cannot provide the answer for all time.

On a more practical level, the model might also raise some difficulties; thus, 'the courts will usually lack the factual foundation necessary to scrutinise closely the issue of causation in estoppel cases.'[177] Further, the Australian High Court viewed the shifting of the burden as being 'both wrong in principle and contrary to authority.' However, the actual item to be disproved under the model is not the detrimental act, which on the other hand was the item in *Sidhu* as in the cases cited there, but the link between the act

[173] *Campbell v Griffin* [2001] EWCA Civ 990.
[174] This is cited by Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 220.
[175] *Campbell v Griffin* [2001] EWCA Civ 990 [28]-[29].
[176] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 4 <http://ssrn.com/abstract=2617413> accessed 20 March 2017.
[177] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 220.

and behaviour on the basis of which the claimant justifiably relied. Nonetheless, some objections can still be made of a disproof element.

It may be objected that it is easier to retain the requirement of proving a (certain kind of) representation or conduct. That requirement usually includes the element of having been calculated to influence certain behaviour. Thus, in *Greasley*, it was said that this intention to influence certain behaviour, coupled with the occurrence of certain behaviour, fulfilled the causative requisites. More accurately or helpfully, the influence must be justifiable. This is a claimant-centred, rather than defendant-centred, standard. Once an estoppel claim is successful, it is assumed that the certain behaviour which results is the certain behaviour which was intended to be the result. But this is a fiction: what courts actually do is seek to justify the behaviour which results, so as to avoid injustice. However, as we saw in section 5.3.3.1, it is artificial to require separate proof of a mental element of reliance, on the part either of the claimant or of the defendant. Usually, instead, the former is inferred, while the latter is an element of proof of representation. It is also unnecessary to ask whether something was calculated to induce behaviour, if the claimant was not actually induced. Clearly, in respect of such proof, the closer the representation is to a commitment or promise, the more successfully we have shown the presence of half the required mental element of reliance.

Further, the approach is unorthodox in no longer requiring proof of a specific kind of representation. Murphy J in *Carter v Ross* explicitly states the need for a representation: 'the courts will hold a promisor to his promise even when made without consideration where it would be unconscionable to permit him to resile from the promise which he had made,' and he also said in that case that 'very clear evidence' was needed of the promise as well as of the other elements.[178] This seems to follow the view of the English courts. Thus, in *Kinane v Mackie-Conteh*[179] it was said to be a requirement that a representation either by words or by conduct must specifically be shown. Mere expenditure, even when the other party knew of it, was held not to be capable of founding an estoppel in *Queen's Gardens*[180] and in *Savva v Harymode Investments Ltd.*[181]

[178] *Carter v Ross* (HC, 8 December 2000).
[179] *Kinane v Mackie-Conteh* [2005] EWCA Civ 45.
[180] *Attorney-General of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114 (PC).
[181] *Savva v Harymode Investments Ltd* (CA, 9 October 1980).

A long-standing practice, even coupled with acts done in the belief that it would continue, was held to be insufficient for the same purpose in *Keelwalk v Waller*.[182]

We also saw that specific proof of the action part of reliance is required of the claimant, and that this is typically done using the prong of detriment. The claimant's mental element of reliance is inferred from the detriment and from the defendant's mental element of reliance, which is the conclusion of the representation prong. But we still need to show the influence or the connection, on the basis that 50,1%+ of likelihood means that reliance is justified. It is preferable to start with proof of detriment by the claimant and then ask whether the conduct was likely or justifiable. A credible estoppel case should involve solid detriment proof regardless of what the first step is, so it makes sense to require detriment as the first step.

The presumption stage of the model eliminates the need to consider separately the mental element of reliance, as well as the unconscionability element, by inferring reliance on the basis of specific proof of detriment corresponding to a definite subject-matter. In *Steria*, Neuberger LJ expressed significant doubt about the validity of placing an onus on the representor to show that the representation was not acted upon. He said that '[a]s a matter of normal principle it seems to me that, as a matter of law, the onus must be on the person alleging the estoppel to establish unconscionability or, to put it another way, to establish, in the case of estoppel by representation, the three essential ingredients of representation, reliance and detriment.'[183] He believed the *Greasley* principle to be limited to the idea that, '[i]n many cases,' 'the representation together with all the other facts of the case' is sufficient for the claimant to have discharged the onus unless the defendant can put forward evidence to the contrary.[184]

However, the model operates differently from Neuberger LJ's interpretation of *Greasley* because its first requirement is specific proof of detriment, and it asks this of the party claiming the benefit of estoppel. It substitutes the sometimes artificial idea of specific proof of reliance and replaces it with an onus on the representor to disprove that the representor's conduct was not the sole inducement of detrimental acts which have already been proven. In other words, the defendant is not required to disprove that the claimant acted to her detriment – although the defendant may do so – but instead to

[182] *Keelwalk Properties Ltd v Waller* [2002] EWCA Civ 1076.
[183] *Steria v Hutchison* [2006] EWCA Civ 1551 [129].
[184] *Steria v Hutchison* [2006] EWCA Civ 1551 [130].

disprove the existence of a causal link between that detriment and any conduct of the defendant which would justifiably have led to the expectation. The content of the expectation is included in the subject-matter as a threshold issue.

What does emerge from *Steria*, and from the *Sidhu* case discussed below in the section on Australia,[185] is that any future interpretation of the *Greasley* case may involve disregarding the shifting of the burden. The effect of *Greasley* would be to permit the drawing of inferences from proof of a representation. If courts do disregard the shifting of the burden element even when applying *Greasley*, this aspect of the model will appear to be less tenable than it currently is, and will have to be replaced with the drawing of inferences from the proof of detriment. However, where that exercise proves to be insufficient, it will be unclear what ought to replace it: whether, for example, the claimant should be asked to prove that representations were made. But, to return to our first question, is it not easier to require claimant perhaps to show, *in addition to showing first the existence of detriment*, that inducement was likely, and *then* assume that inducement is inferred unless defendant can show not? On this view, the claimant needs to state sufficient facts on which we can infer inducement; thus, stating only detriment, from which inducement is then presumed, may be excessively lenient to the claimant. However, the idea is that a defendant will need to demonstrate that the inducement should not be attributed to the defendant, allowing the defendant to adduce claims that inducement was internal to the claimant. To use the language of Low,[186] or Bant and Bryan,[187] we can show that the claimant bore a risk. If such claims by the defendant are weak, they will not be enough to displace burden. On the other hand, if they are strong, proof of representation then becomes relevant in the answer by the claimant. Simply put, the claimant needs to have a better case than the defendant for this to work.

