THE EQUITABLE DOCTRINES OF ESTOPPEL AND PART PERFORMANCE

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Introduction

The very rapid development which has taken place in equitable estoppel in recent years has thrown into focus the viability and indeed the continued existence of the old, and much revered, equitable doctrine of part performance. This article examines the relationship between estoppel and part performance and assesses the position of the latter in the light of contemporary developments.

In their original equitable jurisdiction, estoppel and part performance were administered side-by-side with apparently little judicial concern as to any conceptual distinction between the two doctrines. A fundamental weakness of the doctrine of part performance has been that throughout its long history it has never arrogated to itself any clearly definable basis of application which would serve to demarcate it from other recognised heads of liability. In its early application it was administered very much upon a case-by-case basis. Despite the robust manner in which it was dispensed by the early equity judges, it lacked any secure conceptual anchor thus rendering it vulnerable to side-winds.

Both estoppel and part performance were profoundly affected by the systematisation of equity which took place in the early years of the nineteenth century, and the advent of the judicature system in the latter part of that century. This ultimately secured the supremacy of common law contract. But with the fundamental inadequacies of contract theory as a coherent regime of obligations, which have become manifest in the middle years of the present century, the courts have turned again to estoppel to provide an alternate, or at least much extended, system of obligations. This has meant a quite dramatic increase in the scope of estoppel and conceptually, at least, it can now be seen as having apparently invaded the territory of part performance.

The threat which presently faces part performance is thus not so much an attack upon the actual doctrine itself but the result of the courts attempting to formulate legal obligations which extend beyond those which are secured by orthodox contract theory. The entry of estoppel into contract law itself has inadvertently carried over into the territory of part performance.

The recent developments have also necessitated a re-evaluation of the much-vaunted decision of the House of Lords in *Steadman* v *Steadman.*[1]

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1 [1976] AC 536.

It is submitted that that decision is more appropriately considered as having been determined in estoppel rather than part performance.

Despite the apparently massive inroads which have theoretically been made by estoppel into the territory of part performance, the courts have quite clearly indicated that they are likely to retain what might be termed "orthodox part performance theory".[2] It will probably continue to co-exist alongside the much extended system of obligations now provided for by the development of estoppel. The retention of a clearly visable doctrine of part performance, alongside estoppel, could prove useful, affording the courts a much wider vista of discretion within which to achieve justice in individual cases.

To some extent at least, part performance and estoppel have re-established the symbiotic relationship which existed in the original administration of these two doctrines. The qualification which must be added is that any relationship which may have become established must now be considered against the background of a very well established regime of contract law.

The Early Application of Estoppel and Part Performance

The doctrine of part performance was developed by the Court of Chancery, as an exception to the Statute of Frauds 1677,[3] which provided that certain contracts were unenforceable[4] unless evidenced in writing.[5] A successful plea of part performance would deprive a party of the right to rely upon the defence that the contract did not comply with the Statute. That party was thus prevented, or estopped, from exerting, or insisting upon, a legal right which would otherwise have been available to him under the terms of the Statute. It has indeed been argued that as the effect of non-compliance with the Statute is procedural and not substantive, the

2 "Orthodox part performance theory" is here defined as that formulation of the doctrine confirmed by the decision of the House of Lords in *Maddison* v *Alderson* (1883) 8 App Cas 467, viz, the acts relied upon must unequivocally relate to some such contract as that alleged; the contract must be conclusively proved; specific performance must be available in respect to the contract.

3 29 Car 2 c3.

4 Until the decision in *Leroux* v *Brown* (1852) 12 CB 801, it had been believed that non-compliance with the Statute had the effect of rendering a contract void, *Carrington* v *Roots* (1837) 2 M & W 248. But the decision in *Leroux* v *Brown* held that s 4 of the Statute of Frauds was procedural only and did not affect "the substance of the contract" (1852) 12 CB 801, 824. The effect of non-compliance with the Statute was thus to render the contract unenforceable and not void. Thus non-compliance with the Statute is procedural and not substantive.

5 Section 4 of the Statute of Frauds reads:
"No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised."
Cf the Contracts Enforcement Act 1956 (NZ), s 2.

statutory provisions conver a privilege which a party may waive if he so pleases.[6]

It is true that in many of the early cases there appears to be some difficulty in reconciling the granting of decrees of specific performance with the actual terms of the Statute.[7] but it must be remembered that the Statute was administered in the face of what was already a well recognised equitable jurisdiction in fraud as well as a well established jurisdiction in specific performance. Equity was thus faced with the problem of adapting the Statute to its existing jurisdiction. Rather than attempt to develop any coherent principles in relation to exceptions to the Statute, equity continued to apply accepted heads of jurisdiction to cases where the Statute was relevant. So-styled "part performance"[8] thus evolved as a judicial eclecticism of different concepts and practices brought together under the umbrella heading of providing an exception to the Statute of Frauds. For example in some early cases, which are now generally classified under the heading of part performance, it is clear that equity was essentially exercising its concurrent jurisdiction in fraud.[9]

But probably the most significant of the practices which was assumed by the doctrine of part performance was that of the freely granted delivery and acceptance of the possession of the land in dispute as adequate acts of part performance within themselves. Specific performance of the contract would be granted, upon a plea of part performance, in those instances where the delivery and acceptance of the land in dispute had taken place.[10] This could be in the absence of any equity or unconscionable conduct by any party. This practice had been followed from the very earliest days of the application of the doctrine.[11] It appears that in the seventeenth century, at the time of the passing of the Statute of Frauds, this was an accepted method of conveyance of real property.[12] It was apparently assumed that the passing of the Statute would not affect this practice.

6 Cf Cheshire, Fifoot & Furmston, *Law of Contract* (7th NZ ed 1988) 224. Under New Zealand law a party who wishes to avail himself of the privilege conferred by the Statute must specifically plead it: Rule 183, High Court Rules.

7 From the earliest times, courts of equity reserved to themselves the jurisdiction to set aside statutory provisions in those instances where the application of the statute would give rise to unconscionable results. The Statute of Frauds was no exception: *Halfpenny* v *Ballet* (1699) 2 Vern 373; *Bowdes* v *Amhurst* (1715) Prec Ch 402.

8 The expression "part performance" is to a large extent a misnomer. While it is true that is some very early cases there is dicta to the effect that the acts must be "done in performance" per Lord Hardwick in *Gunter* v *Halsey* (1739) Amb 586; by the time of *White* v *Neaylon* (1886) 11 App Cas 171, acts which were impermissible except for the contract, although neither required nor expressly authorised by the contract were accepted as part performance.

9 As in cases involving the building upon the land of another in anticipation of a contract where the defendant could have taken the value of improvements made to the property by the plaintiff had the contract not been enforced: *Lester* v *Foxcroft* (1701) Coles PC 108; 1 ER 205.

10 Change of possession has been referred to as "the act of part performance *par excellence*" Williams *The Statute of Frauds: Section IV* (1932) 256.

11 See eg *Butcher* v *Stapley* (1686) 1 Vern 363; 23 ER 524, which was the earliest reported case in which relief was granted upon the ground of part performance.

12 This was referred to as "livery of seisin" (1954) 73 Seldon Society Introduction Ciii.

Although they were never regarded as such, these "possession cases" provide an almost copybook example of what later became established as common law estoppel, that is estoppel by representation of fact. The conclusion of the initial contract can be seen as providing the necessary representation, and the actual act of going into possession can be seen as providing the required detriment. Thus one party is prevented (estopped) because of his own previous conduct and the reliance of the other party upon that conduct (i.e. the representations implicit in the contract) from insisting upon his right under the Statute to treat the contract as unenforceable.

However, many other individual cases now classified as falling within the ambit of part performance can be seen with equal facility, as being determined in estoppel. Many early cases involved the building upon the land of another in the expectation of an enforceable contract.[13] These instances usually involved the creation of an equity in favour of the party who was seeking to rely upon part performance. The aggrieved party had usually erected improvements to the property in anticipation of the contract and he stood to lose the benefit of the improvements should the contract not be enforced. Such cases can now be seen as falling under the principle in *Ramsden* v *Dyson*:[14] the defendent had stood by and allowed the plaintiff to act to his detriment in the expectation of obtaining a good title to the land. It is probable that the factual situations of many of the early cases were such that equity would have granted some relief, probably the fulfilment of the expectation which had been raised, in the absence of any contract.[15]

In the early decisions the court appears to have been concerned with preventing the Statute, which was passed to prevent fraud, from being resorted to as a vehicle of fraud. If the Statute should be allowed to intervene, would the plaintiff, by reason of his part performance, be placed in such a position that nothing short of an enforcement of the contract would suffice to do justice between the parties. The court seems to have been concerned with preventing the Statute from being used fraudulently to deprive the plaintiff of the fruits of his part performance of the contract in the expectation of receiving the benefits of reciprocal performance by the other party.

