Equitable Estoppel as a Cause of Action: Neither One Thing Nor One Other

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Introduction

A. Overview

Australia and England are seemingly divided in their approaches to a common problem: when can equitable estoppel operate as a cause of action? At first glance, it might seem that each has taken a different fork in the road: the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher*[1] boldly recognised that equitable estoppel can operate to give B a right where B has relied to his or her detriment on a belief, for which A is responsible, that B had or would acquire a right against A; in England, meanwhile, the traditional restriction has been maintained and the doctrine can operate as an independent cause of action only where B's belief relates to identified property, usually land, of A.[2]

On further examination, however, the contrast is not quite so clear. In Australia, and New South Wales in particular,[3] it has been argued that *Waltons Stores* can be seen as simply an application of conventional principles, and so does not provide authority for the extension of equitable estoppel beyond its original boundaries.[4] As a result, it has recently been noted that: 'It is not yet finally resolved in Australia whether promissory estoppel can operate as a cause of action'.[5] In England, there is first instance authority inconsistent with the idea that, when proprietary estoppel is based on a promise, that promise must be one that B has or will

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[1] [1988] HCA 7, (1988) 164 CLR 387.

[2] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [61].

[3] The views of Handley AJA on both the proper scope of promissory estoppel and the correct interpretation of *Waltons Stores* have clearly been influential: for extra-judicial statements of those views, see eg K Handley, 'The Three High Court Decisions on Estoppel 1988–1990' (2006) 80 ALJ 724, 726 and K Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell 2006). For a persuasive criticism of Handley's analysis, see A Robertson, 'Three Models of Promissory Estoppel' (2013) 7 Journal of Equity 226.

[4] See eg the analyses of *Waltons Stores* proposed in *DHJPM v Blackthorn Resources* [2011] NSWCA 348, (2011) 285 ALR 311 [48] (Meagher JA and Macfarlan JA), [122] (Handley AJA). Note too *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER 737 [98], where Mance LJ suggested that, were the facts of *Waltons Stores* to arise in England, the same result might be reached (on the basis of the reasoning of Deane and Gaudron JJ that A could be precluded from denying that exchange had occurred). See too *Saleh v Romanous* [2010] NSWCA 274, (2010) 79 NSWLR 453 [74] (Handley AJA, with whom Giles JA and Sackville AJA agreed); and *van Dyke v Sidhu* [2013] NSWCA 198 [39] (Barrett JA).

[5] *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)* [2015] FCA 825 [769] (Edelman J), referring in particular to the discussion of the point by Bathurst CJ in *Ashton v Pratt* [2015] NSWCA 12 [115]–[140], a case in which resolution of the point was not required, as B could not satisfy the detriment requirement of an equitable estoppel.

acquire a right in identified land,[6] and academic contributions continue to cast doubt on the validity of that supposed limit.[7]

The approach adopted here is a simple one. As shown by relatively recent decisions of the highest courts in each of Australia[8] and England,[9] it is clear that, in the guise of a particular form of proprietary estoppel, equitable estoppel may operate as a cause of action. It is argued here that, in such cases, the principle recognised in such cases imposes a liability on A to ensure that B suffers no detriment as a result of B's reasonable reliance on a promise, made by A to B, that B reasonably understood as seriously intended by A. The question is as to the proper limits of that principle: in particular, is it capable of applying only where A's promise relates to 'identified property (usually land) owned (or, perhaps, about to be owned) by [A]'?[10] The answer given here, in short, is No: there is no inherent aspect of the principle that prevents its wider operation; nor is there any convincing extrinsic concern which can justify placing an artificial limit on the principle.

This conclusion depends on an analysis of the principle which sees it as distinct both from other principles making up the law of estoppels, and from the law of contract: in that sense, it is neither one thing nor one other. Its application to promises of future conduct distinguishes it from preclusive doctrines such as estoppel by representation, and its application to promises to confer a new right takes it beyond the doctrines making up promissory estoppel. The principle does not, however, allow detrimental reliance to substitute for consideration as a route to contractual enforcement: it may apply where other standard contractual requirements (and not only consideration) are absent and, in any case, it does not operate to impose an immediate duty on A to perform A's promise. Rather, once the relevant facts have occurred, the principle operates to impose a liability on A: a court may be able to make an order against A dealing with the specific form of unconscionable conduct that consists of A's leaving B to suffer a detriment as a result of B's reasonable reliance on a promise of A which B reasonably understood as seriously intended by A. It will be argued here that, far from undermining contract law, the recognition of such a principle may play an important role in justifying the classical requirements of contract formation. Indeed, the principle may exemplify a more general point, also of interest when considering the law of restitution: the

[6] See eg *Motivate Publishing v Hello Ltd* [2015] EWHC 1554 (Ch) [55]–[61] (Birss J) (application to intellectual property); *Strover v Strover* [2005] EWHC 860 (Ch), [2005] WTLR 1245 (application to distribution of insurance pay-out); *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan CC* (1981) 41 P & CR 149 (QBD) (application to promise to buy land from B). See too *Sutcliffe v Lloyd* [2007] EWCA Civ 153, [2007] 2 EGLR 13 where A's promise related to the sharing of profits from the development of land, but was not a promise that B would necessarily acquire any rights in the land itself.

[7] See eg B McFarlane and P Sales, 'Promises, Detriment, and Liability: Lessons from Proprietary Estoppel' (2015) 131 LQR 610; N McBride, 'A Fifth Common Law Obligation' (1994) 14 Legal Studies 35; D Nolan, 'Following in their Footsteps: Equitable Estoppel in Australia and the United States' (2000) 11 KCLJ 202; J Moncrieff and J Neyers, '(Mis)Understanding Estoppel' [2003] LMCLQ 429. For an important earlier contribution, cited in *Waltons Stores*, see D Jackson, 'Estoppel as a Sword' (1965) 81 LQR 223.

[8] *Sidhu v van Dyke* [2014] HCA 19, (2014) 251 CLR 505. At the time of writing, judgment of the High Court of Australia is awaited in *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (on appeal from [2014] VSCA 353). As that case raises issues as to the operation of equitable estoppel as a cause of action, the analysis here is of relevance to it: see further n 144.

[9] *Thorner* (n 2).

[10] ibid [61] (Lord Walker).

existence of such liabilities may be crucial in helping to justify the content of rules which operate to impose private law duties.

B. The Commercial Context

It can be suggested that any concerns as to the operation of equitable estoppel as a cause of action are magnified in the commercial context. For example, where A and B have engaged in negotiations with a view to a contract, and no contract has resulted, equitable estoppel claims have frequently been denied;[11] the concern has been expressed that the recognition of liability would be 'likely to inhibit the efficient pursuit of commercial negotiations'.[12] In the commercial context, the fear of intruding on the domain of contract law is not merely the abstract one of undermining the general requirements of a valid contract, it is also the practical one of allowing recovery by a party who acted on a promise which he or she knew not to be contractually binding.

The argument to be made here is that the specific limits inherent in the principle applied in cases such as *Sidhu* and *Thorner* do not include any bar on the principle's operation in the commercial context. Of course, in determining if the requirements of the principle have been made out, a court will have regard to the particular factual context of the parties' dealings,[13] but this does not require any rigid division between commercial and other cases.[14] First, there is no shortage of commercial cases in which B has successfully invoked equitable estoppel as a cause of action.[15] In *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd*,[16] for example, the Victorian Court of Appeal rejected the argument that equitable estoppel should not arise where a 'promise was made in the course of commercial dealings between well-advised

[11] See eg *DHJPM* (n 4) [56], where Meagher JA referred to the importance of the 'nature of the relationship between the parties and whether they contemplate that any interest to be granted or promise to be performed is to be created by a binding contract' and illustrated this by the failure of B's claim, in a commercial context, in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, in contrast with the success of B's claim, in a non-commercial context, in *Thorner*. For a similar analysis of the difference between those two cases, see *Thorner* (n 2) [96]–[97] (Lord Neuberger).

[12] *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWCA Civ 1619, [2012] 2 All ER 754 [133]. See too *Cobbe* (n 11) [68] (Lord Walker), drawing a distinction between the domestic context in which a claimant expects to acquire an interest in land and commercial cases in which 'the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a *contract*'. See too the extra-judicial suggestion of Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' (2009) 68 CLJ 537, 542: 'before he can establish a proprietary estoppel claim, a claimant must show that he acted in the belief that he has something which can be characterised as a legal right – at least in a commercial arm's length context'.