The model would have to surmount the practical and conscience-based obstacles outlined in Chapter 6 to the recognition of a default minimum remedy. Robertson in 1996 referred to the view that it is an 'undefined', 'general equity.'[188] Thus, while there is

[185] *Sidhu v Van Dyke* (2014) 308 ALR 232, [2014] HCA 19 [59]: The High Court of Australia suggested that the possible effect of *Steria v Hutchison* [2006] EWCA Civ 1551 (by then a seven-year-old case) in England might be to change the understanding of Lord Denning's view in *Greasley*.
[186] Kelvin K Low, 'Nonfeasance in Equity' (2012) 128 Law Quarterly Review 63.
[187] Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) Oxford Journal of Legal Studies 427,
[188] Andrew Robertson, 'Satisfying the minimum equity: Equitable estoppel remedies after *Verwayen*' (1996) 20 Melbourne University Law Review 805, 810.

flexibility at the most fundamental doctrinal level, the most recent trend against a reliance-based estoppel at both the liability and remedy stages is a problem.

There is an insufficient amount of data in the cases to support an in-depth analysis of whether and how the application of the inducement presumption would lead to better results. We are therefore left with very little to draw on to show whether and, if so, how these cases might have been decided differently under the disproof part of the proposed model. It seems in some cases to be obvious that claimant would have acted that way: so the detriment is viewed in the context which includes the representations, or the detriment is viewed alongside the fault of the defendant in not objecting sooner, or in objecting at all.

Mee puts the matter simply: 'in the type of case which is under discussion there is no binding contract between the parties (or it would not be necessary for C to rely on proprietary estoppel).'[189] Concern with proportionality suggests courts do not view estoppel as requiring a corresponding response. So when Mee argues that £150 payback for £200 debt is unlikely to be considered 'proportionate' by the creditor,[190] he is applying to estoppel remedies an accuracy which they have hitherto not enjoyed. In order to move towards this accuracy, the question of what it is that the courts are remedying must have a precise answer.

The model also suffers from similar problems to the principle drawn from *Waltons Stores* in that it purports to extend the reach of equitable estoppel beyond a mere restraint upon rights, but instead allows for the granting of compensation on the non-fulfilment of an assumption as to future rights. Finn identified the difference between a cause of action to reverse reliance loss on the one hand, and on the other a cause of action to restrain the counterparty's insistence upon a strict legal right.[191] Finn says that the equitable jurisdiction here is only concerned with such restraint and adds that, while he does not reject the idea that an independent cause of action may lie here, in most cases the doctrine will be used defensively.[192] However, this is perhaps inconsistent with his view that the disputed insistence may also arise as to a future right or future gift of,

[189] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2007) 412.
[190] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law Volume 4* (Hart Publishing 2007) 409-410.
[191] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 74.
[192] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 89.

for example, money or employment.[193] He acknowledges that the distinction may be arbitrary, as it can be equally unconscionable to resile in circumstances in which the inducement was upon the expectation of a future right.[194] At least, he says, there is reasonable certainty, and unconscionability does not become some talisman.[195] This is essential to consider under the model because of the possibility that a view of estoppel as such a 'talisman' influenced the oddly circumscribed ways of pleading estoppel which arose in Chapter 1.

The co-existence of equitable estoppel with the rules of contract law has been said by McFarlane[196] to be justified on the basis that estoppel creates a more limited obligation, as Lord Hoffmann stated[197] in *Walton v Walton*:[198] it 'does not look forward into the future and guess what might happen' but, instead, 'looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept.' Otherwise, however, there have been fears (alluded to in Chapter 3) that equitable estoppel would encroach excessively upon consideration. It was also seen in Chapter 3 that a possible solution is to restrain courts in their remedial discretion when applying equitable estoppel, while Chapter 6 put forward a principled reason for setting aside the current, excessively expansive view of proportionality. McFarlane has said that the more limited obligation in equitable estoppel, or more specifically the *Thorner* principle, gives rise only to a prima facie liability to ensure that no

[193] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 74.
[194] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 74.
[195] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 75.
[196] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 334, referring specifically to the *Thorner* principle, which is similar to but (arguably, subject to the discussion in Chapter 5 above of the required kind of reliance) more limited in scope than the model proposed in this thesis. See also Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 631: 'it would be a mistake to try to assimilate the promise-detriment principle to contract law, as this would be to overlook the fundamental point that the finding of a contract is not the only means to give some legal effect to a promise.'
[197] Cited by Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 334; see also Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 616-617, 631.
[198] *Walton v Walton* (CA, 14 April 1994).

detriment is suffered,[199] by contrast with the effect of a contract which is to impose 'an immediate duty to honour an agreement.'[200]

It is a valid response to the proposal of a more expansive scope for what is essentially a 'secondary'[201] doctrine that the courts have not had an opportunity to reflect upon aspects or consequences of estoppel of a higher order. They have not addressed questions within estoppel of any greater complexity than the factual matrix of the three-part test, and the discretion to decide what conscience requires. Thus, courts have not yet considered the types of questions that will be important in defining, for example, reasonable reliance, a largely academic discussion of which was provided in Chapter 5: Robertson has remarked that the courts, when deciding upon estoppel cases, have not considered the carelessness of the defendant's conduct and, in particular, the question 'whether a reasonable person in the defendant's position would have inquired as to the true legal position.'[202] By contrast, McFarlane and Sales have provided that the 'promise-detriment' model is 'in line with the position in contract and tort' by requiring the detrimental reliance suffered to be 'within the reasonable contemplation' of the promisor.[203] For his part, Finn has argued that estoppel has not been refined into the type of doctrine which would be concerned with promissory liability[204] and that equity is in any event particularly ill-suited to reforming consideration.[205] Thus, Finn argues, this task is[206] better left to contract lawyers in view of the fact that estoppel is 'too crude, too unsubtle'[207] for the development of a useful doctrine of relied-upon promises. Yet McFarlane has given the lie to this idea through his identification of the 'promise-detriment' principle or *Thorner* principle, which, while limited in the ways described