But this scenario also fits very comfortably into the rubric of estoppel. The initial representation can be seen as implicit in the conduct of the defendant in either entering into the contract and allowing the plaintiff to partly execute his side of the agreement, or in standing by, acquiescing in, or actively encouraging the plaintiff to act to his detriment in the expectation of the contract. The defendant was then estopped from exercising what would have been his right or privilege under the Statute of Frauds to treat the contract as unenforceable.

13 See eg *Lester* v *Foxcroft*, supra n 9; *Hollis* v *Edwards* (1683) 1 Vern 159; 23 ER 385.
14 (1866) LR 1 HL 129.
15 See eg *Earl of Oxford's Case* (1615) 1 Ch Rep 1; 21 ER 485; *Stiles* v *Cowper* (1748) 3 Atk 693; 26 ER 1198, which are now regarded as having been determined in estoppel. Cf also *Ramsden* v *Dyson*, ibid.

However the early courts of equity were prepared to take their avoidance of the Statute much further. As the Statute was initially passed for the purpose of preventing fraud the courts assumed that the Statute did not apply in those cases where fraud could not possibly be in issue. Hence the Statute was held not to apply where the conclusion of the contract was admitted in the course of the proceedings.[16] It appears that this was not dependent upon part performance or any detriment to one of the parties, except that is, the expectationary loss which might have resulted from the non-completion of the contract. In these cases the estoppel can be seen as based upon the simple admission of the contract. A defendant who admitted the contract was not permitted to enjoy the privilege by the Statute.

Thus a great many, if not all, of the early decisions which have traditionally been classified under the heading of part performance can be seen as simply manifestations of a wider principle analogous to what would now be regarded as estoppel, but adapted so as to fit the specific requirements of the Statute of Frauds.

Turning now to the converse situation and viewing part performance in terms of what later became clearly recognised as headings of equitable estoppel, a very close conceptual coincidence can again be discerned.

Estoppel in equity (i.e. a party being prevented from engaging in a certain course of action because of his own previous conduct or because of the effect which that course of action would have upon the other party in view of the situation in which they had both participated), is probably of more ancient provenance than part performance.[17] By the middle years of the eighteenth century the equitable jurisdiction, in what would now be classified as estoppel, had largely settled upon two clearly identifiable bases: (i) the prevention of the insistence upon a legal right in those instances where to do so would be unconscionable[18] and (ii) the jurisdiction in the making good of a representation.[19]

Conceptually these two heads are all but identical to part performance. Thus the "legal right" of estoppel can be seen as equating to the right, in part performance, to regard the contract as unenforceable under the Statute of Frauds. The representation, which had to be made with the knowledge that it was likely to be relied upon,[20] can be seen as implicit in the terms of the actual contract, the proof of which was an essential ingredient of any successful action in part performance. At the same time both of these heads of estoppel involved the performance of acts in reliance upon the conduct of the representor. Conduct in reliance was usually necessary to secure the necessary detriment rendering it unconscionable

16 See eg *Croyston* v *Barnes* (1702) Prec Ch 208; 21 ER 841; *Symondson* v *Tweed* (1713) Prec Ch 374; 24 ER 169; *Child* v *Godolphin* (1723) 1 Dick 38; 21 ER 181.

17 A prominent early example of the application of estoppel is provided by the *Earl of Oxford's Case,* supra n 15.

18 See eg *Huning* v *Ferrers* (1711) 1 Gilb Rep 85; 25 ER 59; *East India Co* v *Vincent* (1740) 2 Atk 83; 26 ER 451.

19 See eg *Burrowes* v *Lock* (1805) 10 Ves 470; 32 ER 927; *Hammersley* v *DeBiel* (1845) 12 Cl & Fin 45; 8 ER 1312; *Loffus* v *Maw* (1862) 3 Giff 592; 66 ER 544.

20 Cf *Hammersley* v *DeBiel,* ibid.

should the representor resile from the representation which he had made.[21] Hence conduct in reliance was usually found as an ingredient of both part performance and estoppel.

The old equity judges were not concerned with this apparently overlapping jurisdiction. Although it would have mostly certainly irritated nineteenth century judges, in earlier times when there was little or no systematisation of the equitable jurisdiction it mattered little.[22] But the jurisdictions in estoppel and part performance were underpinned by one common principle and that was the prevention of unconscionable conduct.[23] This provided the threshold of the equitable jurisdiction and not some deference to any clearly defined principle of liability. But the proscription of unconscionable conduct is a highly expansive and quite incoherent doctrinal justification. Moreover it can be highly judicially subjective. It was this potential for uncertainty which was to provide a major hindrance to the future development of estoppel and was to bring about the reworking of part performance.

Even so, both estoppel and part performance, when they were administered within their original jurisdiction, were substantive heads of law. They were not evidential or procedural in complexion. Regarding part performance it could be said that its application served to accord a degree of pragmatism in the continued existence of the writing requirements of the Statute of Frauds. Throughout the eighteenth century the courts arrogated to themselves a very wide discretion in the avoidance of the Statute, carefully crafting it to suit the exigencies of individual cases.[24] Although this led to much inconsistency in decisions[25] it is probably true to say that it served to maintain the integrity of the Statute.

Moreover the seventeenth and eighteenth centuries were a time when the courts of equity were not only very jealous of their powers and prone to snatch at the slightest wisp of authority to extend their jurisdiction, but were also apt to manifest hostility towards statutes,[26] and the Statute of Frauds was no exception.

21 See eg *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1938) 59 CLR 641, 674, per Dixon J.

22 Of the text writers, it seems that only Sir Frederick Pollock preferred to rest the early equitable intervention in part performance on the basis of estoppel, *Pollock on Contract* (13th ed) 521.

23 The expression "unconscionable conduct" can be taken as equivalent to what was referred to in the early jurisdiction as "equitable fraud".

24 Eg in the eighteenth century the courts of equity, in applying part performance, were prone to "consider the ease and comfort and security of families" per Lord Henley in *Wycherley* v *Wycherley* (1763) 2 Eden 175.

25 See eg the rule as to the acceptance of monetary payments as part performance. In the very early cases a bare monetary payment was held to be inadequate as part performance, *Pengall* v *Ross* (1709) 2 Eq Ca Abr 46; 22 ER 40. But this was very soon reversed and monetary payments were accepted as part performance, *Gunter* v *Halsey* (1739) Amb 586; 27 ER 381; *Lacon* v *Mertins* (1743) 3 Atk 3; 26 ER 803.

26 Cf the tendency of equity to develop fictions for the purpose of removing cases from statutory provisions, eg the "doctrine of acknowledgement" which was resorted to in order to take cases out of the Statute of Limitations until the middle years of the nineteenth century.

The Ascendency of Common Law Contract

The later half of the nineteenth century saw a fundamental change take place in the judicial attitude to both part performance and estoppel. The early part of that century saw a systematisation of equity with a shedding of its *ex tempore* characteristics. The whims of the Lord Chancellor were no longer sufficient and henceforth equity had principles just as the common law had rules.[27] This period also saw the introduction of the judicature system. This meant the rules of common law and the principles of equity being administered side-by-side in the same court system. There was barely room for competing jurisdictions in obligations to co-exist.

However by this time common law contract had come of age. It had dispensed with its affinity to the law of real property and was now a clearly defined jurisdiction with its doctrinal foundations firmly in tune with the requirements of the commercial community.[28] Predictability and certainty in transactions, and the untrammeled right of parties to determine their own liability, and to closely circumscribe that liability, were now regarded as fundamental attributes in the law of personal obligations. The new regime of self-imposed and rigidly stylised obligations (common law contract theory) did not co-exist at all well with the old free-wheeling and highly judicially-subjective equitable jurisdictions. In particular, the long established equitable jurisdiction in the making good of representations was quite incompatible with the wide-spread practical application of the principles of common law contract.

