ARE ALL ESTOPPELS ALIKE?

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1. Tempting as it is to characterise estoppel generally as equitable intervention to prevent a party from resiling from an assurance where it would be unconscionable to do so, the answer to the question in the title to this paper is "no". To explain why, I shall attempt to do the following:

    a. Identify the origins of different estoppel principles and show that they were quite distinct and different;
    b. Show how the view that there is but one underlying principle of equity came about;
    c. Consider the different remedies and requirements attached to different types of estoppel;
    d. Explain why unconscionability is not a key element in all estoppels.

The origins of estoppels

2. I start with a case called *Pickard v Sears*, in 1837[1]. This is one of the earliest cases of estoppel by representation, and demonstrates its origins and underlying principle.

3. Pickard was a mortgagee of machinery. The machinery was seized and sold to Sears by a creditor of the mortgagor. At trial, Pickard succeeded on the basis of his legal title to the machinery. A re-trial was sought on the basis that Pickard had effectively made representations during the course of its seizure and sale, to the effect that he had no title to it. That conduct induced the creditor and the purchaser to change their situations, as it was put. The authorities relied on by Sir Frederick Pollock on behalf of the purchaser were cases where a person makes admissions, upon the basis of which another person acts to as to change his situation, whereupon the person making the admission is estopped from disputing the admitted fact.

4. You can see from this that that estoppel is in substance an evidential bar. A plaintiff may not assert in his pleading or in evidence facts contrary to those which he has led the defendant to assume to be true, and on the basis of which the defendant has acted to his detriment (changed his position). In effect, Pickard made a representation of existing fact: that he had no

[1] (1837) 6 Ad & El 439

prior title to the machinery, and then sought to assert that he did have prior title, which he was estopped from doing.

5. Lord Denman CJ said:

> "the rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time".

6. This was explained further in a later case called *Low v Bouverie*[2]. A lender sued a trustee for having given incomplete information about a beneficiary's interest in a fund and about the extent of prior incumbrances over it. This was therefore a case of an incorrect statement of fact having been made by the trustee. Lindley LJ said "estoppel is not a cause of action – it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself"; and Bowen LJ said: estoppel is only a rule of evidence; you cannot found an action upon estoppel". So a plaintiff can be prevented from asserting that the facts were different, and where a plaintiff otherwise has a valid claim, a defendant can be prevented from asserting that the facts are different from what he represented them to be.

7. Although, in modern practice in England, estoppel by representation is treated as a substantive principle of law rather than a rule relating to admissibility of evidence, it is salutary to recall – as the Court of Appeal did in a case in 2002[3] – that an estoppel based on a representation of fact does not of itself confer a right of action.

8. *Ramsden v Dyson*[4] is often regarded as the origin of the law of proprietary estoppel, that is to say a form of estoppel giving rise to an interest in land. It is in fact not so: there are many earlier 18th Century cases, though these are mostly cases of acquiescence rather than cases where estoppels arise from an express representation or promise. Ironically, the decision in *Ramsden* on the facts was that although a tenant was encouraged to build on another's land, the interest thereby created was no more than a tenancy from year to year, not a term of years or for life. It is the dissenting speech of Lord Kingsdown for which the case is remembered, and which ultimately proved to be the principle on which courts of equity proceeded:

> "The rule of law applicable to the case appears to me to be this: If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and

[2] [1891] 3 Ch 82
[3] *National Westminster Bank plc v Somer International (UK)* [2002] QB 1286
[4] (1866) LR 1 HL 129

> upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation. This was the principle of the decision in *Gregory v Mighell*[5] and, as I conceive, is open to no doubt."

Lord Kingsdown explained that a court would grant relief in order to prevent fraud[6], and that the relief granted might be in the form of a specific interest in land or in the form of compensation for expenditure.

9. This is both far reaching and modern in its approach. Note, in particular, the words "an agreement for … a certain interest in land", which proved to be central to two recent House of Lords decisions on the scope of proprietary estoppel, *Cobbe v Yeoman's Row*[7] and *Thorner v Major*[8] ; also, the indication that the remedy ("will compel the landlord to give effect to such promise or expectation") is one for which the innocent party could bring a claim directly, but that the court had a discretion as to how to satisfy the equity. Note too that the principle so expressed is broad enough to cover the different types of proprietary estoppel, as we now recognise them: acquiescence-based, promise-based, and representation-based.