[199] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 333.
[200] Ben McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 333.
[201] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 633: equitable estoppel as well as unjust enrichment have 'a residual or secondary nature that may assist in understanding [their] function and justification. Each can be seen, for example, not as enforcing a pre-existing duty of A but, instead, as recognising a liability of A: the principles are thus secondary in the sense that the occurrence of the triggering facts does not, by itself, give B a vested claim-right against A, but rather exposes A to a liability.'
[202] Andrew Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in Jason W Neyers, Richard Bronaugh and Stephen GA Pitel (eds), *Exploring Contract Law* (Hart Publishing 2009) 209.
[203] Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 620-621.
[204] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 78.
[205] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 70.
[206] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 84.
[207] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 77.

above, does not discard wholesale the ability of a promise to create rights to lead to some form of obligation: a liability to ensure that no detriment is suffered.[208]

On Finn's view, it seems that, because equitable estoppel is only concerned with restraining the insistence upon current legal rights, promises to create new rights simply cannot lead to any obligation, which it is submitted is too limited a view. Further, it has been seen in Chapter 3 that the reform of consideration is not gathering quite apace. It is submitted that the only correct response to the imprecision strongly highlighted in Chapter 1 is to permit the courts to start considering matters of greater complexity in equitable estoppel. The model's reversed burden could provide a starting-point.

There seems also to be a problem of excessive conservatism constraining the development of equitable estoppel; thus, Finn argues that in an estoppel of wider scope that includes promises as to the future creation of rights, one would be using concepts such as 'reliance, detriment and advantage, encouragement' but also areas of policy which are no concern of estoppel.[209]

Finally, some discussion of the potential practical setbacks to the adoption of a 'minimum equity' approach (to which the liability model is directed) has emerged. Lord Walker has stated his belief that, in cases involving an assistant or carer working with the expectation of having a home, it is 'very unusual for there to be expert (or any) evidence as to the remuneration and terms of service of full-time or part-time carers.'[210] This is a difficulty not only for a default detriment-based remedy, but for any remedy which requires some calculation of the detriment, including the now rather disavowed 'bargain' class of cases, in which the expectation may be granted due to the presence of proportion.

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[208] On the nature of this liability, see Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 Current Legal Problems 267, 293-294; 'Proprietary Estoppel: The Importance of Looking Back' in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015) 346; Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632-633. By contrast, 'The Protection of Pre-Contractual Reliance: A Way Forward?' (2010) 9(2) Oxford University Commonwealth Law Journal 95, 105 speaks rather of the imposition of a duty to ensure that the counterparty does not suffer detriment, although it is also said that 'A's liability in such a case [where A has made a pre-contractual promise on which B has reasonably relied] will be limited to ensuring that B does not suffer detriment as a result of that reasonable reliance.'

[209] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 78.

[210] Robert Walker, 'Which Side "Ought" to Win?–Discretion and Certainty in Property Law' [2008] Singapore Journal of Legal Studies 229, 239.

7.5 Chapter conclusions

This chapter has seen the testing of aspects of the model in cases drawn from four jurisdictions, in order to assess the abstract desirability of the model. For example, it has been seen that the disproof proposition was directly described as unacceptable in *Sidhu*, but that this can be strongly criticised. Again, although the model would not have been accepted by the Court of Appeal of England and Wales in 1999 (and this would remain the case since *Cobbe* in 2008), it has been seen that it allows for a better result in the decision in *Baird*.

The potential relationship of the model to the doctrinal variations in each jurisdiction has been discussed in each of the preceding sections and their conclusions. A discussion of the potential general setbacks the model could face has also been outlined. Here, it will be argued that it nonetheless is a coherent basis for subsuming equitable estoppel into the one doctrine.

The model is based on the idea that some of the less restrictive concepts in proprietary estoppel can be successfully imported to other estoppels. It particularly seeks to emphasise inducement as a causative factor, which it is argued will allow the various estoppel cases to be recognised as hinging on the same fundamental fulcrum. It thus incorporates the presumption of inducement test seen in some proprietary estoppel cases, for example *Wayling v Jones* at first instance, as well as one that has been described as a proprietary and a representation estoppel case, *Hammersmith and Fulham LBC v Tops Shop*. The model dispenses with the need to initially prove a representation, instead regarding the proof of detriment as a more significant initial step that sets the analysis on the correct path. The model's version of detriment, too, borrows from the proprietary estoppel concept of substantial detriment. The model also requires a claimant to show a subject-matter to which the detriment relates, the idea behind which is to allow for examining the purpose, if any, to which the inducement could relate. Viewed in the abstract, an equity is raised once the detriment begins to be incurred by virtue of the effect of the inducement.

The acceptance of a single cause of action is on unstable, if not entirely slippery ground in some of the jurisdictions studied, although it has been argued in Chapter 3 that this position lacks merit. A further objection is that, while the test changes, the results do not radically change, except where a more difficult threshold for inducement would not

in any event be passed, or where an estoppel claim should perhaps never have been allowed in the first place. The central argument is that the model is a simpler and more elegant way of organising the thought process. In fact, the model's consistency with the decided cases (except, for example, in *Wayling*, where there is scope for debate as to the excessive generosity of the effect of proprietary estoppel) is a positive feature in that it does not unduly overthrow the core principles threading the cases together.

The premise of the model is that, if estoppel does not specifically require a promise to be made, then the test for estoppel should not require specific proof of a promise. A strict test of inducement supplies what is required for the single cause of action in estoppel. The use of the subject-matter allows for a more targeted test. In a case such as *Wayling*, it would be asked what the inducement relates to. In *Baird*, we saw that a precise definition of detriment is required, even if we are clear that some detriment was induced, in order to assess whether a detriment-based remedy should be awarded. The subject-matter element is essential in this exercise. In *JR*, it was shown that the respondent's claim would have been made more precise, while producing the same result as Costello J's balanced approach.