By a series of decisions within a relatively short period, equitable estoppel was devastated as a cause of action and the doctrine of part performance was reworked from being a rule of substantive law into a rule of evidence set very securely within the confines of common law contract.

The House of Lords in *Jorden* v *Money*[29] effectively limited estoppel by representation to representations of existing fact. Statements of future intention were no longer actionable merely as a representation intended to be acted upon. This made very serious inroads into the old jurisdiction in representations.[30] At the same time, several earlier decisions which had been determined on the basis of the enforcement of a representation were subsequently reinterpreted by the courts as falling within the ambit of contract. By the later years of the nineteenth century there appears to have been a fundamental reluctance to perceive the existence of the jurisdiction in the making good of a representation as distinct from that of contract. All was common law contract.[31]

But estoppel was dealt further blows by Fry J in *Willmott* v *Barber*[32]

27 Cf Meagher, Gummow, Lehane, *Equity Doctrines & Remedies* (2nd ed 1985) para 114.
28 Cf Freidmann, *Law in a Changing Society* (2nd ed 1972) 119-160.
29 (1854) 5 HLC 185; 10 ER 868.
30 In fact the jurisdiction in the making good of representations continued for some years after the decision in *Jorden* v *Money,* ibid; see eg *Loffus* v *Maw,* supra n 19.
31 The decision of the House of Lords in *Maddison* v *Alderson,* infra n 37, overruled *Loffus* v *Maw,* supra n 19 and consigned *Hammersley* v *DeBiel,* supra n 19 to the realm of common law contract.
32 (1880) 15 Ch D 96.

which laid down a series of probanda which were readily construable as applicable over a quite wide area of estoppel, and by Bowen LJ in *Low* v *Bouverie*[33] that estoppel was only a rule of evidence and was not applicable as a cause of action. Thus two clearly identifiable and readily available devices could be resorted to by counsel in future litigation as effective defences to a plea of estoppel.[34]

On the other hand, one decision stood out as having largely escaped the ravages of the nineteenth century. The judgment of the House of Lords in *Ramsden* v *Dyson*[35] possessed advantages in that it had not been specifically overruled and it was authority for a variety of estoppel which did not necessarily conflict with common law contract. It broadly covered the area of estoppel by acquiescence, i.e. standing by while another acts to his detriment or actively encouraging another to act to his detriment.[36] But this head of estoppel was still subject to the qualifications of the probanda of Fry J in *Willmott* and to being limited to a rule of evidence. As it turned out, it was to be the "*Ramsden* v *Dyson* principle" which was to provide the foundation for the revival of equitable estoppel which was to take place in the middle years of the present century.

While estoppel was devastated in the nineteenth century, the doctrine of part performance underwent a profound metamorphosis. Central to this process was the House of Lords decision, *Maddison* v *Alderson.*[37] But that decision merely placed the final seal of authority upon a process which had been in train for some time.

In accordance with the much-vaunted dictum of the Earl of Selborne in that case "acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged".[38] This provided a quite rigid test of the degree of particularity which was required between the actual acts of part performance and the contract which

33 [1891] 3 Ch 82.

34 The probanda of Fry J amounted to a set of requirements which had to be satisfied before a man could be "deprived of his legal rights". These requirements were: the plaintiff must have made a mistake as to his legal rights; the plaintiff must have expended some money or must have done some act on the faith of his mistaken belief; the defendant, that is the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff; the defendant must know of the plaintiff's mistaken belief of his rights; the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right: supra n 32 at 105-106.

35 Supra n 14.

36 In *Ramsden* v *Dyson,* ibid at 170, Lord Kingsdown's oft-quoted remarks expressed it as follows: "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 exception, 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 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."

37 (1883) 8 App Cas 467.

38 Ibid at 479.

it was sought to enforce,[39] i.e. the extent to which the acts of part performance must speak of the actual contract. But although very widely accepted[40] it has never been subject to any coherent interpretation or gloss. The precise degree of particularity with which acts had to speak of the contract in order to be "unequivocally referable" to that contract was never clearly spelt out. The courts assumed to themselves a considerable degree of discretion as to whether the acts relied upon were adequate to secure specific performance in any individual case.

Maddison was also significant in handing down an ostensible basis for the doctrine of part performance. According to the Earl of Selborne "in a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself".[41] This dictum also was never subject to clear or conclusive interpretation. For example it was never made clear what the equity was to be based upon. Moreover as a basis for the doctrine, this dictum did not sit comfortably with the manner in which many previous cases had been determined.[42]

In applying the doctrine, *Maddison* confirmed that a court commences by setting aside evidence of the parol contract and directing attention to the issue of whether or not the acts relied upon are sufficiently referable to a contract. It was only after this initial evidential threshold had been determined that the equitable aspects of the specific factual situation could be addressed by the court. The original purpose of setting down a requirement of a specific relationship between the acts relied upon and the contract had been to prevent a party fraudulently fabricating a contract by performing acts quite unrelated to any agreement and then alleging that those acts were the result of a concluded contract. *Maddison* had the effect of elevating this essentially evidential aspect of the doctrine, to the status of an initial hurdle which a litigant, seeking to rely upon the doctrine of part performance, had to surmount. The first question was whether the acts spoke of a contract. In such circumstances part performance had a very limited role, as a rule of evidence appurtenant to the law of contract. The paramount question was the presence or absence of a contract and whether the acts spoke of that contract. There was little scope to infuse equitable principles into the application of part performance. Indeed it is highly significant that one of the most notorious contractual practices which could give rise to an equity or to unconscionable conduct (the making of a monetary payment) was specifically excluded as amounting to adequate part performance. Such a payment was always an equivocal act and hence could never be categorically indicative of the existence of a contract. On

39 This was by no means the most rigid version of this test, eg in *Chaproniere* v *Lambert* [1917] 2 Ch 356, 361, it was held that the acts must refer to or imply the alleged contract only, and be referable to no other contract.

40 The "unequivocally referable" version of this test was generally accepted in New Zealand: *Cameron* v *Cameron* (1893) 11 NZLR 642, 645; *Simpson* v *Simpson* (1918) 37 NZLR 319, 322. In Australia it was entrenched in the law by the two High Court decisions in *McBride* v *Sandland* (1918) 25 CLR 69; *Cooney* v *Burns* (1922) 30 CLR 216.

41 Supra, n 37 at 475.

42 Eg in cases where part performance was allowed upon the basis of the change of possession of the land in dispute it was frequently very difficult to divine any equity.

the other hand while the doctrine of part performance was playing such a limited role, its territory, being so restricted, was at least free from being eroded by any possible revival of estoppel.

Maddison was readily accepted by the New Zealand courts.[43]

The Resurgence of Equity

At the beginning of the present century equitable estoppel was in a state of devastation, while the doctrine of part performance was set securely as a rule of evidence within common law contract. Contract itself was confined within the very narrow limits which had been set by classical contract theory in the middle years of the nineteenth century. It was largely this limitation of contract, as a viable regime of personal obligations, which was responsible for the resurgence of equitable estoppel. It was not long before very compelling factual situations began to present themselves to the courts. These were situations that could be accommodated by contract only by straining contract theory to a point which was quite unrealistic or by resorting to some other head of liability. Many of these were of a domestic nature where it was clear that no concluded contract had ever been intended. And yet at the same time these situations were usually intended to have some effect in that they were designed to affect the future conduct of the parties.[44]

These factual situations did not throw up any obvious specification of the particular interest which deserved protection. In many cases it was obvious that the aggrieved party had suffered through reliance upon the conduct of the other party. But deserving cases were clearly not confined to those involving a reliance loss. The protection of expectationary losses presented more of a problem because that was the province of contract theory but there was no clear reason why the protection of expectationary interests should not be extended to non-contractual situations where the interests of justice so demanded. The courts clearly required a much wider approach than merely to aim at the protection of specific categories of loss. The most compelling approach was that based upon an overall assessment of whether or not the conduct of one of the parties was unconscionable. This would involve the direct application of a subjective, judicial, value judgment in order to determine whether unconscionable conduct was present. This required a legal principle which could be directly

43 See *Cameron & Simpson,* supra n 40.

44 These cases fall broadly into two groups. Firstly the "housekeeper cases" where a person, usually a single woman, is induced to keep house, usually for an elderly man, in return for the promise of rights in property; for examples see infra n 76 and also S J Burridge, "A Metric Measurement of the Chancellor's Foot" [1982] CLJ 290, and the cases referred to therein. Secondly the "licence cases" which are frequently found with facts which overlap with "housekeeper cases" and where a party, usually a relative of the plaintiff, is promised some proprietary right in return for some service to the defendant, for example being allowed to live with the plaintiff in the property which has been promised; for examples see infra nn 79 and 84. It is significant that in virtually all of these cases what might be referred to as "equitable consideration" is present. This is some conduct or promise in return for the promise of the other party but which would not be sufficient to amount to formal consideration under classical contract theory.

applied; a universal judicial talisman which could be called upon to do justice over a wide range of factual contours.