10. You can see at a glance that, however much one may say that it would be unconscionable in a case of estoppel by representation and in the case of proprietary estoppel not to grant a remedy – or to say that in both cases the party making the representation or giving the encouragement is not permitted to deny that which he has induced the innocent party to believe because the innocent party has relied on it – the principled basis on which a court disallows a denial of the representation in one case and grants a proprietary right in the other is quite different. The test is not, simply: has the defendant acted or is he acting unconscionably?

11. Different again is promissory estoppel. This arises where the parties are already in a legal relationship with rights and obligations, and one of the parties agrees not to enforce his existing rights. It is a tricky area, in the sense that to allow voluntary promises to be enforced by the promisee would appear to drive the proverbial coach and horses through the doctrine of consideration, which is a cornerstone of English commercial law. The equitable doctrine of promissory estoppel arises of course out of the famous, or perhaps notorious, decision in *Foakes v Beer*[9], where it was held that a promise to accept part of a debt in full satisfaction was unenforceable for want of consideration, however much the promisee, to the knowledge and in accordance with the intention of the promisor, had changed his position to his detriment in reliance on the promise. So in

[5] (1811) 18 Ves 328
[6] Lord Cranworth LC in his speech also stated that the principle existed to prevent dishonesty. The same was said by Fry J in the well-known case of *Willmott v Barber* (1880) 15 ChD 96 (quasi-estoppel by acquiescence).
[7] [2008] 1 WLR 1752
[8] [2009] 1 WLR 776
[9] (1883) 9 App Cas 605

what circumstances will a court hold a party to an agreement that is otherwise not enforceable?

12. The origin of this type of estoppel can now be seen to be *Hughes v Metropolitan Railway Company*[10].

13. The facts were simple. A tenant held houses on a lease subject to repairing obligations on notice. 6 months' notice was given by the landlord to effect repairs. After one month, the tenant offered to sell the lease to the landlord and the landlord engaged in negotiations, remarking that the price first requested by the tenant was rather unrealistic in view of the condition of the houses, and asking for a better offer. No further offer was in fact made. Just before the 6 months expired, the tenant said that, as negotiations had ended, they would now get on with the works. On 6 months, the landlord re-entered and took possession.

14. There was at that time no established jurisdiction to relieve against forfeiture for breach of covenant. The House of Lords, agreeing with the Court of Appeal, considered that the landlord was not entitled to forfeit the lease at the time that he did. No previous decision, whether authoritative or not, was referred to in the speeches of their Lordships. There was no reference to cases of estoppel by representation. The matter was treated as one of first principle. The landlord had, without any mischievous intention, *induced* (a word used by 3 of their Lordships) the tenant reasonably to believe that the operation of the notice would be suspended while the negotiations for a sale continued.

15. Lord Cairns famously expressed the principle on which equity intervened as follows:

> "..it is the first principle on which all Court of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results …. afterwards by their own act or with their own consent enter upon 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 between the parties."

Lord Blackburn said:

> "even if the plaintiff himself did not intend to abandon the notice, yet if his conduct was such as to put the defendants off their guard, and to lead them to believe that the six months' notice would not be insisted on, there is ground for giving relief in equity."

[10] (1877) 2 App Cas 439

16. The decision is rather striking on its facts. The landlord had not in truth done very much, other than show a willingness to negotiate and imply that the price, if agreed, would reflect the current condition of the houses – i.e. *if* the sale was agreed the tenant didn't need to repair. I'm not sure it would be decided the same way today, had it not been decided in 1877 – and a very similar case in 1998 was not decided the same way.[11]

17. What is important about the decision is that:

    a. The equity arose out of communications between the parties subsequently to their legal rights having been established – in that case under a lease and a unilateral notice – leading one party to understand that existing rights would not be enforced;

    b. The equity does not depend on any express promise not to enforce them, only on exchanges that reasonably led one party to understand that they would not be;

    c. There was no expressed requirement *as such* for detrimental reliance, only for enforcement of the pre-existing rights to be regarded as inequitable in the circumstances (but why was it inequitable in that case? – it can only be (though this was not spelled out) because the tenant had reasonably relied on what it was given to understand, thereby exposing itself to a risk of forfeiture);

    d. The effect was that the purported re-entry was invalid, because the landlord could not prove that the tenant had failed to comply with the notice to repair. Like estoppel by representation, therefore, the estoppel operated by preventing the landlord from asserting certain facts.

    e. All of their Lordships recognised that the landlord might resume his position by giving appropriate notice of intention to do so – in other words, his rights were not extinguished, only suspended. This is a central aspect of what we now call promissory estoppel.