Some flexibility in the fashioning of the remedy is required in the cases and has therefore been incorporated into the model in this thesis. The open-ended and potentially unprincipled nature of this exercise is a difficulty. It can, however, be coupled with the idea that the obligation is perfected before the time of trial. If it is up to the court to trigger an obligation, there is nothing to prevent doing away with any parameters or criteria for equitable estoppel. This is a misunderstanding of estoppel. It was suggested earlier that one possibility is to view the obligation as being perfected upon resiling from the representation. This still requires the potential for a court to say that the detriment in the circumstances does not warrant a remedy, even if this risks encouraging litigation. Such a result can be avoided if we say that while there is not an obligation to comply with the expectation as long as the detriment is pending or not erased by something else, there is an obligation not to let pending detriment go disappointed. If this is breached, a court will enforce it by ensuring that pending detriment is compensated in the minimum, reliance measure. This will be enforced, provided some other mutually satisfactory arrangement has not been made, and will be irrelevant while the expectation still holds. While litigation will not be discouraged, the

presentation of unmeritorious claims and expressions of judicial doubt and even impatience seen in Chapter 1 will be preempted by the knowledge that the court will simply enforce the reliance measure, unless there are special factors which warrant not enforcing it. Since these can include a reduction as well as an increase in the measure, the effect on litigation volume may be neutral. Meanwhile, the relatively tough causation test proposed in this thesis, which uses inducement as the parameter, will filter out certain cases which would otherwise have led to a positive estoppel result.

A further problem is that the flexibility of the remedial jurisdiction means that, in theory, if a defendant compensates (for example) 75% of the detriment and the claimant is satisfied with this, the court need not compensate the difference since it is unlikely to substitute its own view of the level of unconscionability required for a remedy for the claimant's view. However, it could be argued that a defendant is under the new model is therefore quite likely to offer undercompensation to a vulnerable claimant who is likely to accept it. Therefore, in order to protect vulnerable claimants, the obligation ought to be to compensate detriment in full unless the court uses unconscionability to limit the remedy.[211] Again, this suggests that because there is necessarily a lack of formality, and because at this stage of events the defendant already realises that the claimant does not have a lot of options, this means that we are dealing with second-order, ex post law.[212] The idea of second-order law may stunt the development of a powerful doctrine of detrimental reliance, even when it is second-order law which allowed for it to exist.

The model attends to the aims identified at the outset: predictability (to the extent that is realistic and desirable in equity) and at the same time restrictiveness. The inducement test shows a preference for strong claims, and the remedial result is to reverse loss. A default minimum, detriment-based remedy has been shown to be incompatible with much of the caselaw in every jurisdiction, and yet it has been argued in this thesis to be not only doctrinally preferable, but also supported by some authority. Mee has suggested (in respect of proprietary estoppel) that a discretionary approach that

[211] See Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632: 'a broader concept of injustice or unconscionability has a residual role in *limiting* A's liability by, for example, allowing A to point to circumstances occurring after A's initial enrichment which mean it would no longer be inequitable for A to retain a benefit acquired at B's expense.'

[212] Henry Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 7 <http://ssrn.com/abstract=2617413>accessed 20 March 2017. His book chapter 'Property, Equity and the Rule of Law' in L Austin and D Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press 2014), touching upon similar themes, is cited by Ben McFarlane and Sir Philip Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 633.

favours a detriment-based remedy, and has as an upper limit the expectation, is defensible in view of the fact that other options involving the consideration of the expectation fall for their lack of logic. Those other options are put forth by Mee on the basis of decided cases, but it seems from his discussion that there is an excess of discretion, and a lack of principle, which then lends itself to hypothetical results which lack logic.[213]

But does the application of such a remedial restriction actually require this particular model? It is argued that the model is certainly preferable, as it is focused, first, on finding detriment, and, secondly, on showing that the detriment has been justifiably incurred. If the remedial results in certain cases appear to be less fair than might otherwise be possible, particularly in proprietary estoppel cases, this could be ascribed (other than, where relevant, to a particular judge's mistake) to the failings of property or contract law, or the legal order generally. To limit the extent to which equity can be the patch to these failings (that is, to limit the ability to recover loss and the amount of what is recovered) is, it is submitted, to fulfil the missing elements of predictability and restriction.

[213] John Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 406: so, for instance, an analysis of the remedy which balances the expectation with the detriment currently lacks any 'principled mechanism' to guide it, so Mee argues that either an 'arbitrary formula' such as establishing the correct remedy as the mid-point, or else 'indefensibly inconsistent' results depending on the weighting given by the court, will be the result.

Chapter 8: Conclusions

8.1 Addressing the research questions

8.1.1 Generally

The research objective was to build a unified equitable estoppel model that simplified the irregularities in the equitable estoppels as identified in England, while consolidating the essential principles to be applied in a unified model, with a view to potentially applying the model generally. Other jurisdictions which received notable focus were Ireland and Australia, chosen respectively because of the fertile Irish ground for further development, and because the Australian approach diverges significantly from that in England.[1]

However, the focus on English cases throughout the thesis served to highlight some difficulties within equitable estoppel as it has developed in that jurisdiction in particular and hence identify the most confusing features of the doctrine. Two surveys were conducted, and described in section 1.3.2, and showed four key issues: an imprecision of terminology, a perception that estoppel is a fallback claim, a possible lack of development of the doctrine, and some welcoming attitudes towards a possible unified doctrine and of fulfilling such missing development.

The issues that may be highlighted as particularly arising from the surveys (section 1.3.2) can be described as follows, with references to the sections that dealt with those issues.