[13] See eg *Cobbe* (n 11) and *DHJPM* (n 4); *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 (CA). A common obstacle for B is that B's reliance occurred before negotiations reached a stage where any promise of A could be regarded as sufficiently certain so as to be reasonably understood by B as seriously intended as capable of being relied on: see B McFarlane, 'Proprietary Estoppel and Failed Contractual Negotiations' [2005] Conv 501.

[14] See N Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31 Legal Studies 175.

[15] For English authorities allowing proprietary estoppel claims in a commercial context, see eg *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782, [2015] HLR 43; *Herbert v Doyle* [2010] EWCA Civ 1095, [2011] 1 EGLR 119; *Sutcliffe* (n 6). For further Australian authorities allowing equitable estoppel to operate as a cause of action in a commercial context, see eg *Waltons Stores* (n 1); *EK Nominees Pty Ltd v Woolworths Ltd* [2006] NSWSC 1172; *ACN 074971109 Pty Ltd (as Trustee for the Argot Unit Trust) v The National Mutual Life Association of Australasia Ltd* [2008] VSCA 247, (2008) 21 VR 351; *Yarrabee Chicken Company Pty Ltd v Steggles Ltd* [2010] FCA 394.

[16] [2004] VSCA 16, (2004) 8 VR 38

corporations, each concerned to advance its own interests';[17] rather, 'unconscionability' was regarded as an underlying principle, and the 'injustice' that would arise were A allowed to renege on a promise, thereby leaving B to suffer a detriment as a result of its reasonable reliance on that promise, was not nullified by the commercial nature of the parties' dealings.

Second, it would be a mistake to think that there is anything in the nature of commercial dealings which means that it could never 'shock the conscience'[18] of the court for A to leave B to suffer a detriment arising from B's reliance on A's non-contractual promise. After all, the requirements developed by common law for the formation of a valid contract apply both to commercial and non-commercial dealings. If commercial cases were to be treated differently, it would be necessary for judges to develop principled means of identifying such cases. It is simple, however, to think of facts on which it is difficult to come to a firm view as to whether or not the parties' dealings are commercial:[19] '[t]he concept of a commercial case is... undefined and obscure, in the absence of any applicable statutory definition'.[20]

Third, a concern as to the chilling effect of possible liability for pre-contractual conduct accepts one of the premises of economic analyses of legal rules: the content of such rules may affect the parties' behaviour. Such an analysis can, however, be used to support the ability of equitable estoppel to provide at least some protection to a party who has reasonably relied on a promise made in pre-contractual negotiations. The ability of A to make a promise which has some legal effect may in fact be of value to A, as it provides a means to encourage B to make investments which may benefit each of the parties.[21] In some cases, such pre-contractual work may be required if the parties are to clarify the nature of the project to be carried out by the final contract.[22] It might be thought that A and B could simply enter a collateral contract, under which, for example, A agrees to indemnify B for certain pre-contractual work should no contract eventuate. It may, however, be unrealistic or inappropriate to expect the parties to make such a collateral contract. First, to the extent that such contracts are not standard, B may feel that insisting on such protection would send unwelcome signals to A as to B's suitability as a potential contracting partner.[23] Second, and linked to this, it may be that such

[17] ibid [40].
[18] The phrase used by Lord Walker in *Cobbe* (n 11) [92] to describe the cases in which a proprietary estoppel claim arises.
[19] See eg *Clark v Clark* [2006] EWHC 275 (Ch), [2006] 1 FCR 421: A and B were brothers who were also sole and equal shareholders in a company and carried on business from the land on which they also lived. The dispute in *Ashton* (n 5), according to Bathurst CJ at [139], 'could be said to involve a commercial arrangement [but] it seems closer to a domestic arrangement'. Indeed, even in *Thorner* (n 2), the farm was a business and B, whilst related to A, did not live with A.
[20] *Cavendish Square Holding BV v Talal El Makdessi; Parking Eye Ltd v Beavis* [2015] UKSC 67, [2015] 3 WLR 1373 [168] (Lord Mance) rejecting counsel's submission that the penalties doctrine should not apply in 'commercial cases'.
[21] In *Sutcliffe* (n 6) [5], reference was made to the view of the first instance judge that the pre-contractual work on the planned development carried out by B was 'amazing'. In *Leading Edge Events Australia Pty Ltd v Kiri Te Kanawa* [2007] NSWSC 228, Bergin J similarly noted the potential benefits of B's pre-contractual work in preparing for a concert from which A was to profit. For a more detailed economic analysis, see R Craswell, 'Offer, Acceptance and Efficient Reliance' (1996) 48 Stanford L Rev 481.
[22] See eg A Schwartz and R Scott, 'Precontractual Liability and Preliminary Agreements' (2007) 120 Harv L Rev 661.
[23] See eg O Ben-Shahar and J Pottow, 'On the Stickiness of Default Rules' (2006) 33 Florida State U L Rev 651, 682, arguing that: 'unfamiliar terms may... raise suspicions and scare away potential counterparties'.

insistence would be inconsistent with the sense of trust which A and B attempt to establish when moving towards a complete contract.[24] It is therefore unduly optimistic to suggest that a commercial party faces 'no emotional or social impediment to insisting on some form of legally binding protection'[25] before undertaking pre-contractual work.

II: Neither One Thing: The Principle Distinguished from Other Estoppels

It is clear from the decisions in *Sidhu* and *Thorner* that equitable estoppel may operate as a cause of action. The inquiry here is as to the proper limit of the principle justifying those decisions. It should not be assumed that the principle necessarily underpins *all* cases that may fall under the heading of estoppel, or even of equitable estoppel. As Lord Denning MR once put it, there are: 'estoppels and estoppels'.[26] This point must be emphasised as the continued use of the word 'estoppel' to describe the principle has caused confusion, even at the highest judicial level.

A. Preclusive Estoppels

Evidence of such confusion can be seen in the analysis of Lord Scott in *Cobbe*. On his Lordship's view,[27] the term 'proprietary estoppel' is to be interpreted literally, and the doctrine is assumed to have the same, limited effect as an estoppel by representation: it determines the factual background[28] against which the parties' rights are to be decided, but does not provide a substantive principle which in itself determines those rights.[29] Such a doctrine cannot avail B where he or she has relied on a promise as to A's future action: B needs no assistance in proving the promise, and, in the absence of any substantive doctrine capable of providing protection where B has relied on a non-contractual promise, A can happily admit the promise, and B's reliance, and still deny B any redress. The preclusive nature of an estoppel by representation means that, simply as 'a matter of logic',[30] it cannot apply to a promise of future action, and this was recognised by courts of equity[31] just as at common law. As an interpretation of preclusive estoppel, Lord Scott's analysis is, therefore,

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[24] See R Scott, 'A Theory of Self-Enforcing Indefinite Agreements' (2003) 103 Col L Rev 1641.
[25] This suggestion was made extra-judicially by Lord Neuberger (n 12) 546.
[26] *Crabb v Arun District Council* [1976] Ch 179 (CA) 187.
[27] *Cobbe* (n 11) [14].
[28] As Lord Scott's analysis makes clear, the background so determined can include a mixed matter of fact and law, such as the identity of an owner of goods, or the location of a boundary: see eg *Pickard v Sears* (1837) 6 A&E 469, 112 ER 179; *Hopgood v Brown* [1955] 1 WLR 213 (CA).
[29] See eg E Peel, *Treitel's Law of Contract* (13th edn, Sweet & Maxwell 2011) para 3.090, drawing the distinction between doctrines which prevent a party from establishing facts, and doctrines which determine the legal effects of a promise.
[30] *Waltons Stores* (n 1) 459 (Gaudron J), pointing out that the limit of estoppel by representation to existing matters is: 'not merely a matter of authority, but also a matter of logic – at least in so far as the representation gives rise to an assumption as to a future event. Because common law or evidential estoppel operates by precluding the assertion of facts inconsistent with an assumed fact, the assumption must necessarily be as to an existing fact and not as to a future event'. This provides a reason for the classic distinction, criticised by eg M Bryan and E Bant, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35 OJLS 1, between representations as to an existing state of affairs and as to the future.
[31] See eg *Jorden v Money* (1854) 5 HL Cas 185, which was an appeal to the House of Lords from a court of Chancery. See further JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th edn, Butterworths LexisNexis 2014) para 17.210.

faultless;[32] yet that is precisely why it cannot account for the principle applied in cases such as *Sidhu* and *Thorner*, which is neither purely preclusive (as it is a substantive principle which in itself determines the parties' rights) nor incapable of applying to promises of future conduct.