18. In short, this is very close to a case of estoppel by representation, except that the type of representation was different (an implied assurance about future conduct rather than a representation of fact), and its suspensory effect was different, no doubt (in that case) because there was no implied assurance that the tenant never had to repair the houses.

19. *Hughes* was, perhaps, not recognised at the time as establishing a new and separate equitable principle. This came later, in the era of Lord Denning,

[11] *Dun & Bradstreet Software Services (England) v Provident Mutual Life Assurance Society* [1998] 2 EGLR 175

starting with the celebrated *High Trees House* case in 1946[12], where he held that in some circumstances a court will refuse to allow a party to act inconsistently with promises that are intended to be relied on but which are not supported by consideration. He suggested that equity should reach a different conclusion from *Foakes v Beer* where a promise to accept payment of part of a debt "is acted upon": "a promise intended to be acted upon and in fact acted on, is binding so far as its terms properly apply". How it had to be acted upon in order to cause equity to intervene was not spelled out. In fact, in that case, the promise, on its true interpretation, was held not to apply to the claim for rent that was made, but clear dicta were expressed to the effect that if it had applied the landlord would not have been permitted to go back on his promise. There is no evidence that the lessee did anything other than pay rent at the reduced rate during the war, and there was certainly no evidence of actual detriment, merely change of position in not paying the full amount of the rent during the war years, which was clearly not detrimental. So the only express requirement was that it should be inequitable to allow the promisor to resile from his promise, if it was clear, intended to be acted upon and was in fact acted upon.

20. In later cases, Lord Denning further developed the principles of what had become known as promissory estoppel. In particular, in *Combe v Combe*[13], it was decided that promissory estoppel creates no new cause of action. A wife desisted from applying in her divorce proceedings for maintenance on the basis of the husband's assurance that he would pay her £100 a year in maintenance. Since she did not desist at his request, there was no consideration for the promise, and it was held that she could not sue her husband for the maintenance. Lord Denning said that promissory estoppel operates as a shield, not as a sword. No inroads have been made into this principle, even though procedural complexities sometimes make it unclear whether it is a shield or a sword that is being wielded.

One underlying principle of equity?

21. In England in the late 1970s and early 1980s, a view began to take a firm hold that all types of estoppel are essentially the application of a single equitable principle, precluding one party from denying something that he has induced another party to believe, where it would be unconscionable to do so.

22. The first famous case of this kind was *Taylors Fashions v Liverpool Trustees Co*[14] in 1979. In that case (to simplify the facts), a tenant spent substantial sums on improving its demised premises in the belief that it had a valid option to extend the lease. The existing lease still had 18 years to run. Another tenant took an interest in the premises on the same

[12] *Central London Property Trust v High Trees House* [1947] KB 130
[13] [1951] 2 QB 215, 219
[14] [1982] QB 133

understanding. The landlord had authorised the works. The option was in law void for non-registration, however.

23. It would have been a classic case of quasi-estoppel by acquiescence, under the *Willmott v Barber* formula, but for one thing. Both parties were unaware that the option was void and both assumed it to be valid. So missing from Fry J's famous analysis of the circumstances in which equity would prevent fraud was knowledge by the landlord that the tenant was acting under a mistake. The landlord was acting under the same mistake.

24. But that did not get in the way of Oliver J. He held that the principle in *Ramsden v Dyson* relating to proprietary estoppel was broader, as follows:

> "..whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – [it] requires a very much broader approach which is directed rather at ascertaining whether, in particular 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 …".

25. So it did not matter in principle that a defendant had *unknowingly allowed* another to make a mistake and act on it to his detriment: the test is whether in the circumstances, where the claimant has acted by mistake to his detriment, it would be *unconscionable* for the defendant to assert a state of affairs contrary to what the defendant assumed. That leaves the intervention of equity leaning heavily on the conclusion of what is and what is not unconscionable, once it is established only that the defendant was involved in some way in the mistaken actions of the claimant.

26. On the facts, Oliver J. held that no estoppel arose in one claimant's case (sc. it was not unconscionable to assert that the option was void) because the defendant had done nothing to encourage the mistaken belief that the claimant held: the tenant was mistaken for reasons that had nothing to do with the landlord. In the case of the other claimant, however, although both parties shared the mistake, the transaction between them had been premised on the validity of the option. The documents drafted by the landlord's solicitors had referred to the option, implying its validity; accordingly it would be unconscionable in those circumstances to allow the defendant to deny the validity of the option.