Thus the courts rescued the *Ramsden* v *Dyson* principle from a state of relative obscurity and reworked it to assume its new role, greatly expanding the law of obligations. As has been indicated above, this principle was subject to a number of limitations which had to be removed before it could be effective in this role. In particular, the limitations imposed by the probanda of Fry J and the prospect that the principle could be limited to a defence and was inoperable as a cause of action, would have dramatically limited the prospect of the direct judicial application of the *Ramsden* principle. These encumbrances of the late nineteenth century had to be dispensed with.

The transformation of this old equitable principle into the new breed of "proprietary estoppel" was achieved with relative ease. This head of estoppel was not necessarily limited by the probanda of Fry J;[45] it was not limited to being merely a defence but could operate as a cause of action;[46] it was not limited to transactions involving real property but was of general applicability;[47] and it was not subject to categorisation.[48] The onus placed upon a party seeking a rely upon estoppel is now very light indeed. A very minimum of conduct on the part of one of the parties will now suffice to satisfy the requirements of estoppel. The threshold of jurisdiction could well be established by the mere raising of an expectation and this does not require an express representation. Acquiescence or standing by is quite sufficient.[49] Estoppel can now truly be seen as "one general principle shorn of limitations".[50] Highly significant for the relationship between estoppel and the doctrine of part performance was that the former was not limited to operating in a non-contractual situation. Estoppel is now a most "general", "flexible" and "useful"[51] principle; most admirably suited to carry into our law the expansive doctrine of the prevention of unconscionable conduct in any shape or form.

Part performance could not have remained unaffected by the changes which have taken place in estoppel. For almost a century, orthodox part performance theory as enunciated by the House of Lords in *Maddison* v *Alderson*[52] remained unchallenged. But pressures in the law were building up. These pressures were orientating part performance in the same direction

45 See *Electrolux Ltd* v *Electric Ltd* (1953) 71 RPC 23, 33; *Shaw* v *Applegate* [1977] 1 WLR 970, 977-928; *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 147; *Amalgamated Investment and Property Co Ltd* v *Texas Commerce International Bank* [1982] 1 QB 84,104.

46 See *Crabb* v *Arun District Council* [1976] Ch 179, 187; *Amalgamated Investment,* ibid at 105.

47 See *Moorgate Mercantile* v *Twitchings* [1976] QB 225, 242; *Western Fish Products Ltd* v *Penwith District Council* [1981] 2 All ER 204, 208; *Taylors Fashions,* supra n 45 at 154-155; *Habib Bank Ltd* v *Habib Bank A G Zurich* [1981] 1 WLR 1265, 1282.

48 See *Crabb,* supra n 46.

49 Cf per Lord Kingsdown in *Ramsden,* supra n 36.

50 Per Lord Denning in *Amalgamated Investment,* supra n 45 at 122.

51 Idem.

52 Supra n 37.

as estoppel as a vehicle for the prevention of unconscionable conduct. Two decisions in the 1960s appeared, at least superficially, to indicate that orthodox par performance theory was about to disintegrate.

Purely upon the basis of doing justice there was no way that the party relying upon part performance could have been permitted to fail in either *Kingswood Estate Ltd* v *Anderson*[53] or *Wakeham* v *Mackenzie.*[54] In both cases a change of possession of property by one party had taken place in response to representations by the other. To this extent the broad requirements of orthodox part performance theory were satisfied. But the simulacrum of orthodox theory was used to conceal what, in both substance and form, amounted to a very substantial reinfusion of equity into part performance.

In *Kingswood Estate* a landlord induced an elderly widow and her invalid son to move from a property, which he desired to redevelop and in which the tenant had statutory protection, to another of his properties. The landlord had represented to the tenant that she would have a life interest in the second property. The landlord then resiled from the agreement by serving the tenant with notice to quit and claimed that she was in possession merely as a weekly tenant.

The Court of Appeal found extreme difficulty in finding a contract in favour of the tenant and it is submitted that the acts relied upon in *Kingswood Estate* would not have satisfied the unequivocally referable version of the test as laid down in *Maddison.* The change of possession, which was relied upon as part performance by the tenant, was equally referable to a weekly tenancy as to a life tenancy. The Court of Appeal placed much emphasis upon "a representation intended to be acted on".[55] It is submitted that the basis of this decision would be the enforcement of the representations which had been made by the landlord. This was required in order to protect the equities which had arisen in favour of the tenet, who had acted in reliance upon the representations which had been made to her. The court clearly regarded the conduct of the landlord, in resiling from the representation which he had made, as unconscionable. The facts of this case do not match a strict application of orthodox part performance theory and this is especially so in view of the extreme difficulty which the court experienced in finding a concluded contract.[56] The decision can be seen as determined in estoppel in that the landlord was prevented from resiling from the representations which he had made and as such indicates a revival of the old equitable jurisdiction in the enforcement of a representation.

Wakeham provides an even more salutary lesson so far as retaining orthodox part performance theory intact is concerned. It was a housekeeper case in the best nineteenth century tradition. An elderly man had induced a housekeeper to continue to live with him by the assurance of a proprietary

53 [1963] 2 QB 169.
54 [1968] 2 All ER 783.
55 Per Upjohn LJ [1963] 2 QB 169, 188.
56 It will be recalled that proof of the concluded contract had always been an essential ingredient of a successful action in part performance.

right. Significantly the judgment of Stamp J is aglow with the rhetoric of pre-nineteenth century equitable thought:[57]

> Nothing could have been more fraudulent to the way of thinking of the old equity lawyers than that (the defendant) having induced performance of the contract and enjoyed the benefits of that performance, should have repudiated his obligations . . . And the question which I have to decide is whether that performance is such as to raise equities.

The judicial reference to "equities" is highly significant. Hitherto this was an expression not much upon the lips of twentieth century judges when determining part performance cases.

These two decisions exemplify a clear shift back to situation analysis as well as a re-emergence of emphasis upon unconscionable conduct by one of the parties. In this respect *Wakeham* is illuminating as the facts were virtually upon all fours with those of *Maddison* with the exception that in the earlier case change of possession had not taken place. But this point does not appear to have been accorded a great deal of emphasis in the decision in the later case. Despite the coincidence of facts the decision in the later case was the reverse of that in the earlier.

Orthodox part performance theory was clearly under very severe pressure in both *Wakeham* and *Kingswood.* The courts were now prepared to again take into account non-contractual elements in arriving at a decision. Also the way was open for the re-entry of estoppel into the territory of part performance. Moreover the search was on for some new principle upon which to set the doctrine of part performance and the new basis appeared to be the prevention of unconscionable conduct in any shape or form.

If the emanation of a doctrinal coincidence between part performance and estoppel was adumbrated by the decisions of the 1960s, it was made manifest by the House of Lords in *Steadman* v *Steadman*[58] which has been seen by some as taking part performance back to its pre-nineteenth century state.[59] In *Steadman* the parties' marriage had dissolved and they were negotiating a settlement of the wife's claim under the Married Women's Property Act 1882. An agreement was reached whereby the husband would take over the matrimonial home, for an agreed price, maintenance orders should be discharged and arrears of maintenance should be remitted except for an amount of one hundred pounds, which amount was duly paid into court by the husband. The wife, having admitted the agreement in the course of proceedings, refused to sign the transfer in relation to the property, relying upon section 40 of the Law of Property Act 1925.[60] Her resiling

57 Supra n 54 at 785-786. See also the extensive note from *Maxwell* v *Lady Montacute* (1719) Prec Ch 526; 24 ER 235, cited with approval by Stamp J as an alternate ground of determination. This early case had confirmed a head of equitable estoppel long since regarded as dead.