Certainly, the mere addition of the adjective 'proprietary' cannot convert a preclusive doctrine such as estoppel by representation into a cause of action. This is the problem with the view of proprietary estoppel adopted by Lord Denning MR in *Crabb v Arun District Council*.[33] His Lordship there referred to his own judgment in *Moorgate Mercantile Co Ltd v Twitchings*[34] – a decision of the Court of Appeal which was shortly to be reversed by the House of Lords[35] – to support the point that the effect of estoppel on a true owner of property may be that: 'his own title to property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein'.[36] This analysis is of some importance as, in *Thorner*, Lord Walker invoked it when stating that: '[i]t is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely as a shield'.[37]

The Court of Appeal's decision in *Moorgate Mercantile* was, however, concerned with the application of the preclusive doctrine of estoppel by representation to A's representation as to the present ownership of a car. As such a representation is as to a matter of fact, or mixed fact and law, it can lead to A's being precluded from denying its truth. That preclusion can then assist B in establishing a claim against A. For example, in *Knights v Wiffen*,[38] B, a sub-purchaser from X of unascertained barley which A had contracted to sell to X, had relied on A's representation that A held specific barley in its granary for X and would now hold that barley for B. In fact, no barley had been appropriated by A to the contract with X. On X's insolvency, A refused to allow B to take any barley from the granary. B's claim in conversion against A was successful: A was precluded from asserting the fact (the lack of appropriation of any barley to A's contract with X) that prevented title passing to B. This example, however, merely demonstrates that the preclusive logic of estoppel may, in certain cases, prevent A from denying the truth of a matter that is crucial to B's making a successful claim. This is not a unique attribute of proprietary estoppel: any preclusive estoppel may, in suitable circumstances, have such an effect. In *Waltons Stores*, for example, on the view of the facts adopted at first instance and accepted by Deane and Gaudron JJ,[39] A was simply prevented from denying that a contract had already been concluded, by means of exchange, between A

[32] Although Lord Scott also described proprietary estoppel as a sub-set of promissory estoppel, and thus failed to distinguish between estoppel by representation and the quite different principles of promissory estoppel that will be discussed in section IIB.
[33] *Crabb* (n 26).
[34] [1976] QB 225 (CA). The Court of Appeal judgment in *Moorgate Mercantile* was handed down on 18 June 1975, and that in *Crabb* on 23 July 1975. The House of Lords' decision to reverse the Court of Appeal in *Moorgate Mercantile* was promulgated on 16 June 1976.
[35] [1977] AC 890 (HL).
[36] (n 34) 242, cited in *Crabb* (n 26) 187.
[37] *Thorner* (n 2) [61].
[38] (1869-70) LR 5 QB 660 (QBD).
[39] See *Waltons Stores* (n 1) 436–441, 461–463. See too *Baird Textile* (n 4) [98] (Mance LJ).

and B, and B was therefore able to establish a contractual claim.[40] Equally importantly, the preclusive doctrine of estoppel by representation does not transform into a cause of action merely as a result of its application in a proprietary context. In *Knights v Wiffen*, for example, B's success in a conversion claim against A did not mean that B had in fact acquired title to any barley: it is in the 'very nature of things'[41] that a property right cannot exist in relation to unascertained goods, and no barley had in fact been appropriated to B's contract. In such a case, B has only a 'metaphorical title':[42] if a third party had carelessly damaged the barley in A's granary, then B would have had no claim in tort, as the operation of an estoppel against A would give B no assistance as against the third party.[43]

The principle applied in cases such as *Sidhu* and *Thorner* cannot, therefore, be explained as simply the application of a preclusive estoppel in a proprietary context: it must have some other basis. In *Cobbe*, Lord Walker suggested that B's reliance on a promise of future conduct by A can give rise to a proprietary estoppel claim only where B 'believed that the assurance on which he or she relied was binding and irrevocable'.[44] The decisions in *Thorner* and in *Sidhu*, however, are inconsistent with such a limit. In the former case, it was not suggested that, when choosing to work for A, B had believed that A was already under a binding duty to leave his farm to B. It would, on the facts, have been very difficult for B to show that he had reasonably held such a belief: given the 'oblique and allusive'[45] way in which A had communicated to B, it was not possible to identify a specific act of A that B could reasonably regard as giving rise to an immediately binding duty on A. Nonetheless, B's claim succeeded. Similarly, in *Sidhu*, B's claim was that she had relied on A's promises that 'he would transfer (or procure the transfer of) the Oaks property to her', not that she had relied on a belief that A was already bound to do so.[46] For example, when, some years after the first promises, B sought further reassurance from A as to the security of her position, she pressed A for confirmation not of any pre-existing duty, but rather of his 'continued promise that the house would be [her] own'.[47] If the principle applied in such cases were based on a form of preclusion, and if it were used to impose a duty on A, it would be logical to require

[40] See J Campbell, 'Waltons v Maher: History, Unconscientiousness and Remedy – The "Minimum *Equity"'* (2013) 7 Journal of Equity 171, noting that the remedy ordered at first instance was made under s 68 of the Supreme Court Act 1970 (NSW), in lieu of specific performance.
[41] See C Blackburn, *A Treatise on the Effect of the Contract of Sale* (William Benning & Co 1845) 122 (Blackburn J was one of the judges in *Knights v Wiffen*). See Sale of Goods Act 1979 (UK), s 16; Sale of Goods Act 1923 (NSW), s 21. See too Lord Mustill in *re Goldcorp's Exchange Ltd* [1995] 1 AC 74 (PC) 90: 'common sense dictates that the buyer cannot acquire title until it is known to what goods the title relates'.
[42] The term used by Devlin J in *Eastern Distributors v Goldring* [1957] 2 QB 600 (CA) 607, 611 (Devlin J), distinguishing the operation of estoppel from cases where B in fact acquires title as a result of an agent's apparent authority.
[43] See Lord Mustill in *re Goldcorp's Exchange* (n 41) 94: 'The most that the *Knights v Wiffen* line of authority can give to the purchaser is the pretence of a title where no title exists'.
[44] *Cobbe* (n 11) [66]. See too *DHJPM* (n 4) [68] (Meagher JA). For full discussion of this suggested limit, and its rejection in *Thorner*, see J Mee, 'The Limits of Proprietary Estoppel: *Thorner v Major*' (2009) 21 CFLQ 367.
[45] *Thorner* (n 2) [3] (Lord Hoffmann).
[46] See too *Delaforce v Simpson-Cook* [2010] NSWCA 8, (2010) 78 NSWLR 483: A's promise was made as part of the notation at the end of a consent order. B was therefore aware that the notation was not part of the legally binding order. Nonetheless, a proprietary estoppel claim based on that promise was successful.
[47] *Sidhu* (n 8) [15], referring to the first instance judgment: [2012] NSWSC 118 [66].

that B relied on a belief that A was already under such a duty; yet, as shown by *Sidhu* and *Thorner*, the principle is not subject to such a limit.[48]

It is worth noting that the same analysis applies in commercial cases: equitable estoppel claims have been permitted where B reasonably relied on A's promise of future conduct, rather than on a belief that A was already under a duty to B.[49] Indeed, in *Sutcliffe v Lloyd*,[50] in an unsuccessful appeal against a judgment in favour of B, a builder and property developer, A, an entrepreneur, expressly argued that B's proprietary estoppel claim should have failed as A had never suggested that his promise to B was legally binding. Wilson LJ, as he then was, rejected this contention as 'misconceived in law', making the crucial point that, as the doctrine does not in any case operate so as to make A's promise immediately binding, there was no need for A to 'mis-state the law in this regard'.[51]

B. Promissory Estoppels

Some recent authority, particularly in New South Wales, has challenged the view that *Waltons Stores* permits equitable estoppel to operate as a cause of action beyond the proprietary context. In *Saleh v Romanous*, for example, Handley AJA stated that: 'A promissory estoppel is not enforced as a contract, but as an equitable restraint on the exercise of enforcement of the promisor's rights'.[52] On this analysis, a 'promissory estoppel must be negative in substance'[53] and so cannot operate as an independent source of rights. As has been judicially noted,[54] this constitutes a direct challenge to the influential reasoning of Brennan J in *Waltons Stores* and, in particular, the assertion that there is no relevant distinction between a 'change in legal relationships effected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one'.[55]

It will be argued here that, as an interpretation of the principles applied in important promissory estoppel decisions such as *Hughes v Metropolitan Railway Company*[56] and *Central London Property Trust Ltd v High Trees House Ltd*,[57] the analysis of Handley AJA is correct.[58] Conversely, the contention of Brennan J does not provide a convincing reason for extending the traditional categories of promissory estoppel, as the content of rules regulating the loss or assertion of pre-existing rights often differ, with good reason, from the content of