27. Oliver J. thought that it made no difference whether the successful claimant's case was put forward on the basis of an estoppel by representation or as a proprietary estoppel, based on encouragement to spend money on the land. In reality it was neither, and in a case decided later in 1979, and by the Court of Appeal in 1981, the Court for the first time identified what the authors of a leading textbook had previously called "estoppel by convention" as a description of this kind of estoppel.

28. This later case was *Amalgamated Investment & Property Co v Texas Commercial International Bank*[15]. You will recall that there was an agreement in principle for the Bank to make a loan to a subsidiary of the plaintiff and for the plaintiff to guarantee the debt. The guarantee was executed and related to monies owed by the subsidiary to the Bank. The loan was eventually made, but for exchange control reasons the Bank lent the money to its subsidiary and that subsidiary lent the monies to the plaintiff's subsidiary. This was about 3 months after the guarantee had been executed. The loan was made (and other security taken) on the understanding that the loan was guaranteed by the plaintiff, though in fact the guarantee said nothing about monies owing to the Bank's subsidiary. At the plaintiff's request, the Bank through its subsidiary gave further time for repayment. The Bank set off monies owed to the plaintiff against the amount of the guaranteed debt, and the plaintiff sought a declaration that it was not entitled to make the set-off. The Bank argued that the plaintiff was estopped from contending that the guarantee did not cover monies advanced by the Bank's subsidiary. The plaintiff's liquidator contended that there was no equitable estoppel of any established type that could avail the Bank.

29. Robert Goff J held that it was not right to restrict equitable estoppel to certain defined categories. He referred to Oliver J's approach and held that the question he had to ask was whether in all the circumstances of the case it was *unconscionable* for the plaintiff to seek to take advantage of a shared mistake. The Judge found assurances made by the plaintiff that the guarantee was valid in relation to the loan, which contributed to the Bank's error, and he held that it would be unconscionable for the plaintiff to take advantage of the Bank's error. Importantly (though strictly *obiter* in that case, since the Bank was not suing on the guarantee), he expressed the view (by reference to some proprietary estoppel or acquiescence cases) that it was not an obstacle to an estoppel that it enabled a party to enforce an obligation where, but for the estoppel, there would not have been a cause of action. This distinction is referred to in some older Privy Council authorities as enlarging a representee's rights or a representor's obligations, rather than creating a cause of action.

30. The Court of Appeal held that, as a matter of interpretation of the guarantee at the time when it took effect, the reference to debts owed to the Bank could be interpreted as debts owed to its subsidiary. But, in the alternative, they held that there was a convention as to the effect of the guarantee on the basis of which both sides had acted, and that the convention bound both sides, irrespective of whether either was aware of the mistake in the document. Eveleigh LJ considered that the Bank could not have sued on the guarantee, but Brandon LJ considered that it could, by alleging that the guarantee meant that the debts owed to its subsidiary were covered (even if it didn't say that), and then when the plaintiff denied that, assert in reply that the plaintiff was estopped from so denying.

[15] [1982] QB 84

31. Lord Denning expressed the following general principle, "shorn of limitations", as he put it:

> "when 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 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."

32. That is to say: any mistaken assumption on the basis of which parties have proceeded cannot be denied if it would be unfair or unjust to allow that. As a statement of the principle of estoppel by convention, that may be so, and it throws considerable weight upon the evaluation of unfairness, or injustice, on the particular facts of a case. In both the *Taylors Fashions* and the *Texas Bank* cases, it was held to be material that the party estopped was at least partly responsible (innocently) for the inducement of the other party's mistake and that the other party had changed its position to some extent as a result. Clearly, if – as appears to be the case – neither inducement nor detriment is an express requirement of estoppel by convention, then the assessment of unconscionability or unfairness or injustice, call it what you will, becomes in itself a substantial and very important element.

33. As a statement of a broad principle of general application to all estoppels, Lord Denning's formulation is plainly insufficient, however.[16] It doesn't cater for many cases of proprietary estoppel, and it doesn't cater for cases where an express promise is made by one party to the other. Oliver J's formulation is more detailed, in that it includes expressly the elements of inducement and detriment, and yet it still includes the requirement of unconscionability, a point to which I will return.