8.1.1.1 Imprecision

There is a judicial sense in England that a unified doctrine exists (section 3.3 on the case law) in contrast with a sense that several estoppels need to be pleaded together (sections 1.3.2.1[2] and 1.3.2.2[3]). Paradoxically, the latter view may be due to that sense that there is some unified doctrine, combined however with a general refusal to fully implement it, as seen in section 3.3.1.2 discussing academic views. However, this is also

[1] The position in the US, and specifically the contractual doctrine in §90 of the *Restatement*, was occasionally added to the discussion at hand for a distinct view, while some regard was had to general ideas expressed in the US literature.
[2] See section 1.3.2 n 35; see also n 43.
[3] See section 1.3.2 n 64.

on the basis that the cases have not yet evolved in this direction, so those are pre-emptive warnings without a case having appeared that acknowledges unification, and does so in a way that is principled, and not unstable. Thus, *Ros Roca* (section 3.3) to all effects applied a unified doctrine, despite the fact that the Lords Justices either did not say they were doing so, or unconvincingly denied that they were. Therefore, a unified doctrine would resolve the paradox and provide greater clarity, as well as simplification and greater scrutiny (as suggested in section 3.3.1.1 on the basis of Hopkins' arguments, albeit these were in favour of a looser unified estoppel[4]).

Such greater scrutiny would involve reassessing the availability of a cause of action (section 3.2.7[5]). In addition, the extent to which the principle of proportionality fails to deal with minimum equity was dealt with in section 6.2.

8.1.1.2 A fallback claim

There may be a sense in practice that by invoking some idea of unconscionability in a last-ditch effort, a sympathetic judge may lean in favour of one's client. There is a perception that other claims may be more advantageous, which it seems is due to estoppel's limited sphere of application (sections 2.3, 4.3, 6.4, and 7.3). To the extent that lawyers perceive that there may be a unified equitable estoppel, which (if the claim is brought within proprietary estoppel) may lead to the award of a bounty, the perception of a 'fallback' claim that depends on a judge's generosity will remain. The answer to this has been addressed in Chapter 6 and, particularly, sections 6.2 and 6.4.

8.1.1.3 Immaturity and lack of development

Relatedly, the doctrine's relative youth (section 2.2.2) requires solutions to be identified. The current approach to unification, seen above, does not help resolve this issue. The thesis opts for strong unification on the bases outlined in chapter 5 leading to the liability-finding (see sections 4.2.1.3 and 4.3) stage in the model (7.1.4) as well as the public-law analogy summarised above.

[4] Nicholas Hopkins, 'Proprietary estoppel: A functional analysis' (2010) 4 Journal of Equity 1, 86.
[5] See, for instance, 3.2.7.1(a) on why proprietary estoppel is usually treated differently, and a response to this in 3.2.7.2(a).

8.1.1.4 The positives

Finally, this all may be contrasted with an alternative view of some judges who would be willing to hear arguments in equitable estoppel, but counsel evidently chose a different strategy: this was seen in *Pao On* (section 3.2.7.2(c)) as well as the more recent *Mungalsingh v Juman*,[6] mentioned in the survey (section 1.3.2.2). Fruitful debate on important points of concept and principle is evident in the academic commentary (sections 2.3.1, 2.3.2, 3.2.7, 3.3.1, and 4.2.2.2). Some possible approaches to a unified equitable estoppel were defined in terms of obligations (section 2.3).

8.2 Concrete proposals

8.2.1 The model defined

The model is delineated at section 7.1.4. The arguments in favour of (section 3.3.1.1) and against (section 3.3.1.2) a unified doctrine were outlined. The following will describe the steps involved in the model, and where the justifications for each step can be found in the thesis.

8.2.1.1 A cause of action

The availability of a cause of action in non-proprietary estoppels is necessary for the operation of a unified doctrine. The inconsistencies generally with not allowing a cause of action in non-proprietary estoppels were outlined in sections 3.2.7.2, particularly 3.2.7.2(a), and they were contrasted with arguments in section 3.2.7.1, essentially to the effect that such a cause of action is not necessary. In view of the need for a unified doctrine, and particularly the arguments in favour of it, described in section 3.3.1.1 (contrasted in turn with the arguments against it in section 3.3.1.2), it was argued that a cause of action is necessary in section 3.4. Although this facilitates a unified doctrine, the questions were considered separately.

8.2.1.1 (a) Step (A): Detriment

Detriment was isolated as a key unifying feature of the liability in a unified equitable estoppel, based on sections 5.2.1, 5.2.2 and 5.2.3 dealing with the exaggerated number of tests available, sections 5.3.1.1 and 5.3.3.1 dealing with the difficulty of

[6] *Mungalsingh v Juman* [2015] UKPC 38 [25].

isolating the elements, and section 5.3.2.1 discussing detriment specifically. The precise significance of detriment was isolated in sections 4.2.1.3, 4.3, and 6.4, while its content was described in section 5.3.2.1.

8.2.1.1 (b) Step (A)(i): Subject-matter

It was argued that the detriment ought to be relevant and plausible. Given, first, that a unified estoppel should prescind from definitions of the representation and particularly where they are the first element of a test, since this would produce regress to the current position, and, secondly, that the confusing tests for liability generally – in sections 5.2.1, 5.2.2 and 5.2.3 – seem to point rather towards inducement, it was argued that inducement (considered at section 5.2.1) should replace the representation. However, there needs to be a threshold of relevance and plausibility, as well as an ability to link the detriment to a specific expectation. The subject-matter element was defined in section 7.1.4.2, and its usefulness was seen particularly in the discussion of *Baird Textile Holdings* at section 7.2.2.2.

8.2.1.1 (c) Step (B): Inducement

Inducement was seen as the preferred causative threshold for liability, based on the issues identified in sections 5.2.1, 5.2.2 and 5.2.3. Described at section 7.1.4.3, it was applied in each of the examples discussed in Chapter 7 (see further below on general and jurisdictional objections).

8.2.1.1 (d) Step (B)(i): A defence of reasonable reliance

The idea of justifiable or reasonable reliance (see section 5.2.2), which was described as meaning two of unconscionability (section 4.3) was shown to be an imperfect threshold for liability. However, in section 5.2.2, some positions in favour of its operation as a negative, defensive criterion were outlined. The step was considered in sections 7.1.4.3 and 7.1.5.1. It was argued that the question of whether reliance was justifiable should be considered by a court only if it has already found that a defendant induced the conduct.