58 Supra, n 1.

59 See eg H W R Wade, "Part Performance: Back to Square One" (1974) 90 LQR 433.

60 15 Geo 5. Section 40(1) reads: "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or not thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

from the agreement apparently resulted from the belief that a higher price could be obtained for the property on the open market.

Their Lordships, whilst taking time to reconsider the doctrine of part performance in some detail, did not see fit to proffer a definitive restatement of orthodox theory. *Maddison* was not overturned but was reinterpreted so as to render it a more viable vehicle for the direct application of equitable concepts to factual situations.[61] It appears highly unlikely that in terms of orthodox part performance theory, the acts relied upon by the husband would have amounted to adequate part performance because they did not relate directly to the land in dispute. Moreover the husband did not have the benefit of a change of possession of the property in dispute which he could proffer as part performance.

On the other hand the case would appear to go much further than the pre-nineteenth century law in finding part performance in favour of the husband. It is very difficult to perceive any equity which had arisen in favour of the husband. He had made a small payment of money into court and he had prepared and submitted a transfer to the wife for signature. These acts were barely sufficient to raise an equity in his favour. Thus it is not possible to see any significance reliance damage which would have resulted to the husband should the contract not have been fulfilled. Also it is not possible to divine any delictual conduct on the part of the wife which was deserving of sanction. All she had done was to change her mind after, that is, having concluded a contract. The ultimate decision of their Lordships in finding part performance in favour of the husband was to protect the expectionary interest and it was the protection of this interest which the Statute of Frauds had specifically prohibited. In its early application part performance was not applied to protect a mere expectionary interest.[62]

The decision is better viewed as based upon estoppel. It could be argued that the estoppel arose from the admission of the contract by the wife in the course of proceedings. But that would not have accorded any equitable substance to the decision. As the husband had hardly acted to his detriment there was no conclusive reason why the wife should be estopped simply from denying the existence of the contract. It is submitted that the estoppel was based upon the conduct of the wife in resiling from the agreement which she had freely concluded, in anticipation of obtaining a higher price for the property in dispute upon the open market. The language in *Steadman* is peppered with the terminology of estoppel.[63] The conduct of the wife was clearly regarded as unconscionable by their Lordships:[64]

61 Thus monetary payments were reinstated as adequate part performance and the acts relied upon as part performance were held to be sufficient "if they pointed on balance of probabilities to some contract between the parties and either show the nature of or were consistent with the oral agreement alleged" per Lord Reid, supra n 1 at 541-542.

62 See eg *Cooke* v *Tombes* (1794) 2 Anst 420, 425; 145 ER 922.

63 Eg per Lord Salmon supra n 1 at 571, "Once a party to a parol contract relating to land admits to any court the existence of the contract and that he has received a benefit under it which he is unable or unwilling to restore, the mischief aimed at by the statute disappears." Ibid at 573, "This payment, in my opinion, bars the wife from relying on the statute and she is accordingly bound to perform her part of the agreement."

64 Per Viscount Dilhorne, ibid at 555.

> She heard the terms of the agreement announced. She made no objection. She received £100 from the respondent which she has retained and then, in the hope no doubt that she would get more than £1,500 for her share of the house, she gave, more than two months later . . . her first intimation of her intention to resile from the agreement. I think that to allow her to do so . . . would indeed be to allow section 40 of the Law of Property Act 1925 to be an instrument of injustice.

The use of the highly judicially-subjective expression "injustice" in preference to the more conventional "equitable fraud" is significant in itself even if amounting to a contemporary euphemism of the older expression. But what was clear from the judgments in *Steadman* was that equity had resumed its place as an integral part of the application of the doctrine of part performance. It was no longer merely a rule of evidence.

On the other hand their Lordships were intent upon retaining the fascade of nineteenth century orthodox theory. *Maddison* v *Alderson* was held to be "now so embedded in the law that . . . it would be impracticable to foresee all the consequences of tampering with it".[65] Although their Lordships were clearly determining upon the basis of principle in *Steadman* due deference was paid to precedent and orthodoxy was retained intact. Hence it was open to a future court to revisit the earlier decision. At the same time a future court now had an option available in that, rather than revert to the earlier law, it could build upon the foundation stones left in place by the decision in *Steadman.*

Although *Steadman* has been subject to much criticism[66] it is probable that it saved part performance from being consigned to legal history. The compelling instrument which is now required by the judiciary is a concept which can be utilised to rationalise the writing requirements of the Statute of Frauds with contemporary commercial conditions. Orthodox part performance theory was much too rigid for that purpose. The earlier decision represented a much too deterministic view of contract law and had it been rigidly adhered to part performance would probably been cast aside by litigants in favour of estoppel.

A Conceptual Synthesis Attained

Once the process (whereby part performance and estoppel freed themselves from the systematisation with which they had become encumbered in the last century) had worked itself out, little remained by way of conceptual and functional distinction between the two doctrines.

Reduced to its fundamental terms, estoppel rested upon the making of a representation of fact by one party where it was clear that the representation was intended to, or likely to, be acted upon. The representation did not need to be express. It could indeed be the raising of an expectation which could amount to simply standing by and allowing a person to act to his detriment. The effect of the representation was the same regardless of the form in which it was made. Estoppel involved preventing the representor from denying the truth of the assertion which he had

65 Per Lord Reid, ibid at 542.
66 See Wade supra n 59; see also Megarry and Wade, *Law of Real Property* (5th ed 1984) 593.

made (i.e. from resiling from the representation) in those instances in which it would be unconscionable for him to do so.

It is not fruitful, in cases of estoppel, to claim that its effect is to preclude the truth. When estoppel is successfully pleaded the rights of the parties are regulated not by the actual or real state of facts but by the state of facts which they have both accepted as the basis of their mutual conduct, and from which one of the parties has later sought to depart. The preclusion of the truth, if such is relevant, is seen as necessary in the interests of justice.

Applying this rubric to part performance, the initial representation, or raising of an expectation, can be seen as implicit in the making of the contract, the proof of which was a requirement of part performance. Thus the contract can be seen as giving rise to the mutual conduct of the parties from which it may be unconscionable for one of the parties to later try to resile. The contract gives rise to the expectations and presumptions upon which the acts of part performance are based.

The successful application of part performance, like estoppel, thus prevents a representor from denying the enforceability of the representation, which he has made in the contract, by preventing him from relying upon what would otherwise be his rights under the Statute of Frauds. Thus it could be argued that a successful plea of part performance requires the representor to conform to the terms of the contract which then regulates the rights and obligations of the parties. In allowing part performance the court thus requires the parties to assume the enforceability of the contract. The parties are required to assume the accuracy of the expectations which were raised.

A fundamental conceptual distinction which still remains between part performance and estoppel is that the former relates to a highly structured situation in that it is necessary for the party relying upon part performance to prove the existence of the oral contract. The court is not usually called upon to structure the interactional situation between the parties. It may, of course, be called upon to interpret the terms of the contract or derive the intention of the parties. Usually a court will merely enforce those carefully crafted expectations which the parties themselves have agreed to.

Estoppel, on the other hand, does not derive basically from a contractual relationship. It usually derives from an interactional situation between two parties. The court is thus free to structure estoppel upon any basis which appears appropriate in the particular circumstances of an individual case. Whereas in part performance it is theoretically only the expectationary interest which is receiving protection, in estoppel there is no limit to the range of interests which may be protected.

Both part performance and estoppel have as their end result the requirement of an equity in favour of one of the parties. Both are aimed at the protection of equities and the equity provides an intermediate stage in the securing of rights, in the case of estoppel, and the recognition of rights in the case of part performance.

Conduct, or acts, carried out in reliance upon the contract or the representation would appear to be a traditional requirement of both part

performance and estoppel.[67] The requirement of the execution of acts would seem to imply that the detriment to the plaintiff flows from the acts of part performance, or the acts in reliance upon the representation in the case of estoppel.

In accordance with *Maddison*[68] the acts of part performance were elevated to a central role in the administration of the doctrine with the requirement that the acts be "unequivocally and of their own nature referable to some such contract as that alleged".[69] In estoppel, acts in reliance never assumed quite such a central place in the gamut of requirements. Emphasis here was more upon the effect which the representation had upon the mind of the party to whom it was made. Even so, some conduct was normally required in reliance upon the representation in order to secure the estoppel.[70]

However *Steadman*[71] meant a very substantial mitigation of the role of the acts of part performance. The acts were sufficient if upon "balance of probability" they indicated the existence of a contract and the acts had to be viewed in terms of their surrounding circumstances.[72] This tended to equate to the requirements relating to acts in reliance in estoppel. There is now a tendency in both part performance and estoppel to view the conduct of the parties in terms of the overall situation.