Different remedies and requirements

34. Having looked at the four main types of estoppel – proprietary estoppel; estoppel by representation of fact; promissory estoppel, and estoppel by convention, it is now necessary to examine the differences between them. What we shall see is that proprietary estoppel (including what used to be called quasi-estoppel by acquiescence) is in many respects a different creature from the other estoppels, and that while there are many similarities between the other main types of estoppel there are important differences too.

[16] Lord Bingham of Cornhill and 2 others in *Johnson v Gore Wood* [2002] 2 AC 1 were prepared to accept Lord Denning's formulation as a single formula, but Lords Millett and Goff were not.

35. This analysis can be done under the following headings:

a. Creation of rights or mere defence;
b. Extinctive or suspensory effect;
c. Clarity of representation, assurance or assumption;
d. Inducement, and
e. Detrimental reliance or unconscionability.

(1) Creation of rights or mere defence

36. The classic statement that estoppel acts as a shield and not as a sword applies with full force to estoppel by representation and promissory estoppel, and to a large extent (though the position remains somewhat unclear) with estoppel by convention. But it has no application at all to proprietary estoppel, where a new cause of action based on entitlement to an interest in land can be founded on knowing acquiescence, encouragement or on promise of an interest in future.

37. In the case of estoppel by representation, the estoppel operates so as to prevent a person from denying that a given fact is the case, where he has represented that it is the case, thereby inducing the representee to act to his detriment in reliance on that fact. So it either operates in favour of a defendant, who is able to say that a plaintiff cannot allege the fact that he alleges and so cannot succeed in his claim, or where the representee is a plaintiff, in favour of the plaintiff because the defendant is estopped from denying the plaintiff's claim by asserting facts contrary to those that the defendant previously represented. There is no basis on which a representee can found a cause of action on the fact represented. The representee may succeed on a cause of action that he has where he would otherwise have failed, but the facts represented cannot in themselves form the basis of a claim.[17]

38. Similarly in relation to promissory estoppel. The doctrine applies where the parties have existing legal relations and the effect is to prevent one party from relying on his pre-existing rights, to a greater or lesser extent. The idea that a promise as to future conduct would be enforced as such would run flatly contrary to the doctrine of consideration. Although in Australia the High Court there has held in favour of the creation of rights by promises as to the future[18], that is not the law of England and Wales. There is no close English analogy to the *Waltons Stores* case in Australia, but the decision of the House of Lords in *Cobbe v Yeoman's Row* and the Court of Appeal in *Baird Textile Holdings v Marks & Spencer plc*[19] show that the same result would not be achieved in England.

39. In *Baird*, the claimant had supplied M&S for 30 years, and argued that there was an implied term of its contract that M&S could not terminate it,

[17] *Low v Bouverie*, above.
[18] *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387.
[19] [2002] 1 All ER (Comm) 737

except on reasonable notice, and alternatively that it was estopped from terminating without reasonable notice (which notice period was suggested to be 3 years, during which M&S had to continue to order goods from Baird at reasonable prices). The Court of Appeal rejected both arguments, accepting in terms that it was unarguable that either promissory estoppel or estoppel by convention could create a right of action entitling Baird to claim damages for breach of contract, or specific performance.

40. In relation to estoppel by convention, there is more uncertainty whether, where a contract or other obligation undoubtedly exists, an estoppel can enlarge the rights or obligations, such that the enlarged rights can be sued on. An example is the "enlarged" guarantee in the Texas Bank case (on the assumption that the argument based on interpretation of that obligation did not succeed): could the Bank have sued the plaintiff under the guarantee, which only covered the monies owed to its subsidiary if the estoppel could be invoked? In my view, Brandon LJ's analysis is probably correct: the guarantee can be sued on as it stands, with the guarantor then being estopped from contending that it does not cover monies advanced by the Bank's subsidiary.[20] That means that, in principle, contrary to the view of Lord Denning MR, an estoppel by convention cannot be relied on as giving rise to a cause of action, though it may have the effect indirectly of enlarging the claimant's rights. In many cases of estoppel by representation or estoppel by convention, the estoppel only arises in relation to particular facts, and facts in isolation don't give rise to a cause of action in any event. But estoppel by convention can be based on an assumption of the legal effect of private rights or contracts, and in those circumstances the orthodox view is that an assumption about rights cannot itself give rise to an action to enforce those rights.