8.2.1.1 (e) Step (C): Determination by the court

This involves at least Step (C)(i) and a possible two further steps.

8.2.1.1 (f) Step (C)(i): Whether a court is satisfied that liability has been established

The fourth meaning of unconscionability was described in sections 4.2.1.3, 4.3, 5.3.2.2, and 6.4 to involve the question whether the court considers it would now be unconscionable for the defendant to insist upon his strict legal rights. The question was based upon a finding that this ought to be an assessment of the court at the time of the trial (section 4.2.1.3) and upon a terminology referred to throughout the thesis, see in particular 3.2.7.1(c).

It was argued then that the question is really a construct for the court's finding to its satisfaction that the elements of liability have been established under (A) and (B).

The step therefore asks whether [it would be unconscionable for the court now to permit going back on the undertaking on the basis that] the court is satisfied on the evidence that a liability has been raised. Thus, If the answer to (A), (A)(i), and (B) is yes, and the answer to (B)(i) (if (B)(i) is asked) is no, then the elements of a liability will successfully have been raised. The court now moves to consider the remedy, which it was argued in section 2.3.2 to be necessary to isolate from the question of liability (see also 3.2.1) or, in other words, substantive rights (see 2.3.2).

8.2.1.1 (g) Step (C)(ii): A remedy in the amount of the minimum equity

The principle of redressing a claimant only to the extent of the 'minimum equity to do justice' is a key feature of equitable estoppel and an attempt was made to categorise it in section 2.3.2. The survey of the principle of proportionality in equitable estoppel, found in section 6.2.1, determined that the 'minimum equity' tends towards the maximum rather than the minimum in England and Ireland (section 6.2.1.1), Australia and New Zealand (section 6.2.1.2), and the United States (section 6.2.1.3). It was highlighted in section 3.3.1 that a pre-condition to a fully-unified, single cause of action, rather than a loosely-unified model, would be to minimise the remedy in proprietary estoppel. It was further seen that equitable estoppel occupies a similar space in the wider law to unjust enrichment (section 2.2), and that the boundaries between and around those doctrines in English law are still being determined (section 2.2 and particularly 2.2.5). The idea of a quantum meruit remedy, pinpointed in section 2.2.5 and discussed further in section 6.3, was described as a possible analogy for the correct remedy in equitable estoppel. The remedy would thus redress the detriment loss, which after all is

the objective of the detriment inquiry under step (A), and it would do so in monetary terms unless, under (C)(iii) below, a different order is seen by the court to be more appropriate, such as, for example, a suspension of contractual duties in cases in which *Collier* would apply (section 6.3.2).

Further assistance was sought from public law, and specifically the doctrine of legitimate expectation. The thesis looked at the analogy between that doctrine and equitable estoppel from the opposite direction to that usually taken. Estoppel has often been used to justify holding a public authority to a position it refused to take subsequently to representing to an individual that it would. We saw in section 6.3.3 that this position remains in Ireland, though not in England, and that the doctrine in Australia is in any event restricted to procedural legitimate expectations. There was an indication in section 6.3.3.1(b) that there is an argument to be made in favour of enabling an order of damages, on the basis of a minimum equity, to be made to an individual as against the public authority where the expectation is impossible to fulfill. Further, the idea of proportionality can be used to determine whether a breach of the expectation is unfair. It was seen that a disproportionate *breach* (which depends on factors relevant only to public law) could in certain circumstances lead to an order of damages against a public authority, measured according to equitable standards. It was seen that an impossibility justification (sections 6.3.3 and 6.3.4) could apply by analogy to equitable estoppel. This would allow construing the defendant's consent to fulfiling the expectation as having been withdrawn. It was said in section 6.3.4 that a defendant could either fulfil the expectation so there is no liability and the claimant does not go to court, or not fulfil it, in which case the law does not immediately compel him to because of his strict legal rights (or first-order law: see Smith, referenced in sections 2.2.4 and 4.3, and the discussion of liability at section 2.3.2[7]) On the basis of this idea, the court ought nonetheless to grant the claimant some limited redress in the interests of justice.

Step (C)(ii) therefore asks, [since the consent of the defendant to complying with the assumption is withdrawn,] does conscience dictate the grant of a remedy based upon the minimum equity?

[7] At n 208.

8.2.1.1 (h) Step (C)(iii) Varying the minimum equity

A court can consider here the factors which may require varying, or in rare cases extinguishing, a minimum equity which has been found in Step (C)(iii).

8.2.2 Further development of the model

In Chapter 7, the model was outlined, tested and explored. It was introduced at 7.1.4. The chapter proceeded to test it using real-life cases. Its positive points and limitations were discussed in relation to its possible adoption in England, Australia, and Ireland. Issues relating to concurrent liability were discussed, and possible general weakenesses identified.

8.2.2.1 Examples of its application

This was generally done in section 7.2, divided by jurisdiction into England (7.2.2 and 7.2.3), Australia (7.2.4 and 7.2.5) and Ireland (7.2.6 and 7.2.7). Cases dealing specifically with proprietary estoppel were addressed in sections 7.2.2, 7.2.4 and 7.2.6. Estoppel by representation and concurrent liability were addressed in sections 7.1.4 and 7.3.1.

8.2.2.2 General objections

The identified possible objections to the model have been outlined as follows:

8.2.2.2 (a) The burden of proof

It was noted that this was a difficult point, and the issues were addressed in sections 7.1.4.3 and 7.4, as well as in 7.2 generally (see, for instance, 7.2.3).

8.2.2.2 (b) Litigation issues

Specific practical effects of adopting the model were discussed in section 7.3.2. Issues relating to the production of evidence and costs are discussed in sections 7.2.2, 7.2.4, 7.2.6, 7.3.1 and 7.3.2.

8.2.2.2 (c) Jurisdiction-based objections

Within the study of cases from three jurisdictions, the likelihood of the model succeeding in each of these was studied in sections 7.2.3, 7.2.5, and 7.2.7. Section 7.2.3,

which dealt with England, built in particular upon the problems outlined in sections 3.2.7 and 3.3.1.