It is in relation to the available remedy that the two doctrines remain poles apart. Specific performance, decreed upon a successful plea of part performance, serves to make good the representations and expectations implicit in the conclusion of the contract. In the case of part performance the parties provide their own remedy and the court will ensure this upon a successful plea. At no time has part performance departed from the requirement that it is only available in those cases where the contract is subject to specific performance.[73] Estoppel does not see itself limited by any predetermined remedy notwithstanding that a particular remedy may conform to the expectations of the parties. It is for the court to divine the equity and then to determine how best to satisfy it.[74] Estoppel thus still provides the courts with a much more extensive menu of remedies than part performance.

67 According to the Earl of Selbourne (1883) 8 App Cas 467, 475, "In a suit founded upon part performance the defendant is really "charged" upon the equities resulting from the acts done" and in reference to estoppel, according to G Spencer Bower and Sir Alexander Turner, *Estoppel by Representation* (3rd ed 1977) 91, "It must be shown that the representee acted on the faith of the representation."

68 Supra, n 37.

69 Ibid at 479.

70 According to Spencer Bower and Turner, supra n 67 at 94, "There must have been an intention . . . to induce the particular representee . . . to act upon the representation, as well as the fact that the representee did act upon it."

71 Supra, n 1.

72 Ibid at 541.

73 See eg *Brittain* v *Rossiter* (1879) 11 QBD 123.

74 See eg *Plimmer* v *Mayor etc of Wellington* (1884) 9 App Cas 699, 713, where according to their Lordships, a claim would not fail "merely on the ground that the interest to be secured had not been expressly indicated".

Flowing from the remedy, both doctrines can operate to redistribute property rights. In part performance, the rights and obligations flowing from a successful plea are still controlled by the general rules of contract law and, for example, the doctrine of privity of contract may apply. On the other hand it seems that estoppel can give rise to rights which may transfer to third parties and to obligations which may blind third parties.[75]

As a vehicle for the conveyance of this new principle — the sanctioning of unconscionable conduct — into the law, estoppel is a much more expansive and judicially useful weapon than part performance. Estoppel is much wider in its ability to prevent an insistence upon the exercise of strict legal rights where to do so would be unconscionable. This is especially so if part performance is viewed in its evidential guise of merely providing evidence of a contract. The conduct of a party may be examined so as to determine whether or not he has conducted himself in such a way that, in the circumstances of the particular case, he has disentitled himself from asserting his legal rights. In estoppel the concern was with what the rights of the parties should be, while in part performance the concern was much more limited in scope. It was with whether or not rights which the parties themselves had determined should or should not be enforced, even if this was by the route of determining whether a party should be permitted to exercise his rights under the Statute of Frauds.

The Legal Structuring of Factual Situations

At present both estoppel and part performance are being applied alongside the rules of classical contract to provide for a system of obligations which is extending well beyond that set by the boundaries of classical contract theory.

Estoppel has probably found its greatest utility in giving legal effect to non-contractual situations which are clearly intended to have some influence upon the future conduct of the parties. These are "arrangements" which are intended by the parties to be binding but which would not meet the requirements of a binding contract. Such cases are often of a domestic nature and will frequently be a family arrangement involving the promise of property rights in return for some quid pro quo of a domestic nature, such as the caring for a parent for the rest of his days.[76] Many of these arrangements are highly imprecise in their terms[77] and will usually be altered during the course of their execution so as to accommodate the changing aspirations of the parties.[78] The facts of these cases are often extremely socially compelling and involve some detriment in that the party seeking to enforce the arrangement will have acted upon, or changed his position, in reliance upon the representations of the other party.

75 See eg *Williams* v *Staite* [1979] Ch 291.

76 See eg *Re Gonin* [1979] Ch 16. But these cases are not confined to the care of a close relative. In *Loffus* v *Maw,* supra n 19, a niece was induced to housekeep for her uncle. But quite often the housekeeper was not a relative: *Maddison,* supra n 37; *Wakeham,* supra n 54; *Greasley* v *Cooke* [1980] 1 WLR 1306.

77 See eg *Hardwick* v *Johnson* [1978] 1 WLR 683.

78 See eg *Riches* v *Hogben* [1985] 2 Qd R 292.

In situations of this nature the courts have shown a tendency to adopt one of two approaches. First, the boundaries of orthodox contract theory may be stretched so as to give these cases effect as contracts and thus render what could well be seen as a gratuitous undertaking binding. Thus certainty will be derived from situations where there is obviously insufficient certainty to support a contract in terms of orthodox theory.[79] A contract may be extracted where, quite clearly, no contract was intended by one of the parties.[80] A contract will be found which could obviously never be specifically enforced, for example, where the contract involved the performance of personal services,[81] or where to award specific performance would be futile.[82] In these circumstances part performance could well be applied despite, in terms of orthodox theory, part performance not being available because of the non-availability of specific performance. Thus what is probably a non-contractual situation has often been rendered binding by the finding of a contract and the application of the doctrine of part performance.[83]

Secondly, if for some reason the boundaries of contract are not capable of accommodating the particular factual contours, then estoppel may be applied to secure the obligations of the parties. Whether estoppel or contract is applied in these cases will depend largely upon what the court, in the individual case, perceives as the appropriate outcome in terms of preventing or rectifying an unconscionable situation.

A very good illustration of the working out of this process is to be found in the determining of the "licence cases". Here we see a neat division as between the grant of a contractual licence and the awarding of an equitable licence deriving from the creation of an equity found by the application of estoppel. The structuring which has taken place in these instances has been determined by the function which the court desires to attain. This will usually be how best to secure the expectations of the parties.

Where a contractual licence has been considered by the court as adequate to secure the rights of the parties then such will probably be found to exist.[84] But the contractual licence does not normally grant proprietary rights.[85] Hence where it has been found necessary to protect a party against the possibility of, for example, claims from third parties, the contractual licence will frequently not be sufficient. Then applying estoppel, a licence deriving from the equity will be found to exist. It will be recalled that in such a case the court can determine the interest and decide how best to give effect

79 See eg *Hardwick* v *Johnson,* supra n 77.
80 See eg *Kingswood Estate* v *Anderson,* supra n 53.
81 See eg *Wakeham* v *Mackenzie,* supra n 54.
82 See eg *Riches* v *Hogben,* supra n 78.
83 See cases referred to supra nn 79-82.
84 See eg *Tanner* v *Tanner* [1975] 1 WLR 1346; *Hardwick* v *Johnson,* supra n 77; *Chandler* v *Kerley* [1978] 2 All ER 942.
85 It will be recalled that at common law the licence was little more than a defence to an action in trespass.

to it.[86] So in *Williams* v *Staite*[87] the problem with interpreting the Staite's licence as contractual was that the original licensors were not involved in the action for possession brought against the Staites. Hence justice could only be achieved for the Staites if their rights were found to be binding on third parties.

There is no doubt that estoppel could have been resorted to in those cases where contractual licences were found to exist and it is highly significant that the courts were prone to cling to orthodox contract theory. This was so even where it was found necessary to extend the boundaries of contract theory.

A recent case which vividly illustrates the respective roles of part performance and estoppel in extending orthodox contract, and which also shows the relationship between part performance and estoppel, was that of the Queensland courts in *Riches* v *Hogben.*[88] Superficially this decision could be read as indicating that estoppel is attaining ascendency over part performance as a technique for endowing non-contractual situations with legal effect. An elderly defendant was sued by her son in order to enforce an alleged agreement. She undertook to purchase and pay for a house property in Australia, to be placed in the son's name, if he, together with his wife and children, would migrate with her from England and allow her to live with them in the property until her death. It was also agreed that the son should be permitted to mortgage the house property in order to obtain finance for a business venture. Later it was agreed that the property should be placed in the name of the mother rather than that of the son.