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[48] Of course, if B in fact argues that he or she relied on a belief that a contract existed between A and B, then it will be necessary to ask if B could reasonably have believed that such an arrangement existed: see *Ashton* (n 5) [132], [237].
[49] See eg *Anaconda* (n 16); *EK Nominees* (n 15).
[50] (n 6).
[51] ibid [38].
[52] *Saleh v Romanous* [2010] NSWCA 274, (2010) 79 NSWLR 453 [62] (Handley AJA with whom Giles JA and Sackville AJA agreed).
[53] *DHJPM* (n 4) [47], [93] (Meagher JA and Macfarlan JA), [94] (Handley AJA).
[54] *Ashton* (n 5) [108]–[115] (Bathurst CJ).
[55] *Waltons Stores* (n 1) 425.
[56] (1877) 2 App Cas 439.
[57] [1947] KB 130.
[58] The analysis in section III will also support Handley AJA's view that those principles (along with the principle underlying *Sidhu* and *Thorner*) are distinct from contract law, and so are not caught by the rule in *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR (HCA) 133 (this was the context, in *Saleh* (n 52), of Handley AJA's observations on promissory estoppel).

rules regulating the acquisition of new rights. Perhaps the clearest examples are the rules of waiver, and of election, which can operate to extinguish a claim-right or power of A as a result of conduct of A (eg acceptance of substitute performance by B;[59] continued contractual performance by A)[60] that could never, by itself, operate to give B a cause of action against A. Moreover, dealings between A and B may provide good grounds for equity to restrain A's enforcement of a right acquired as a result of those dealings, even if such dealings, by themselves, do not impose a duty on A to B. *Hughes* provides an example:[61] where A claims that particular conduct[62] by B has given A a right, A may be prevented from enforcing that right if B's conduct was undertaken in reliance on a belief, encouraged by A, that A would not in fact acquire or enforce that right, or would do so only on terms.[63] Klimchuk has observed that the principle is 'equitable in Aristotle's sense' [of correcting for the imprecision of the law] as it 'expressly prevents persons from being sticklers in a bad way'.[64] The principle prevents A from taking advantage of the very legal rules which, triggered by B's conduct, operate to give A a right[65] and such a concern can never operate as a means to give B a claim-right against A.[66]

The principle in *High Trees*, despite Denning J's best attempts to argue to the contrary, is distinct from that in *Hughes*.[67] The hypothetical claim of A considered in *High Trees* was simply to enforce a pre-existing debt, not to assert a new right acquired as a result of conduct of B undertaken in reliance on any encouragement of A. The principle at stake in such a case seems instead, like rules of waiver and of election, to confer finality on a particular decision by A:[68] in this case, a decision to accept substitute performance by B in discharge of a pre-existing duty owed by B to A. Whilst distinct from *Hughes*, and from preclusive estoppel,[69]

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[59] See eg Sale of Goods Act 1979, s 11(2); *Bottiglieri di Navigazione SpA v Cosco Qingdao Ocean Shipping Co (The Bunga Saga Lima)* [2005] EWHC 244 (Comm), [2005] 2 Lloyd's Rep 1.

[60] In the context of election, see eg Sale of Goods Act 1979, s 11(4) and s 35(4); *The Northern Pioneer* [2003] 1 WLR 1015 (CA) 1037 (Lord Philips MR): 'If the shipowner continues to provide the services of his ship, or the charterer continues to make use of those services beyond such time as would reasonably be needed to react... the inference will normally be that he has decided not to exercise the right...'.

[61] For further analysis of the *Hughes* principle, see B McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) 66 CLP 267, 282–286.

[62] Conduct here includes both action and/or inaction by B.

[63] See too eg *Inwards v Baker* [1965] 2 QB 29 (CA).

[64] D Klimchuk, 'Equity and the Rule of Law' in L Austin and D Klimchuk (eds) *Private Law and the Rule of Law* (OUP 2014) 263. Although note that very similar principles apply at common law too: see eg *Hickman v Haynes* (1875) LR 10 CP 598; *Minister of Health v Bellotti* [1944] 1 KB 298 (CA) 305–306.

[65] So eg in *Legione v Hateley* (1983) 152 CLR 406 (HCA), although of course it was found by a majority that the principle did not apply on the facts of the case, the principle was in play as if A could be said to have made a sufficiently clear promise that the time in which B had to pay would be extended, A could then have been prevented from exercising A's contractual power to terminate arising from B's failure to pay.

[66] It would be a mistake to think that any case in which the *Hughes* principle applies can also be seen as one in which the principle in *Sidhu* and *Thorner* applies: first, the former principle can apply where A has encouraged a belief of B whereas the analysis in *Thorner* requires A to have made a promise (although this point is controversial, see eg *Hoyl Group* (n 15)); second, the former principle does not seem to require proof of detriment by B, as it is rather focused on A's benefit: see eg *Hughes* (n 56) 449 (Lord O'Hagan) and the analysis of D Gordon, 'Creditor's Promises to Forego Rights' [1963] CLJ 222.

[67] For further analysis of the *High Trees* principle, see McFarlane (n 61) 281–282.

[68] In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 811 for example, Goff J described the effect of an election as based on the 'need for finality in commercial transactions'.

[69] Note that the principle in *High Trees* does not seem to require the prospect of B's suffering a detriment, as it depends instead on A's acceptance of B's substitute performance, which may in fact, as in *High Trees* itself,

the principle in *High Trees* is therefore also necessarily incapable of operating as an independent cause of action, as it regulates when a pre-existing right is extinguished.

Handley AJA therefore seems to be correct in concluding that the principles in each of *Hughes* and *High Trees* are necessarily negative in substance. This does not mean, however, that the overall conclusion of Handley AJA must be accepted, and that of Brennan J rejected. The crucial point is that correctly identifying the negative nature of the principles in each of *Hughes* and *High Trees* does not provide a convincing reason to limit the scope of other principles, such as that applied in *Sidhu* and *Thorner*.[70] As Finn noted,[71] a critical step, evident in a decision such as *Crabb*, was taken when proprietary estoppel was permitted to function not only as a means to prevent A's assertion of a right against B, but also as a means to require A to confer a right on B. As a distinct strand of equitable estoppel has thus developed, there is no necessary reason why the inherent limits on the *Hughes* and *High Trees* principles must also apply to that principle. The real challenge to the view adopted by Handley AJA lies not in Brennan J's argument that principles applying to cases involving the extinguishing of rights must also apply to cases involving their creation, but rather in the different argument, also made by Brennan J, that principles applied to promises to confer rights in property should also apply to promises to confer other forms of right.[72]

III: Nor One Other: The Principle Distinguished from Contract

The concern has been expressed that, were equitable estoppel to operate more widely as a cause of action, the law of contract in general, and the requirement of consideration in particular, would be undermined.[73] The first point to note, however, is that this concern has not prevented proprietary estoppel's operation as a cause of action, even in cases, such as *Sidhu* and *Thorner*, in which B's claim is based on a promise made by A, and leads to B's being put in the same position, as far as possible, as B would have been in had the promise

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confer a benefit on B. It is therefore unfortunate that, owing to the confusion with preclusive estoppel, courts have often strained to find a detriment to B in cases covered by the *High Trees* principle: see eg *Je Maintiendrai v Quaglia* (1980) 26 SASR 101, 115–116; *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643.

[70] To that extent, the position taken here accords with the submission of B in *Ashton* (n 5) [107] that: 'the principle stated in *Saleh* and *DHJPM* [does] not extend to equitable estoppel generally'.

[71] See P Finn, 'Equitable Estoppel' in P Finn (ed) *Essays in Equity* (Law Book Co 1985).

[72] *Waltons Stores* (n 1) 426: 'Moreover, unless the cases of proprietary estoppel are attributed to a different equity from that which explains the cases of promissory estoppel, the enforcement of promises to create new proprietary rights cannot be reconciled with a limitation on the enforcement of other promises. If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another'?

[73] See eg *Combe v Combe* [1951] 2 KB 215 (CA). Note too the argument of A in *Giumelli v Giumelli* (1999) 196 CLR 101 (HCA) 121 (rejected by the High Court of Australia) that the measure of relief in equitable estoppel must be limited 'lest the requirement for consideration to support a contractual promise be outflanked and direct enforcement be given to promises which did not give rise to legal rights'. Note too the fate of the now defunct equitable doctrine of 'making representations good': see eg F Dawson, 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329; Finn (n 71); and P Matthews, 'The Words Which Are Not There: A Partial History of the Constructive Trust' in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2009) 25–44.

been performed.[74] It is important to ask if, in such cases, B's detrimental reliance is being permitted to function, in the absence of consideration, as an alternative route to contractual enforcement. Atiyah, for example, argued that when a court permits the enforcement of an agreement on the grounds of proprietary estoppel, only 'outmoded ideas about the purpose and nature of the doctrine of consideration' prevent the court's acknowledging the true contractual basis of B's claim.[75] Similarly, in the United States, the heading given to section 90 in each of the Restatement (First)[76] and the Restatement (Second)[77] assumes that a promise complying with its requirements constitutes a contract.