8.2.2.2 (d) Other, pre-existing principled objections to a model of this kind

These were found in sections 3.2.7.1 (on views opposing a cause of action in non-proprietary estoppels) and 3.3.1.2 (on views opposing a unified equitable estoppel).

8.2.2.3 Why the model is particularly relevant to, and applicable in, Ireland

Despite what was outlined in section 3.2.6, the relative paucity of Irish development of the doctrine means that this jurisdiction is likely to accept the model, since there is simply no well-laid-out alternative, as discussed in sections 7.2.6 and 7.2.7. The development of the doctrine of legitimate expectation in sections 6.3.3 and 6.3.4 also provides insight.

8.2.3 The meanings of unconscionability

8.2.3.1 A critique of the idea of the six meanings (sections 4.2.1.3, 4.3, and 5.3.2.2)

These were identified in section 4.3, and some of them elaborated upon in sections 4.2.1.3, 4.3, and 5.3.2.2, as follows: unconscionabilty can mean, first, the jurisdiction in the sense of a basis for the existence of equitable estoppel in the first place; secondly, the context in which the reliance takes place; thirdly, the justifiability of the reliance; fourthly, whether it is unconscionable to move to an inconsistent position; fifthly, whether the court ought to grant a remedy; and, finally, what parameters aid the court in shaping the remedy.

First, it could be argued that merely identifying several meanings of unconscionability brings us back to the same position as before. Chapter 4 identified various case-law meanings which connote nothing more nor less than objectively wrong conduct, as well as some differences in academic opinion on what unconscionability means. It could be argued that describing six meanings of unconscionability adds to the confusion, and, further, is not susceptible of finality, given the looseness of the term. However, the advantage of the six meanings, which were defined specifically in relation to equitable estoppel, is that they allow us properly to isolate the detriment factor, which permits a more precise analysis of both the liability and remedy stages.

Secondly and relatedly, it may be objected that the meanings are not exact, since they omit the fact that courts do (for better or worse) elide the specifically detriment-related aspects with unconscionability. Thus, Collins states that the 'normal source' of a court's 'finding of unfairness of unconscionability will consist in the irretrievable economic harm which has resulted from misplaced reliance upon the undertaking.'[8] Hence, it may be said that the detriment's being a necessary element of the fourth meaning is not enough, because the fourth meaning as adopted by the model is merely the question whether a liability has been raised and thus is more general than what the courts say. First, however, it is submitted that, when, the courts elide detriment with unconscionability, they are analysing it contextually (the second meaning) as well as for the purposes of the fourth meaning. Secondly, the fourth meaning is whether it is unconscionable to resile, which, adopted by the model, is a construct for the real question of whether the elements of liability have been proven to the court's satisfaction. The first of those elements is detriment. By allowing for the separate analysis of detriment, the model departs from the same position as that outlined by Collins but arrives at a more principled basis.

Thirdly, it could be objected that the meanings are silent as to the defendant's mental state, in the narrow sense of unconscionability found by McFarlane.[9] But the meanings are intended to specifically relate to a unified equitable estoppel and are stated generally. Where that narrow sense is necessary,[10] it could be identified within the second meaning, which relates to contextual factors, or the third, which relates to the question whether the reliance was justified.

[8] Hugh Collins, *The Law of Contract* (4th edn LexisNexis 2003) 84.

[9] Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) para 5.05 referring to Lord Walker in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [92] referring in turn to Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2001] Ch 437.

[10] As Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford University Press 2014) paras 5.35-5.37 argues it is in only the acquiescence strand of estoppel.

8.3 Has the model achieved the objectives set out in the thesis question?

8.3.1 The model and general objectives – throughout the thesis

The model sought to simplify and consolidate equitable estoppel, and to make it generally applicable. A model was proposed with basic, incremental steps (section 7.1.4 and see outline above section 8.2).

At the outset, however, it may be impossible to fully 'simplify' an area of the law that is ultimately reliant on an assessment in conscience. The advantages of such assessment (sections 4.2.2.2(b) and 4.2.2.2(c)) and the objections to it (section 4.2.2.1) were laid out. It was noted that unconscionability has 'infinitely various' case law meanings (section 4.2.1.2) which really relate to the conscience of the court in an objective sense, derived from Christian teaching (section 4.2.2.1(a)). It was then proposed that unconscionability has six potential meanings in equitable estoppel (sections 4.2.1.3, 4.3, and 5.3.2.2). It was further proposed that only the last two of those meanings, when they arise in future equitable estoppel cases, should be informed in content by unconscionability itself. Those meanings are described in the model as (C)(ii) and (C)(iii).

The consolidation of equitable estoppel under the model would possibly lead to issues concerning the subsuming of the initial conduct and the disproof model that was adopted, these objections having been discussed in section 7.4. That section also addresses the realistic possibilities for application, in principle, of the model. The possible jurisdictional objections were outlined in sections 7.2.3, 7.2.5, and 7.2.7.

8.3.2 The model and the surveys

The model provides some answers to the four questions raised by the surveys. First, by consolidating the estoppels, it was intended that the model address imprecision in a preliminary way. The generality of the model was, it is submitted, necessary for that consolidation, but such generality can itself create imprecision. In particular, the disproof of inducement, which substitutes the tests for representations, would initially only be subject to general rules. However, by outlining the three key steps, with their sub-steps, future cases would have a simplified and definite basis on which to develop by analogy with pre-model cases. In the ultimate analysis, an area subject to the conscience jurisdiction can never be said to be subject to strict parameters.