(2) Extinction or suspension

41. The orthodox view is that a promissory estoppel is suspensory only in its effect. This can be seen by the *Hughes v Metropolitan Railway* case. The landlord was not forever precluded from requiring the premises to be repaired, nor from enforcing the notice: he could do so on giving reasonable notice that repair was now required. The same is understood to be the effect of the *High Trees* case, and has been asserted in numerous cases since.[21] However, in many cases the issue doesn't arise directly because the promise will be interpreted in such a way as to define the time during which the promisor's rights are suspended. That was the actual decision in the *High Trees* case.

42. In other cases, where the promise cannot be interpreted in a limited way, and where the promisee has permanently lost an opportunity or a right as a result of relying on the promise, it may be inequitable to allow the promisor to resume his rights at all. This is an example of the flexibility of

[20] This view is supported the by analysis of Longmore LJ in *Triodos Bank NV v Dobbs* [2005] EWCA Civ 630 at [26] and that of Mance LJ in *Baird Textile Holdings v Marks and Spencer plc* at para [88].
[21] See, e.g., *Tungsten Electric Co v. Tool Metal Manufacture Co* [1955] 1 WLR 761.

the doctrine, and it will be recalled that whether or not it is inequitable to allow the rights to be asserted is one of the required elements that have to be proved with promissory estoppel. There is no requirement as such for detriment[22], though detrimental reliance may well satisfy the requirement that it be inequitable to allow the right to be enforced. In some cases, even though there is a promise not to enforce rights, it may not be inequitable at all to prevent the promisor from asserting his rights without limit, either because no prejudice has been suffered by the promisee or because of other extraneous reasons.[23]

43. In relation to estoppel by convention, this issue appears to be similarly resolved, as it is a substantive element of the doctrine that it would be "unconscionable" to allow the parties (or one of them) to go back on the common assumption. In the absence of any strict requirement for a representation, promise, inducement or detriment, the work is done by the concept of unconscionability. In some cases, it may be unconscionable to depart from the convention at any time; in others, not at all; in others, it may be unconscionable to depart in respect of matters done while the convention existed but not after the mistake was discovered and the convention spent.[24]

44. In relation to estoppel by representation and proprietary estoppel, however, there is no suggestion that a party can resume his position by correcting a representation or by objecting to what the mistaken party is doing. That is because it is, in both cases, an essential element of the estoppel that the party seeking to rely on it has acted to his detriment in reliance on the representation, encouragement or promise. Once that detrimental reliance has been incurred, the equity arises. In the case of proprietary estoppel, however, the discretion that the court has to fashion an appropriate remedy may well allow for temporary relief rather than permanent relief to be granted, e.g. where the equity would be satisfied by allowing the innocent party to enjoy the land for a term of years, rather than in perpetuity. But that is a question of how the equity is to be satisfied rather than whether its effect has expired.

(3) Clarity of representation or assurance

45. A clear and unequivocal representation of existing fact is a necessary element of estoppel by representation[25], and the existence or not of private rights is treated for these purposes as a fact, as is the state of the representor's mind as to his present intention. For promissory estoppel, on the contrary, there is no need for any representation of fact. Instead, there must be a promise or assurance made by the promisor as to the

[22] *W.J. Alan & Co v El Nasr Import and Export* [1972] 2 QB 189, 213.
[23] *Societe Italo-Belge pour le Commerce v Vegetable Oils (Malaysia) Sdn Bhd* [1981] 2 Lloyd's Rep 695; *Orchard Central Pte v Cupid Jewels Pte* [2013] SGHC 46.
[24] See e.g. *Troop v Gibson* [1986] 1 EGLR 1, where the estoppel was spent once the parties realised their mistaken understanding of what the alienation covenant in fact stated.
[25] *Low v Bouverie*, above.

enforcement or reliance in future on existing rights. The promise is generally said to be required to be clearly made, and unequivocal.[26]

46. There is no explicit requirement for a clear and unequivocal understanding for estoppel by convention, though there must be a communicated assumption of fact or law – one that, as it is said, "crosses the line" between the parties. It is not sufficient that both parties independently make a certain assumption. As to how clear the assumption must be, there are conflicting dicta in some of the cases and textbooks. Since there is a substantive question of whether or not it would be unjust or unconscionable to allow a party to go back on the assumption, it is suggested that there need be no requirement that the assumption be "clear and unequivocal". If there was doubt as to the meaning or extent of the communicated assumption, that is likely to have a bearing on whether or not it is unconscionable to allow a party to insist on his legal rights. In such a case, the estoppel may arise to the extent that is most favourable to the party sought to be estopped but not further.