It is clear, however, that the principle as developed in proprietary estoppel cases does not depend on seeing detrimental reliance as an alternative to consideration. This is because the principle may operate even when other contractual requirements are also absent.[78] First, and most obviously, there is no need to satisfy statutory formality requirements regulating the validity or enforceability of contracts for the sale or other dispositions of interests in land.[79] It is notable that in *Cobbe*, Lord Scott was concerned that it would be 'unacceptable' if proprietary estoppel were used 'to render enforceable an agreement that statute has declared to be void'.[80] This concern, however, was based on the view, discussed and rejected in section IIA, that the doctrine operates as a preclusive estoppel. In a proprietary estoppel case, B does not seek to prevent A's invoking a formality rule, or otherwise denying that a contract exists. Rather, B invokes an independent cause of action, which does not depend on the existence of a contract.[81] As Lord Neuberger has put it extra-judicially: 'the fact that, if there was a contract, it would be void is irrelevant: indeed, the very reason for mounting the proprietary estoppel claim is that there is no enforceable contract'.[82] Moreover, Lord Scott is mistaken in stating that the statute imposing the formality requirement operates to make an *agreement* void: it simply means that it cannot give rise to a contractual claim, and does not prevent other claims.[83]

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[74] In *Sidhu* (n 8), specific performance of the promise was impossible as the cottage initially promised to B had since been destroyed in a fire, but the High Court upheld the finding of the Court of Appeal of New South Wales that B was entitled to payment of a sum 'measured by reference to the value of [B's] disappointed expectation' (see [42]).

[75] P Atiyah, 'When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity' (1976) 92 LQR 174, 174.

[76] Headed 'Informal Contracts Without Assent or Consideration'.

[77] Headed 'Contracts without Consideration'.

[78] For a recognition of this point in the American context, see eg *Cyberchron Corp v Calldata Systems Development Inc* 47 F 3d 39, 46 (1995), where the court expressly rejected A's argument that promissory estoppel could operate only as a substitute for consideration.

[79] See eg *Crabb* (n 26), *Waltons Stores* (n 1), *Thorner* (n 2), *Sidhu* (n 8). In some cases (see eg *Yaxley v Gotts* [2000] Ch 162 (CA); *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] WTLR 345 reliance is placed on s 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989, which provides a specific exception for constructive trusts, but the better view is simply that s 2 is not even prima facie applicable, as a proprietary estoppel claim does not depend on the existence of a contract.

[80] *Cobbe* (n 11) [29], referring to the Law of Property (Miscellaneous Provisions) Act 1989, s 2.

[81] See eg *Waltons Stores* (n 1) 408 (Mason CJ and Wilson J), 416 (Brennan J). See too *Tipperary Developments Pty Ltd v State of Western Australia* [2009] WASCA 126, (2009) 38 WAR 488 [137]–[140] (McLure JA).

[82] Lord Neuberger (n 12) 546.

[83] This is clear from the wording of each of s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and s 54A of the Conveyancing Act 1919 (NSW). Indeed, in *Cobbe* (n 11) itself, Lord Scott permitted B's personal claim for the value of B's work rendered pursuant to the parties' oral discussions.

Second, a proprietary estoppel claim may succeed even in the absence of intention to create legal relations, and even in the absence of an agreement that is sufficiently certain to be enforced as a contract.[84] This point was confirmed in the influential,[85] but unreported, judgment of Hoffmann LJ in *Walton v Walton*.[86] It was accepted that A's promise that B, her son, would inherit her farm was likely to have been subject to 'unspoken and ill-defined qualifications' and so it could not have been reasonable for B to believe that A had intended to enter into a contract which 'subject to the narrow doctrine of frustration, must be performed come what may'. Hoffmann LJ held that this uncertainty did not, however, prevent a claim based on proprietary estoppel[87] as, in contrast to contract law, the principle applied:

> does not look forward into the future and guess what might happen. It 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.

The analysis in *Walton* is crucial to the argument made here.[88] The principle applied in the proprietary estoppel cases, even if it requires a promise to be made by A to B, does not impose an immediately binding duty on A to honour that promise, but rather ensures that A is not free to 'shock the conscience of the court' [89] by leaving B to suffer a detriment as a result of B's reasonable reliance on that promise.[90] This means, first, that, in contrast to the contractual position, there is no guarantee that a successful claim will lead to B's receiving the value of A's promise: at the very least,[91] there will be cases, in which, given the limited

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[84] As noted by Bathurst CJ in *Ashton* (n 5) [114], McPherson J in *Riches v Hobgen* [1985] 2 Qd R 292, 300–301 (in a passage cited by the plurality in *Giumelli* (n 73) 121) 'appeared to accept that an equitable estoppel could be applied to give some effect to an agreement that for want of certainty or some other essential element falls short of constituting an enforceable contract'. In *Thorner* (n 2), Lord Neuberger suggested at [86] that an estoppel claim can arise even if A and B have each adopted reasonable, but different, interpretations of the content of A's promise, which is not the case for the latter claim (see eg *Raffles v Wichelhaus* (1864) 2 Hurl & C 906, 159 ER 375).

[85] It is relied on in *Thorner* (n 2) by each of [52]–[57] (Lord Walker) and [101] (Lord Neuberger).

[86] *Walton v Walton* (CA, 14 April 1994). See further B McFarlane, 'Proprietary Estoppel: The Importance of Looking Back' in J Pila and P Davies (eds) *The Jurisprudence of Lord Hoffmann* (Hart Publishing 2015).

[87] This is not to say that the certainty of a promise is irrelevant to a proprietary estoppel claim. On the contrary, as seems to have been the case in *Cobbe* (n 11), it may prevent B's showing that B reasonably understood A's promise as seriously intended by A.

[88] It is consistent with too with *Arfaras v Vosnakis* [2016] NSWCA 65, in which the conclusion that there was no objectively ascertainable intention of A and B to enter into a binding legal contract (and also that there was no consideration to support A's promise) ensured the failure of B's contractual claim, but did not prevent a successful equitable estoppel claim. See too the key point made by McPherson J in *Riches v Hogben* [1985] 2 Qd R 292, 300–301 (in a passage approved in *Giumelli* (n 73) 121): '[w]hat distinguishes the equitable principle from the enforcement of contractual obligations is, in the first place, that there is no legally binding promise'.

[89] The phrase used in *Cobbe* (n 11) [92] (Lord Walker) to describe the cases in which a proprietary estoppel claim arises.

[90] See *Waltons Stores* (n 1) 423 (Brennan J) and also *Commonwealth v Verwayen* (1990) 170 CLR 394 (HCA) 454 (Dawson J) (approved in *Giumelli* (n 73) 121), stating that 'the discretionary nature of the relief in equity marks a further reason why the fear of the common law that promissory estoppel would undermine the doctrine of consideration is unwarranted'. Hoffmann LJ's analysis helps to explain the precise sense in which the equitable relief is discretionary, without being wholly at large.

[91] It can further be argued that protecting B's expectation should not operate even as a prima facie outcome, and that in all cases the basic focus of the court should simply be to ensure that B suffers no detriment as a result of B's reasonable reliance (although in some cases, such as *Sidhu* (n 8) and *Thorner* (n 2)) the nature and extent of B's detriment may be such that B should be given the value of A's promise: see eg A Robertson, 'The Reliance

nature of B's potential detriment, A will be able to avoid unconscionable conduct[92] by paying a sum of money to B that will remove that prospect of detriment.[93] Second, it may be possible for A to show that, as things turned out, it would not in fact be unconscionable for A to leave B to suffer at least some detriment:[94] it seems that the range of factors (for example, the types of changed circumstances) which A may be able to invoke when making such an argument is wider than it would be if A's promise were contractually binding.[95]

It is therefore possible to meet the concern that the principle in *Sidhu* and *Thorner*, if expanded beyond the proprietary context, would 'overthrow' the requirement of consideration.[96] Consideration is a requirement of contractual claims, and is not threatened by the recognition of non-contractual claims. Nor can it be said that no cause of action (even if non-contractual) can arise from a promise unaccompanied by consideration. Even if promises in deeds are put to one side, there remain a number of examples in which a promise without consideration can form a crucial part of a cause of action[97] and, in some cases at least, the cause of action may lead to B's being put, as far as possible, in the same position as B would have been in had the promise been performed.[98]

Indeed, it can be argued that the classical requirements of contract formation, such as the doctrine of consideration, can more easily be justified precisely because other doctrines may, in some circumstances, give some legal effect to A's promise. First, a comparison can again be drawn with formality rules: the English Law Commission, when proposing the rule that a

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Basis of Proprietary Estoppel Remedies' [2008] 72 Conv 295; B McFarlane, *The Law of Proprietary Estoppel* (OUP 2014) paras 7.35–7.69.