Secondly, the perception that estoppel is a fallback[11] or last-ditch claim may never be eliminated. This is perhaps not a flaw of equitable estoppel nor, indeed, of the model. The crucial distinction is between, on the one hand, unwise pleadings that are probably bound to fail, but are raised in any event because they involve an unconscionability element, and, on the other, doctrines that are a 'second order type of law – law about law.'[12] If equitable estoppel enables success in perhaps a limited range of cases, this is an incident of the doctrine, not a flaw. Further, the study of concurrent liability in section 7.3.1 highlights the model's small sphere of usefulness as well as its limitations, which are not negatives but natural consequences of its boundaries. It may be that a litigant often simply would prefer the benefit of the preclusive doctrine,[13] and some of the surveyed cases in section 1.3.2 do recite claims of a preclusive nature, sometimes alongside other estoppels of more substantive content. A unified equitable estoppel, prescinding itself from the preclusive doctrine, would enable a more clearly differentiated development of both doctrines. In particular, in an appropriate case, it would be possible clearly to separate analysis of the preclusive doctrine on the one hand, from an equitable estoppel with a limited equitable remedy on the other. In England, on the basis of *Derby*[14] and *Somer*,[15] that separation cannot be said to be explicit.[16]

Meanwhile, the problem of unwise pleadings should not reignite old debates about the acceptability of using estoppel as a 'talisman'[17] or a 'palm tree.'[18] The

[11] In *Parabola Investments Ltd v Browallia Cal Ltd* [2009] EWHC 901 (Comm), an impatience could be discerned with the 'so-called "estoppel" argument.' See also, in particular, *Jim Ennis Construction Ltd v Premier Asphalt Ltd* [2009] EWHC 2017 (TCC) (a 'fallback argument'); *Computer Software Group Ltd v Sanderson* [2009] EWHC 3827 (QB); *Hodgson v Lipson* [2009] EWHC 3111 (QBD); *Transfield Shipping Inc v Chiping Xinfa Huayu Alumina Co Ltd* [2009] EWHC 3629 (QB); *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm); *Lovett v Carson Country Homes Ltd* [2009] EWHC 1143 (Ch); *Braceforce Warehousing Ltd v Mediterranean Shipping Company Ltd* [2009] EWHC 3839 (QB); *Workspace Management Ltd v YJL London Ltd* [2009] EWHC 2017 (TCC); *The Flat Roof Company Ltd v Bowden* [2009] EWHC 2894 (Ch).

[12] Henry Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 59 <http://ssrn.com/abstract=2617413>accessed 20 March 2017.

[13] See the discussion in section 7.3.1 of *Hopgood v Brown* [1955] 1 WLR 213 (CA), in which the operation of the preclusive doctrine produced a better result for the defendant than would the proposed model.

[14] *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369.

[15] *National Westminster Bank plc v Somer International (UK) Ltd* [2001] EWCA Civ 970, [2002] QB 1286.

[16] Sean Wilken and Karim Ghaly (eds), *Wilken: The Law of Waiver, Variation and Estoppel* (3rd edn, Oxford University Press 2012) para 7.09: both cases 'raise the possibility of a unified theory. What is unclear from both is the ambit of that theory.' See the discussion above section 7.3.1 n 160.

[17] PD Finn, 'Equitable Estoppel' in PD Finn (ed), *Essays in Equity* (Sydney Law Book Co 1985) 75.

[18] *Taylor v Dickens* [1998] 1 FLR 806.

perceptions about the usefulness of unconscionability can certainly no longer be said to end there, as sections 4.2.2.2(b) and 4.2.2.2(c) demonstrated.

The final two points can be addressed together: the third is that the relative immaturity of the doctrine would be remedied by greater development, and the fourth is the apparent appetite for such development. The objection that could be made here is that development ought to be made, in the common-law style, by considering the boundaries of a doctrine in a case in which such boundaries are determinative. It could be said that this would be preferable to adopting a model that excises the case law that the model-maker finds unhelpful. It could be answered, however, that such incremental growth has led to the outlined inconsistencies, and that when revolutionary cases such as *High Trees*, *Waltons Stores* and *Cobbe* appear, they make matters more difficult for lawyers, not easier.

8.3.3 The model, on balance

The model has taken on the challenges highlighted as arising in English doctrine. It can produce fairer (*Baird*), and more principled (*Wayling*) results, or results that are substantially the same (*JR*, *Somer*[19]), or produce a possible alternative (*Courtney*). It occasionally also will simply not assist, a finding which allows us to delineate some of its boundaries (*Nram*, *Lloyds Bank* and the remaining cases discussed in section 7.3.1). The model would be a good starting-point for the future development of private law-specific claims in Ireland. An analogy having been drawn with legitimate expectation in order to illustrate estoppel's operation, it can be said that the influence usually operates in the other direction. Such sustained influence certainly justifies the consolidation of principle within estoppel itself in this jurisdiction.

8.4 Remaining questions

The influence of equity was discussed, in particular, in Chapter 4. Glister and Lee have remarked that '[m]uch of the modern development of the law of estoppel, especially promissory estoppel and proprietary estoppel, has been achieved without enquiring whether the doctrines are doctrines of equity, or of law or of both.'[20] This

[19] Section 7.3.1 n 150.

[20] Jamie Glister and James Lee, *Hanbury and Martin's Modern Equity* (20th edn, Sweet & Maxwell 2015) para 1-020.

appears to champion the cause of fusion, but it can alternatively serve to criticise the fact that the ideas in the fruitful fusion debate have not been used in discussing equitable estoppel. Further, only proprietary estoppel is then said to be part of the law of equity: the authors leave the question of the origin of other estoppels to be decided by others.[21] Further, and future, abstract questions can ask whether equitable estoppel effects a sort of procedural justice, resolving something analogous to the Roman 'fraud on the law,' or whether it could eventually be identified as first-order law in itself. A unified equitable estoppel has been distilled in the thesis to a second-order avenue[22] of a limited measure of redress, according to a simplified model. Yet those two abstract questions can remind us of the need to isolate equitable estoppel thus. Smith, in his identification of the conceptual basis of and justification for equity, acknowledges that he leaves open 'the nagging question of how and how much to do equity.'[23]

The question cannot be fully answered for all time. The thesis has focused on the narrow area of equity's limited application to detrimental reliance on beliefs induced by defendants who then seek to undermine the belief. It is hoped that this thesis has proposed a principled suggestion at least for the aspects of the answer that arise in this context.

[21] Jamie Glister and James Lee, *Hanbury and Martin's Modern Equity* (20th edn, Sweet & Maxwell 2015) para 1-020.
[22] See generally Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) <http://ssrn.com/abstract=2617413> accessed 20 March 2017.
[23] Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (15 January 2015) 73 <http://ssrn.com/abstract=2617413> accessed 20 March 2017.

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