47. In relation to proprietary estoppel on the other hand the principles appear to be different. Although the rights acquired must relate to a certain interest in land, at least where the estoppel is based on a representation or on a promise (*Cobbe v Yeoman's Row*), in the case of a promise to confer rights in future it was held that the promise need only be "clear enough", not necessarily explicit; and in the leading case in England now on representation- and promise-based proprietary estoppel[27] (*Thorner v Major*), the assurance of inheritance was not even made in words. And in many cases the rights arise out of acquiescence, not language.

(4) Inducement

48. As I have already said, it seems to have been a very material fact in both the *Taylors Fashions* and the *Texas Bank* cases that the assumed validity of the option/guarantee, as communicated by the landlord/guarantor, at least partially induced the counterparty to act. Where in the case of one of the tenants in *Taylors Fashions* there was no inducement as a result of anything the landlord had done, no estoppel binding the landlord was found. Inducement can be seen to be a relevant and common issue in all types of estoppel that I have considered, though it is not a primary requirement of estoppel by convention.

49. In the case of estoppel by representation, the representation must be one that is meant to induce the representee to rely on it and which in fact does induce the representee to act to his detriment. In the case of promissory estoppel, the promisee must have been induced by the promise to change his position in some way, either by forbearing to take steps or by acting differently, whether or not that caused him detriment.[28]

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[26] See, e.g., *BP Exploration Co (Libya) v Hunt (No.2)* [1979] 1 WLR 783, 812.
[27] As opposed to acquiescence-based.
[28] *James v Heim Galleries* (1980) 256 E.G. 819.

50. Proprietary estoppel too has a clear requirement of detrimental reliance on the acquiescence, representation or promise of the owner, in other words that the conduct of the owner of the land induced the other person to act to his detriment.

51. So far as estoppel by convention is concerned, it is not the case that the mistake made by the party seeking to rely on the estoppel *has to be* created or contributed to by the party estopped. There is no requirement of an unambiguous representation or promise, and it can be enough that the party seeking to rely on the estoppel makes a mistake, that the mistaken understanding in some way "crosses the line", and that the other party then acquiesces in it, entirely innocently. Whether or not, in those circumstances, it would be *unconscionable* for the party estopped to depart from the convention is a question at large, and is likely to be highly fact sensitive.

52. In *Texas Bank*, the fact that the communications from the guarantor played a part in the conventional understanding of the bank was considered by the trial judge to be highly material. Similarly, in *Taylors Fashions*, the fact that Taylors were not in fact influenced by any communication of the landlord proved to be significant in the judge's conclusion that no estoppel bound the landlord vis-à-vis Taylors. It seems to me that, in reality and despite the fact that there is no requirement of inducement as such, in the cases where estoppel by convention succeeds there is always some causative link between the factors establishing the convention and the change of position. So there would have to be some connection proved between the acquiescence of party estopped and the party who made and acted on the basis of the mistake, otherwise it would not be unconscionable to deny the convention.

Unconscionability

53. So finally I come to unconscionability. This was said by Lord Goff in *Johnson v Gore Wood & Co*[29] to provide the link between different categories of estoppel, but on the whole the higher courts of England and Wales have more recently asserted the differences, rather than the uniformity, of various kinds of estoppel. In relation to estoppel by convention and estoppel by acquiescence, Lord Steyn has said that "to restate the law in terms of an overriding principle tends to blur the necessarily separate requirements, and distinct terrain of application, of the two kinds of estoppel".[30] And Lord Goff himself said that they cannot be accommodated within a single formula.

[29] [2002] 2 A.C. 1
[30] *Republic of India v India Steamship Co (No.2)* [1998] AC 878, 914.

54. It is easy to describe a general approach to estoppel in terms such as: relief is granted by the court to prevent someone, who has induced another to act on one basis, from acting unconscionably in asserting inconsistent rights. However, that is more in the nature of general description of a class of cases, and no court grants a remedy simply on the basis that it considers that a person is acting unconscionably. Indeed, in *Cobbe v Yeoman's Row*, Lord Scott of Foscote made it clear that he considered that the company was acting in an unconscionable manner in resiling from its commitment to share the profits of the development with Mr Cobbe, but that nevertheless the claim fell a long way short of establishing any entitlement to relief under a constructive trust or by way of proprietary estoppel. Lord Walker of Gestingthorpe on the other hand considered that the company was acting unattractively but not unconscionably. If the test had depended on that criterion, the two Law Lords would not have agreed in the result in that case, which in fact they did.