[92] See eg Campbell (n 40) 187–188 for the argument that the ultimate goal of equitable estoppel, as reflected in the remedy, is the prevention of unconscionable conduct.

[93] See eg *Verwayen* (n 90) 442 (Deane J); *Sidhu* (n 8) [84]: 'If [B] had been induced to make a relatively small, readily quantifiable monetary outlay on the faith of [A's] assurances, then it might not be unconscionable for [A] to resile from his promises to [B] on condition that he reimburse her for her outlay' (for an example of such a case arising in practice, see eg *Powell v Benney* [2007] EWCA Civ 1283 and *Young v Lalic* [2006] NSWSC 18.

[94] In *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch), [2004] Ch 142 [201], for example, Neuberger J invoked the notion of unconscionability in explaining why events occurring after B's reliance may be taken into account in determining if an estoppel by convention has been established: 'Estoppel 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'.

[95] In *Thorner* (n 2), for example, Lord Scott raised at [19] the question of A's position if A had been required to sell A's farm to fund his own medical care. It would seem, however, that the backwards-looking nature of proprietary estoppel means that it can react to such changes: see eg *Uglow v Uglow* [2004] EWCA Civ 987, [2004] WTLR 1183 [30] (Mummery LJ); *Germanotta v Germanotta* [2012] QSC 116 [141]–[148] (McMeekin J). The view on this point expressed by Handley AJA in *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 [85]–[89] may therefore be too narrow. Note too EA Farnsworth, *Changing Your Mind: The Law of Regretted Decisions* (Yale UP 1998) 85–88, arguing that a broader set of circumstances than those leading to frustration should be relevant when considering a non-contractual means of giving effect to a promise of future conduct.

[96] [1951] 2 KB 215 (CA) 220.

[97] See eg *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) (gratuitous promise involving an assumption of responsibility giving rise to a duty of care); *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1 (gratuitous promise to take care of property as part of a gratuitous bailment). As in *Cobbe* (n 11), an express or implied promise of payment can form part of the basis under which B undertakes work for A and therefore support a restitutionary claim for the value of such work.

[98] As is the case where a duty of reasonable care arises and where A's promise is one to take reasonable care, as in *Yearworth* (n 97).

contract for the sale or other disposition of an interest in land must be made in writing signed by both parties, specifically adverted to proprietary estoppel as a means to deal with any injustice that might otherwise arise from the rule.[99] Second, decisions which might otherwise seem to depend on extensions of, or exceptions to, the classical requirements of contract formation can instead be seen as applications of an independent principle imposing a liability to ensure that B suffers no detriment. In the proprietary context, for example, the identification of such a principle can rebut Atiyah's criticism[100] that a case such as *Crabb* involves an implicit rejection of the traditional tests for consideration. If the principle operates more widely, it may also assist in explaining the operation of unilateral contracts in a case where B has begun, but not completed, performance.[101] If there is some limit, in such a case, on A's freedom to revoke A's promise,[102] it may be difficult to explain on standard models of consideration,[103] as B has made no promise to complete performance, and partial performance was not requested by A.[104] Rather than stretching such standard models of consideration, it may instead be possible to regard A, in such a case, as under an initial liability to ensure that B suffers no detriment as a result of B's reasonable reliance on A's promise, with A's contractual duty arising only on B's completion of performance.[105]

This analysis might seem to raise the spectre that the principle in *Sidhu* and *Thorner*, if extended, might 'absorb the whole of contract law'.[106] First, of course, it is important to note that B may acquire a contractual right even in the absence of reliance;[107] many practically important contractual bargains are beyond the scope of any principle that requires reliance by B on A's promise. Second, it is clear that, where a contract exists, A is under a duty to perform and so B has an entitlement to have his or her expectation protected on breach by A;[108] in contrast, when the principle in *Sidhu* and *Thorner* applies there are at least some

[99] Law Commission, Formalities for Contracts for Sale etc of Land (Law Com No 164, 1987) para 5.2.
[100] P Atiyah, 'When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity' (1976) 92 LQR 174.
[101] Where performance is completed, the significance of there being a unilateral contract is that A is under an immediate duty to perform A's promise to B, rather than under a liability to ensure that B suffers no detriment as a result of B's reasonable reliance.
[102] As was accepted in eg *Schweppe v Harper* [2008] EWCA Civ 442, [2008] BPIR 1090 [44]–[45] (Waller LJ) and in *Errington v Errington and Woods* [1952] 1 KB 290 (CA) 295; [1952] 1 All ER 149, 153 (Denning LJ).
[103] Note that E Peel, *Treitel's Law of Contract* (13th edn, Sweet & Maxwell 2011) 3–158 includes such unilateral contracts as one of the 'special cases' in which consideration may be found even if not present in the classic sense.
[104] The analysis of the Full Federal Court in *Mobil Oil Australia Ltd v Wellcome International Pty Ltd* (1998) 81 FCR 475, 501–506 is persuasive in rejecting any 'universal proposition that an offeror is not at liberty to revoke the offer once the offeree "commences" or "embarks upon" performance of the sought act of acceptance'.
[105] This is consistent with the approach of the Full Federal Court in *Mobil Oil Australia* (n 104) where it is also noted that B will have an alternative means of protection if A can be shown to have made a collateral contractual promise (for which consideration was provided) not to revoke A's offer.
[106] The phrase used by S Waddams, *Dimensions of Private Law* (CUP 2003) 67 in considering the argument in G Gilmore, *The Death of Contract* (Ohio State UP 1974).
[107] As in the case of an executory contract. In contrast, as noted by McPherson J in *Riches v Hogben* [1985] 2 Qd R 292, 300–301 (in a passage approved in *Giumelli* (n 73) 121): 'the equitable principle has no application where the transaction remains wholly executory on the plaintiff's part'.
[108] Even if, as in eg *Williams Bros v Ed T Agius Ltd* [1914] AC 510 (HL); *Clark v Macourt* [2013] HCA 56, (2013) 253 CLR 1, this results in B's ending up in a better position than B would have been in had the contract been performed.

cases in which B will have to settle for lesser redress.[109] Third, whilst it imposes a free-standing liability, the principle analysed here is a second-order one, as in assessing whether the prospect of detriment arises, any other rights or claims available to B must first be taken into account.[110] Certainly, if a valid contract exists between A and B, the existence of B's claim-right, arising as soon as that contract is concluded, can be seen as a countervailing benefit that removes the prospect of any detriment to B.[111] Again, an analogy can be drawn with restitutionary liability, as the contractual rights and duties of A and B must first be considered before any such liability may arise.[112] Fourth, the recognition of the principle may in fact enrich our understanding of contract law in certain cases.[113] For example, in determining A's duty where a contract has been breached, B should be free to claim reliance-based damages (capped of course to ensure B does not receive more than the value of B's right to performance),[114] as B should not be any worse off than a party relying on the principle in *Sidhu* and *Thorner*. In such a case, establishing reliance loss is not simply an indirect means to protect B's expectation by establishing what A must do to put B in the

[109] See eg *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501; *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988; *Sullivan v Sullivan* [2006] NSWCA 312; *ACN 074 971 109 Pty Ltd (as Trustee for the Argot Unit Trust) v National Mutual Life Association of Australasia Ltd* [2008] VSCA 247.

[110] See eg the analysis of Deane J in *Waltons Stores* (n 1) 453–4.