It was found that a contract had been concluded and, as the agreement was not in writing, part performance was then applied in order to render it enforceable. But there was insufficient part performance to support the contract as the acts which were relied upon were not "unequivocally referable" to the contract which was alleged. Indeed the acts relied upon were largely those of the mother. It will be recalled that in Australia, the "unequivocally referable" test had become entrenched by the two High Court decisions in *McBride* v *Sandland*[89] and *Cooney* v *Burns.*[90] Thus the Australian courts do not have available the much broader version of this test as enunciated by their Lordships in *Steadman.*[91] However in any event, the case was probably not one in which part performance was available because the contract, being of a personal nature, was probably not subject to specific performance. The court then determined the case in favour of the son by the application of estoppel, placing emphasis upon the equity which had arisen subsequent to the contract and applying the *Ramsden*

86 According to Lord Denning in *E R Ives Investment Ltd* v *High* [1967] 2 QB 379, 394, "The Court will not allow (the) expectation to be defeated when it would be inequitable so to do. It is for the court in each case to decide in what way the equity can be satisfied." See also *Inwards* v *Baker* [1965] 2 QB 29, 37.

87 Supra, n 75.

88 Supra, n 78.

89 Supra, n 40.

90 Ibid.

91 Supra, n 1.

v *Dyson* principle. However it would seem that *Riches* goes much further in making an order for the transfer of the property which had been purchased by the mother to the son. If the case is viewed in terms of the prevention of the unconscionable insistence upon a legal right, then it is very difficult to perceive what right was relevant. At the time the mother made the promise (which gave rise to the estoppel) she did not actually possess any property which could give rise to a relevant proprietary right. The decision is more appropriately viewed as either the enforcement of a representation, or a contribution towards the evolution of a jurisdiction in reliance protection.[92]

In contrast to non-contractual arrangements, situations of putative contract involve the ostensible or intended formation or a contract which for some reason, possibly through repudiation by one of the parties, does not come to fruition. Situations of putative contract are usually limited to commercial transactions.[93]

The recent decision of the Australian High Court in *Waltons Stores (Interstate) Ltd* v *Maher*[94] was a classic example of this situation. An intended written contract for the erection of a new building, on land owned by the plaintiff builder and to be leased by the defendant, Waltons, was returned to the builder, Maher, unsigned. This was after oral agreement had been reached as to the full terms of the contract and after the builder had expended considerable time and money in demolishing existing buildings on the site, and had commenced the erection of the new buildings. The completion date of the new buildings was, of course, set out in the proposed deed of contract and the builder was anxious to meet this date. It apparently served the interests of Waltons to retain the option of signing the contract in limbo while they considered a report in respect to their future retailing activity in the area.

A key to the ultimate finding is provided by an understanding of how the court perceived its function. This was the rectification of the detriment which the plaintiff had suffered as a result of the conduct of the defendant. What was in fact a highly compelling and unconscionable situation deserved rectification. The court was thus called upon to search for a legal vehicle to convey this function into effect. But there were problems. This was not a case whether either orthodox contract theory or orthodox part performance theory was applicable because the court had found, as fact, "the parties did not intend to be bound contractually at any stage prior to exchange effective between their solicitors."[95]

But assuming estoppel as the only available conceptual vehicle there were a number of difficulties to be overcome. This was clearly not a case of the unconscionable insistence upon a legal right. The court thus found some difficulty in attempting to fit the instant facts into existing categories

92 Cf the decision of the Court of Appeal in *Pascoe* v *Turner* [1979] 1 WLR 431.
93 We are concerned here only with those instances where an action for breach of contract is not available.
94 (1988) 62 ALJR 110.
95 Per Brennan J, ibid at 119.

of estoppel.[96] But the conclusion was eventually reached that "equitable estoppel" was applicable.

The essence of estoppel in this case rested not in simply providing a device with which to side-step the putative contract but in the application of estoppel as a distinct cause of action in its own right. The estoppel which gave rise to the equity arose after the putative contract had come into existence. It was based upon the conduct of the defendant in standing by and allowing the other party to act to his detriment, in full knowledge of what was happening, and taking full account of the previous conduct of the defendant in concluding the putative contract. The defendant thus raised an expectation in the mind of the plaintiff and continued to fuel that expectation until it finally returned the unexecuted deed. This conduct was clearly regarded by the court as unconscionable.

The High Court in *Waltons* was emphatic in the distinction which it saw between the actual contract, which it did not seek to enforce, and the rectification of detriment, which it clearly did see as its function. In particular the estoppel and the detriment were not seen as providing a substitute for consideration and the High Court took time to emphasise this point:[97]

> The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment . . .
>
> If this object is kept steadily in mind the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed.

Thus in *Waltons* there is a manifestation of an identity for the reliance principle which is quite distinct from the bargain principle. This proposition is probably not easy to sustain in view of the overwhelming emphasis which has been placed upon the bargain principle over the past century and a half. It was well recognised that in applying the reliance principle, the court was moving towards providing a common law remedy analogous to that contained in section 90 of the American Restatement.[98] Hence there are clear indications that estoppel is being used as a device to convey into the law a distinct principle aimed at the rectification of reliance damage. There were also indications of this in the earlier case of *Pavey & Matthews Pty Ltd* v *Paul*[99] where the old common law writ of indebitatus assumpsit was revived to allow for the recovery of money expended under an oral building contract which was unenforceable because of non-compliance with the Builders' Licensing Act 1971 (NSW). As the contract was unenforceable

96 Brennan J with some assistance from recent decisions of the English courts, concluded, ibid at 121: "Perhaps equitable estoppel is more accurately described as an equity created by estoppel."

97 Per Brennan J, ibid at 125.

98 This provides for the enforcement of promises "which the promisor should reasonably expect to induce action or forbearance on the part of the promise and which does induce such action or forbearance and where injustice can be avoided only by enforcement of the promise".

99 (1987) 61 ALJR 151.

by statute an action in quantum meruit or quasi-contractual, restitution was dubious.[100]

But if there are indications that a new distinct jurisdiction in reliance protection is emerging then what are its implications for the doctrine of part performance? It could be argued that *Waltons* clearly illustrates the limited scope which is now available for the doctrine of part performance. On the other hand it must be remembered that historically, in the functional application of a doctrine, the rectification of reliance damage has played a major role. The case probably illustrates the continued affinity of the doctrine of part performance to the strictly contractual situation, and in *Waltons* the High Court was intent upon emphasising a cause of action which was fundamentally non-contractual in complexion. There was no way that the court in that case would have permitted the doctrine of part performance to have stood in the way of a remedy in favour of the plaintiff.

The role of part performance as applied to the facts of *Waltons* is clearly illustrated by a comparison of the decision of the High Court with that of the Court of Appeal of New South Wales.[101] The lower court made a conventional approach to estoppel and it was held that the defendant was estopped, despite the Statute, from denying the existence of the contract. This meant, in effect, that the way was then open for the original cause of action, based upon the contract, to proceed. The court could then go on and consider the strictly contractual remedy of specific performance and whether it was applicable or appropriate in the circumstances. In the Court of Appeal, the Statute was also raised as a defence to the enforcement of the contract, but the court experienced no difficulty in finding that the conduct of the plaintiff (in clearing the site and commencing building) amounted to adequate part performance.

By way of comparison, the majority of the High Court saw the fundamental cause of action as based not upon the original contract but upon the rectification of damage resulting from detrimental reliance. This approach left no place for any conventional role for part performance for the simple reason that the contract was only relevant in raising the expectation which had given rise to the reliance. The contract itself was not to be enforced.

On the other hand the decision of the High Court can be seen as envisaging a much wider role for acts of part performance. In *Waltons* there had been part performance of the expectations which had been raised and that part performance was vital in raising the requisite detriment.

But many questions remain unanswered. Should a new jurisdiction in reliance protection arise it would most certainly not cover all the situations which have, up until the present, been covered by the application of the

100 There are also indications of the movement towards reliance protection in recent English decisions, see eg *Crabb* v *Arun D C,* supra n 46; *Pascoe* v *Turner,* supra n 92; but cf *A G Hong Kong* v *Humphreys Estate (Queens Gardens) Ltd* [1987] 1 AC 114, where although there was expenditure in reliance the defendant had not created or encouraged the belief that it would not exercise a clause in the contract which allowed it to withdraw at any time.

101 (1986) 5 NSWLR 407.

doctrine of part performance. As earlier indicated, a great many of the decisions illustrate an evidential role for part performance and many of those decisions would remain intact with the separate existence of a jurisdiction in reliance.[102] A new jurisdiction would most certainly require more substantial damage in reliance upon the contract than what has been evident in many part performance cases.