55. So why do we continue to refer to unconscionable or inequitable conduct as a litmus test when considering whether or not an estoppel arises. In one sense, it is a useful cross-check, as Lord Walker said in *Cobbe v Yeoman's Row*: "if the other elements [for an equitable estoppel] appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again". A sort of judicial spell check, perhaps. At the same time, one academic has likened the criterion of unconscionability to having a fifth wheel on a coach.

56. The answer, I suggest, is that in relation to some types of estoppel, as they have been formulated over the years by the courts, inequitable or unconscionable conduct is a substantive element of the estoppel, whereas in others on a true analysis it is not. The estoppels that fall into the first category are promissory estoppel and estoppel by convention. With promissory estoppel, the court must be satisfied that in all the circumstances it would be inequitable for the promisor to go back on his promise. With estoppel by convention, the court must be satisfied that it would be unjust or unconscionable in the circumstances to allow the parties to go back on the convention. In neither of those types of estoppel is there a required element that the promisee was induced by the promise or convention to act to his detriment.

57. In the cases of estoppel by representation and proprietary estoppel, on the other hand, there is a required element that has to be proved that the representee was induced to act to his detriment by the representation, acquiescence or promise of the representor and to his knowledge. Where that element is present, the criterion of unconscionability is indeed a fifth wheel on a coach. If the other elements of the estoppel are present (e.g. a promise to grant a particular interest in land made to induce the promisee to work for the promisor, on which the promisee relies to his substantial detriment in working for years for little pay) then there will be an estoppel. For the promisor to deny a proprietary entitlement in those circumstances would indeed be unconscionable. The exact extent of the interest needed to satisfy the equity is a question for the discretion of the court, but that

discretion has nothing to do with unconscionability. There is no need, in these cases, for any separate assessment of whether or not the conduct of the defendant is unconscionable. That question has already been answered.[31]

58. It was only where one of the established ingredients of estoppel by acquiescence was absent in the *Taylors Fashions* case – namely the requirement that the owner should be aware of the mistake made by the other party and of his inconsistent right – that Oliver J. was forced back on a broader principle based on unconscionable conduct. Without the landlord knowing that the option was void and that accordingly the tenant was mistaken in its assumed rights, the conduct of the landlord was not necessarily unconscionable; but if the landlord had known of those matters its conduct clearly would have been unconscionable. Similarly, in *Texas Bank*, where knowledge of mistake was similarly absent, the court was forced to revert to a more general proposition, as Oliver J had been, and thereby established a new kind of estoppel that did not depend on detrimental reliance on a representation or promise or on knowledge of a mistake, but only on a shared, communicated assumption and that *in all the circumstances* it could be said to be unfair or unconscionable to deny the shared assumption.

59. For that reason, in my view, unless one is to retreat to a kind of palm tree justice, where everything depends on the judge's view of what is in all the circumstances unconscionable, it is essential to be clear about whether the estoppel relied upon is a proprietary estoppel, an estoppel by representation, a promissory estoppel or an estoppel by convention. The dividing line between estoppel by representation and estoppel by convention can be somewhat unclear, on the facts of many cases, and in other cases there may be a promissory estoppel and an estoppel by convention in play. But nevertheless, in analysing whether an equity is established, it is necessary to consider each of the types of estoppel separately, in order to avoid confusing the ingredients of each.[32]

60. Whether or not the defendant is acting inequitably or unconscionably is not in itself a question that the court needs to answer where the claim is based on one of the more sophisticated types of estoppel, namely proprietary estoppel or estoppel by representation. But where the less developed equities of promissory estoppel and estoppel by convention are concerned, the right approach is to consider first whether the necessary primary elements of an estoppel are present, and then and subsequently to ask oneself whether in the circumstances thereby disclosed it is (in the case of promissory estoppel) inequitable to allow the promisor to enforce his legal rights or (in the case of estoppel by convention) unconscionable to seek to resile from the convention.

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[31] See per Sundaresh Menon JC in *Hong Leong Singapore Finance v United Overseas Bank* [2006] SGHC 205 at [191,192]; but, apparently contrary to this, per Lai Siu Chiu J in *Neo Hui Ling v Ang Ah Siu* [2012] SGHC 65 at [79, 80].

[32] An approach endorsed by Chan Seng Onn J in *Chng Bee Kheng v Chng Eng Chye* [2013] SGHC 48 at [95, 96].

61. The answer is not and should not be, simply, whether there is an underlying incorrect assumption from which, in all the circumstances, it would be unjust to allow a party to resile.

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