[111] See McPherson J in *Riches v Hogben* [1985] 2 Qd R 292 at 300–301 (in a passage approved in *Giumelli* (n 73) 121: '[i]f there is [a contractually binding promise], then the plaintiff must resort to the law of contract in order to enforce it, it being the function of equity to supplement the law not to replace it'. The better explanation for this result depends on the second-order nature of the principle itself, rather than on a broader point about equity. That second-order nature also seems to be the best explanation of *Lloyd's Bank plc v Carrick* [1996] 4 All ER 630 (CA): as a valid contract existed between A and B, B was prevented from instead arguing that a right had arisen through proprietary estoppel (B wished to make such an argument as a registration requirement applying under the Land Charges Act 1972 (UK) to an estate contract would not have applied to an equitable interest acquired through proprietary estoppel). Further, in assessing the detriment requirement in estoppel by representation, it seems that if B's reliance also gives B the benefit of a change of position defence to an unjust enrichment claim by A, that benefit can eliminate B's detriment and so prevent an estoppel's arising: *Scottish Equitable v Derby plc* [2001] EWCA Civ 369, [2001] 3 All ER 818 [47].

[112] See eg *Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27, (2008) 232 CLR 635.

[113] See too *Planche v Colburn* (1831) 8 Bing 14, 131 ER 305: a principle focussed on B's reliance on A's promise provides a ready explanation for B's recovery of remuneration for services provided to A without, for example, requiring an artificial finding that B's work benefitted A.

[114] See eg *Omak Maritime Ltd v Mamola Challenger Shipping Co* [2010] EWHC 2026 (Comm), [2011] 2 All ER 155; *Commonwealth of Australia v Amann Aviation Pty Ltd* (1992) 174 CLR 64 (HCA). The principle in *Sidhu* (n 8) and *Thorner* (n 2) is also subject to the qualification that A cannot be made to do more than ensure B is put in the position that B would have been in had A's promise been performed: B can have no complaint if A does so, so must bear any greater reliance loss: see eg *Watson v Goldsbrough* [1986] 1 EGLR 265 (CA); *Parker v Parker* [2003] EWHC 1846 (Ch), [2003] NPC 94.

position that B would have been in had the contract been performed,[115] but rather justifies a distinct form of contractual damages.[116]

IV: Conclusion

A. The Nature and Function of the Principle

It has been argued here that decisions such as *Sidhu* and *Thorner* rest on a particular strand of equitable estoppel that does not depend simply on restraining A's assertion of a fact or a right, and which does not operate to make a promise immediately binding. The principle underlying those cases can be seen as 'backwards-looking':[117] it imposes a liability on A such that a court can intervene to prevent the particular form of unconscionable conduct which consists of A's leaving B to suffer a detriment as a result of B's reasonable reliance on a promise of A which B reasonably understood as seriously intended by A.

There is thus a clear separation between contract law as a duty-imposing doctrine and a principle which instead imposes a liability, concretised as a duty only if and when a court ascertains what is required of A in the particular case. This model is consistent with the notion that, prior to any such court order being made in B's favour, B has an 'equity by estoppel';[118] even if, for example as in *Thorner*, that equity will be satisfied by an order that A convey particular land to B, it would not be accurate to say that, prior to such an order, A already had a duty to make that transfer. Such a conclusion would be premature, given the backward-looking nature of the principle.[119] An analogy can be drawn with the argument of Stephen Smith, that, where A commits a breach of contract or a tort, A does not come under an immediate duty to pay damages to B, but is instead subject to a liability.[120] In the case of proprietary estoppel, however, the liability is not a secondary one, depending on a pre-existing duty of A and arising in response to a breach of that duty. Rather, the liability is a

[115] As noted by G Treitel, 'Damages for Breach of Contract in the High Court of Australia' (1992) 108 LQR 226, 232, it is necessary to distinguish between the separate reliance and expectation measures in order to explain, for example, the willingness of a court (as in *Amann* (n 114)) to take account of the possibility of A's renewal of a contract in deciding that A cannot establish that B's reliance expenditure would have been wasted even if A's promise had been performed, when such a possibility would (as noted by Mason CJ and Dawson J in *Amann* (n 114) 93) not in general be considered when calculating the extent of any claim for expectation damages. Treitel (n 115) 229 notes the 'kind of verbal trick' involved in the device of presuming that reliance losses are at least equal to the value to B of A's promise: '[t]o weld two principles into one with the aid of a presumption can scarcely conceal the fact that two different methods of compensating the plaintiff are involved'.

[116] It is therefore possible to support both the result reached by Teare J in *Omak Maritime* (n 114) and the analysis of Treitel (n 115), rejected in *Omak*, that reliance and expectation damages have fundamentally different bases.

[117] Following the analysis of Hoffmann LJ in *Walton v Walton* (CA, 14 April 1994).

[118] See eg Land Registration Act 2002 (UK), s 116(a).

[119] It is important to emphasise, as noted in *Walden v Atkins* [2013] EWHC 1387 (Ch), [2013] BPIR 943 [45] that the backwards-looking nature of the principle does not mean that B has no right at all before a court order. A court may for example have to establish the nature of B's right at some point prior to the court's order. Where, for example, property was transferred by A to C, and B wishes to make a claim against C, the court needs to establish whether B had any rights in that property at the time of the transfer to C. This can be done by asking, if A's liability had been given effect to at that point in time, this would have done by ordering A to grant B a property right rather than, for example, paying money to B. See further McFarlane (n 91) paras 8.80–8.117.

[120] S Smith, 'Duties, Liabilities, and Damages' (2012) 125 Harv L Rev 1727.

primary one,[121] imposed in order to prevent a particular form of unconscionable conduct by A.

The closer parallel, at this abstract level of course, may be with restitutionary claims, which may also arise in the absence of any breach of duty by A, as when, for example, A is the recipient of B's mistaken payment. As Smith has noted, it is often difficult to think of A as being under a duty to make restitution as soon as payment is received: at that stage, A may be entirely unaware of the payment.[122] Instead, A might be described as being liable to make restitution. There is also a backwards-looking aspect to the operation of such a liability: the change of position defence provides one example of a later change of circumstances which may limit or even extinguish the liability. Indeed, the focus of the court's inquiry is on whether it would *now* be unconscionable for A to resist a claim for restitution. In *Australian Financial Services Ltd v Hills Industries Ltd*,[123] for example, the operation of the change of position defence was considered by Hayne, Crennan, Kiefel, Bell and Keane JJ under the heading of: 'The relevant enquiry: whether retention of monies unconscionable'. Indeed, a parallel was expressly drawn between the basis of the change of position defence and the concept of detriment within equitable estoppel, both as to the method of assessment[124] and, at the more abstract level that 'both estoppel and the defence are grounded in that body of equitable doctrine that prevents the unconscientious assertion of what are said to be legal rights'.[125]

Certainly, it is no surprise that the principle considered here is associated with equity, as it can be seen as preventing A from taking opportunistic advantage of the strict legal position. The crucial development, evident in decisions such as *Crabb v Arun DC*,[126] and noted by Finn,[127] is that the courts have extended that rationale from cases where A actively seeks to assert a right against B[128] to cases where A instead simply seeks to assert a liberty not to confer a benefit on B. In such cases, A is not seeking to rely positively on any particular legal rules as a means of asserting a right, or retaining a benefit; rather A points to those rules of property law or contract law that B has not satisfied, in order to show that A is under no duty to B. Smith has suggested that principles recognising a liability rather than a duty are 'not responses to failures by defendants; they are responses to imperfections in the legal system itself'.[129] When equitable estoppel gives rise to such a liability, the 'imperfection in the legal

[121] A Robertson, 'Estoppels and Rights-Creating Events: Beyond Wrongs and Promises' in J Neyers et al (eds) *Exploring Contract Law* (Hart Publishing 2009) makes the important point that equitable estoppel can give rise to a right of B even in the absence of any wrongful conduct of A; see eg *Repatriation Commission v Tsourounakis* [2007] FCAFC 29; *Walden* (n 119).
[122] See S Smith, 'A Duty to Make Restitution' (2013) 26 Can J L Juris 157 and S Smith, 'The Restatement of Liabilities in Restitution' in C Mitchell and W Swadling (eds) *The Restatement Third: Restitution and Unjust Enrichment –Critical and Comparative Essays* (Hart Publishing 2013).
[123] (2014) 253 CLR 560 [65]–[76].
[124] ibid [88], where reference was made to *Gillett v Holt* [2001] Ch 210 (CA).
[125] ibid [86].
[126] (n 26).
[127] Finn (n 71).
[128] See eg *The Earl of Oxford's Case* (1615) Chan Rep 1; 21 ER 485; *Inwards* (n 63).
[129] S Smith, 'A Duty to Make Restitution' (2013) 26 Can JL Juris 157, 170. See too B McFarlane, 'Unjust Enrichment, Rights and Value' in D Nolan and A Robertson (eds) *Rights in Private Law* (Hart Publishing 2009).

system' must then lie in the generality of the rules of property law or contract law: whilst adequate in the vast majority of cases, they leave open the possibility that, in a rare case,[130] their application to deny B redress might allow A to 'shock the conscience of the court'.

B. The Limits of the Principle

It may be that an unjustified fear of undermining the law of contract (along with a failure properly to distinguish the strand of proprietary estoppel applied in cases such as *Sidhu* and *Thorner* from those based on A's acquiescence in a mistaken belief of B, or on A's representation of a matter of fact, or mixed fact and law)[131] has deterred courts from emphasising that, if equitable estoppel is give rise to a cause of action in a case where B has relied simply on a belief as to A's future conduct, A must have made an (express or implied) *promise* to B. An insistence on an express or implied promise by A can, for example, be discerned in the House of Lords' decisions in *Cobbe* and *Thorner*.[132] In *Cobbe*, it was clear that A had in fact encouraged B in his belief that A's land would be sold, yet this did not suffice for a claim. In *Thorner*, each of the three courts hearing the case insisted on a promise or on an assurance by A and the House of Lords' decision ultimately depended on the simple point that there had been insufficient basis for the Court of Appeal to overturn the finding of the first instance judge that such a promise could be found. It is clear, after all, that A is under no general duty or liability to ensure that B suffers no economic loss through reliance on A. The making of a commitment by A is crucial in ensuring that responsibility for B's detriment can be reasonably allocated to A rather than to B. It is therefore unfortunate that formulations of equitable estoppel often suggest that it is sufficient if A simply *encouraged* B to believe that A would act in a particular way in the future.[133]

The main point made here is that, once the principle applied in *Sidhu* and *Thorner* is identified, and seen as independent both from preclusive or promissory estoppels and from contract law, there is no reason why its ability to give rise to a cause of action should be limited to cases where A's promise is to give B a right in relation to identified property of A.[134] An emphasis on the need for a seriously intended promise by A may play an important role in meeting fears as to the effect of allowing the principle to operate more widely. A more difficult question is whether, in line with the suggestion of Brennan J in *Waltons*,[135] the principle should be limited to cases where A's promise was that a particular legal relationship did or would exist between A and B, and that A would not be free to withdraw from that relationship.

It could be argued that, just as the suggested restriction to property rests on a misguided view of the principle as based on preclusive estoppel, so does this suggestion depend on a

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[130] See H Smith, 'Property, Equity, and the Rule of Law' in L Austin and D Klimchuk (eds) *Private Law and the Rule of Law* (OUP 2014) for the view that a characteristic form of equitable intervention consists in preventing A from taking opportunistic advantage of rules that work very well in the vast majority of cases.
[131] For discussion of the distinct strands of proprietary estoppel, see McFarlane (n 91) ch 1.
[132] See further McFarlane (n 91) paras 2.80–2.113.
[133] See eg *Hoyl Group* (n 15) 43 relying on the formulation in C Harpum et al (eds) *Megarry & Wade: The Law of Real Property* (8th edn, Sweet & Maxwell 2012) para 16.001. See too *DHJPM* (n 4) [48], [94].
[134] See too McFarlane and Sales (n 7).
[135] *Waltons Stores* (n 1) 428.

confusion between the principle and those forms of promissory estoppel that prevent A's acquiring or asserting a right against B.[136] Certainly, as the principle can impose a free-standing liability on A, it need not piggy-back on any other form of legal relationship. This can be seen from the fact that, where the principle applies, the liability imposed on A may have different consequences to those of the envisaged legal relationship.[137] Moreover, it might seem arbitrary if the principle can apply, for example, where A promises to make a contract with B to paint B's house (a promise of a binding legal relationship) but not if A simply promises to paint B's house. Further, as Robertson has shown, a number of Australian authorities are inconsistent with such a limit.[138]

An argument in favour of such a restriction could, however, be made by focussing on the nature of the principle as a liability-imposing rule. It may be that liability-imposing rules can be seen, as a group, as not required by any first principles of corrective justice, but rather as necessary to support the functioning of such primary rules, and thus as having a second-order element, dealing with dangers posed by the legal system itself. A promise-based proprietary estoppel case such as *Sidhu* or *Thorner* could be said to reveal the dangers to B of A's power to make an inter vivos or testamentary transfer of land to B, and of B's reliance on that power. The liability arising in such a case mitigates the dangers of such a power to B. The same can be said in a case where A promises to exercise a different legal power (the power to contract) in B's favour, but not when A simply promises to perform an act for B's benefit, as A's power to perform the act does not derive, in any meaningful sense, from legal rules.[139] If, then, the function of the principle in *Sidhu* or *Thorner* is to depend on its nature as a liability-imposing rule, there may be an argument for limiting its operation to cases where the prospect of detriment to B depends not only on A's promise but on the presence of a legal rule conferring a power on A.

An analogy can be drawn with restitutionary liability.[140] In a case where, rather than mistakenly conferring a right on A, B mistakenly performs a pure service for A, it seems reasonably clear that the classic strict-liability restitutionary model does not apply.[141] Similarly, it is not clear that the model applies where, rather than directly exercising a legal

[136] See section IIB.
[137] See (n 109).
[138] Robertson (n 3) 240–243, referring to eg *W v G* (1996) 20 Fam LR 49; *EK Nominees* (n 15); *ACN 074971109* (n 15).
[139] It is possible that the facts of *W v G* (n 138) could be brought within this model, as A's promise can be seen as relating to A's legal power to assume particular parental responsibilities. A point raised in argument in *Crown Melbourne* (n 8) is as to whether a proprietary estoppel claim can arise where A's promise is to offer to grant a lease to B rather than directly to grant a lease: such a promise, as it relates in any case to a legal power of A, would fall within both the narrower and wider models. Similarly, a promise to transfer a burial licence (as in *Arfaras* (n 88) falls within each model, even if such a licence does not confer a genuinely proprietary right.
[140] Compare the suggestion that the law of unjust enrichment plays an 'apparently second order' role: R Stevens, 'Is There a Law of Unjust Enrichment?' in S Degeling and J Edelman (eds) *Unjust Enrichment in Commercial Law* (Lawbook Co 2008) 11, 23.
[141] See eg *Blue Haven Enterprises Ltd v Tully* [2006] UKPC 17; *JS Bloor Ltd v Pavilion Developments Ltd* [2008] EWHC 724 (TCC), [2008] 2 EGLR 85; *Brand v Chris Building Co Pty Ltd* [1957] VR 625 (SC); S Degeling and B Edgeworth, 'Improvements to Land Belonging to Another' in LB Moses et al (eds) *Property and Security: Selected Essays* (Lawbook Co 2010) 277. For a contrary view, see eg T Wu, 'An Unjust Enrichment Claim for the Mistaken Improver of Land' [2011] Conv 8; C Mitchell et al (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) para 9.04.

power to confer a benefit on A, B sets in train a series of events which leads to A's acquiring such a benefit from a third party.[142] The crucial question in such cases can be seen as one of extrapolation from the core case of the mistaken payment: is the key feature of that case B's causing a benefit to be conferred on A or, more narrowly, is it the operation of legal rules to ensure that the same event caused both a loss of a right by B and a gain of a right by A?[143] From the standpoint of first principle, it may seem arbitrary to distinguish between different means by which B may factually cause a benefit to be acquired by A, just as it seems arbitrary to distinguish between A's promise to enter a contract with B, and A's promise to perform an act for B. If, however, the underlying liability is not itself based on first principles, but rather functions to deal with risks caused by the presence of legal rules, the distinction between those cases may be justified.

It is not, however, the purpose of this chapter to decide whether equitable estoppel's ability to operate as a cause of action should be restricted to cases where A's promise relates to a legal power of A. The crucial point is rather that, in establishing the limits of the principle applied in *Sidhu* and *Thorner*, a court should not regard that principle as a form of preclusive or promissory estoppel, or as a means of giving contractual effect to promises unsupported by consideration, but should rather focus on the inherent nature and function of the principle itself.[144]

[142] For recent analysis of this point, referring to the academic and judicial debate as to the correct test for establishing if A's enrichment is at the expense of B, see *Bank of Cyprus UK Ltd v Menelaou* [2015] UKSC 66, [2016] AC 176 [28]–[35] (Lord Clarke), [65]–[73] (Lord Neuberger).

[143] An argument in favour of the narrower view is made by McFarlane (n 129).

[144] It is therefore hoped that, in its decision in *Crown Melbourne* (n 8), the High Court, in considering, for example, the certainty required of a promise which can found a cause of action in equitable estoppel, and the applicability of the rule in *Hoyt's v Spencer* (1919) 27 CLR 133, bases it conclusions on the nature of that cause of action, distinguishing it from other forms of estoppel and from contract law.