On the other hand, where obvious reliance damage has taken place, a new jurisdiction would no doubt be able to provide a much more flexible remedy than that of specific performance of the expectation which is available under part performance. But a new jurisdiction, like orthodox part performance theory, would probably require a clear connection between the acts in reliance and the actual expectation which has been raised by the representor.

The Continuing Utility of Orthodox Part Performance Theory

The decision of their Lordships in *Steadman* did not cast aside the earlier decision of the House in *Maddison.*[103] In the period following *Steadman* there has been considerable, highly significant, revisitation of orthodox part performance theory. Despite the recent developments, the courts appear quite reluctant to throw this old established version of the doctrine overboard.

In *Dualia* v *Four Millbank Nominees Ltd*[104] acts preparatory to the contract (which never came into existence) were rejected as part performance. Again in *Re Gonin*[105] the party relying upon part performance was unable to convince the court that the contract existed for the transfer of the family home to her in return for the caring of her parents. It would seem that that was an attempt to make use of part performance to fabricate a contract out of acts which any child would be likely to carry out in the course of a normal relationship with parents.[106] The decision shows that despite the recent developments, the courts are not prepared to permit part performance to be resorted to as a vehicle to fabricate a contract. A party cannot, by resorting to part performance, inflict his own mental state upon the other side.

These are instances where the prime focus of the courts has been upon whether or not a contract has been concluded.[107] In this respect the tenets of classical contract theory appear to have been upheld. The courts of appeal to have based their judgments upon the fundamental proposition that no agreement had been reached. The presence or absence of a contract

102 A separate jurisdiction in reliance protection would not, for example, have assisted the husband in *Steadman,* supra n 1.

103 Supra n 65.

104 [1978] Ch 231.

105 Supra, n 76.

106 In *Re Gonin,* idem, the plaintiff had simply left her position with the Air Ministry, and the billet to which she had been posted during the War and returned to her pre-war position with her parents. It appears that she had not even entered into possession of the property which she claimed.

107 See also *Cohen* v *Nesdale Ltd* [1981] 3 All ER 118; [1982] 2 All ER 97 (CA); *Ogilvie* v *Ryan* [1976] 2 NSWLR 504.

constituted the basic relationship between the parties. There were no equities deriving from any other source. There was no damage resulting from detrimental reliance, and there was no basis upon which a decision based upon estoppel could have been applied in these cases. These are cases where orthodox part performance theory was applied in support of classical contract theory. The courts no doubt perceived that within such a rubric, justice could best be effected. There was no unconscionable conduct or situation which called for the approbation of the court in these cases.

Should the courts find it necessary to strike down an alleged contract, orthodox part performance could well be the most effective way to achieve such an end. The advantage of orthodox theory lies in the potential which it provides a court to either uphold or dispose of a contract within a clearly established framework of very authoritative precedent. The version of the doctrine of part performance in *Maddison* in fact affords a court with a very wide discretion as to which acts of part performance may be disposed of. Whether or not a particular act is "unequivocally referable to some such contract as that alleged" is very much a subjective, value judgment. This test directs judicial attention into very narrow limits. A court is not faced with the problem of roaming at large over the entire gamut of facts presented by a particular case. It can confine its enquiry to the quite limited question of whether or not the acts exhibit an adequate reference to the alleged contract. Moreover if orthodox theory is applied, a court is not faced with the difficulty of having to find some other foundation stone for its judgment.

In some cases therefore, orthodox theory may be able to achieve exactly the same results as estoppel in preventing unconscionable conduct. The present indications are that the courts will seek to retain orthodox part performance as a distinct and coherent doctrine as its retention serves to increase the range of options which are available for the resolution of individual cases.

The New Zealand courts have shown a tentative acceptance of the new approach to part performance. The courts in this country have not been faced with the problem encountered by their Australian counterparts, namely two High Court decisions which entrenched orthodox theory. In *Whitaker* v *Carruthers,*[108] Wilson J commented that "lawyers everywhere will welcome the rationalisation of the doctrine of part performance by the House of Lords this year in *Steadman*".[109] Whereas, in *Boutique Balmoral* v *Retail Holdings,*[110] Mahon J expressed apprehension of the decision in Steadman. But litigation in this country on part performance has been sparse and the courts have not so far been faced with a factual situation which would induce them to radically depart from orthodox theory. They have not been faced with the issue of having to determine a case where there was extensive damage resulting from reliance upon a putative contract as in *Waltons.*

108 [1975] 1 NZLR 372 (HC); [1975] 2 NZLR 667 (CA).
109 Ibid at 380.
110 [1976] 2 NZLR 222, 226.

However the decision of Perry J in *Boviard* v *Brown*[111] provides an interesting contrast to the other recent decisions in apparently being based upon estoppel. The action was an attempt to enforce the sale of a house property where an oral extension of time to a clause in a written contract, conditional as to finance, had been granted. There was thus an oral variation of a written contract to be overcome by the plaintiffs who were seeking specific performance. Insuring the property, instructing the solicitors to prepare a transfer and send it to the defendant, asking for a settlement statement, accepting an offer of a loan and asking their solicitor to prepare a mortgage, were successfully relied upon as acts of part performance.

A strict application of orthodox part performance theory would most probably have defeated the plaintiff's claim in this case. Of the acts relied upon it could well be submitted that only one, paying the insurance, could be said to have directly related to the subject matter of the contract. Moreover in accordance with a strict application of orthodox theory, this could well have been subject to the rule that monetary payments are an equivocal act and thus unavailable as part performance.

But the decision is best explained in terms of estoppel. The written contract had here been signed by both parties and the defendant admitted in the course of proceedings, that he had waived the clause on the basis of an extended settlement date. According to Perry J:[112]

> I think by himself giving evidence of the arrangement the defendant has waived his right to plead the statute, and this having been the way the defence has been conducted, his counsel must not now be heard to plead the unenforceability of a contract which his client admits in the witness box.

By admitting the contract in the course of proceedings the defendant was estopped from denying the contract and thereby lost his privilege of treating the contract as unenforceable under the Statute.

In contrast, the other recent decisions of the New Zealand courts have all centred upon the contract and have been determined largely in accordance with orthodox theory. In *Boutique Balmoral,* Mahon J adopted a quite rigid version of orthodox part performance theory and rejected acts which were preparatory to the contract, and not in execution of the actual terms of the contract, as part performance. While in *Whitaker,* the defendant, who had withdrawn from the contract and decided to remain upon his farm upon medical advice, but who had acted at all times as if he intended to conclude the contract, was able to fall back upon a "subject to finance" clause contained in the unsigned contract. In the recent decision *Hinterlietner & Ors* v *Heenan*[113] Holland J, while finding that there was sufficient part performance for there to be an enforceable contract in principle, concluded that an essential term in the oral agreement was too uncertain for the contract to be enforceable.

111 [1975] 2 NZLR 694.
112 Ibid at 703.
113 Unreported, High Court, Invercargill, 9 January 1989, CP 108/88, Holland J. Noted (1989) 12(4) The Capital Letter 516.

The New Zealand courts have tended to show a trend somewhat along the lines of their English counterparts. Following an initial acceptance of the decision in *Steadman,* there has been an inclination to revert back to orthodox part performance. *Boviard* is alone in having been determined in estoppel. The remaining recent decisions exhibit an emphasis upon basic contractual principles and a propensity, where possible, to determine issues upon the basis of whether or not agreement has been concluded between the parties.

The decision of the Court of Appeal in *Whitaker*[114] is significant in this respect. In the lower court it had been found that there was sufficient written evidence to satisfy the requirements of the Statute and, alternately, that there was sufficient part performance. The elderly farmer had not actually signed the contract of sale but at all material times had acted as if he intended to conclude the agreement for the sale of his farm. He resiled from the contract at the last minute upon medical advice that he should remain upon his farm.

In reversing the decision of the High Court, the Court of Appeal based its finding upon the very narrow contractual issue of construing the point at which the parties intended to be bound. The Court concluded that this was not until the contract had been signed by both parties. But as the vendor had resiled before he had signed there was thus no binding contract.

With respect, this is hardly taking a substantive view of the intentions of the parties as manifested by their conduct. It is clear that the elderly and ailing vendor intended to be bound until he was told by his medical practitioner to remain upon his farm. The approach taken by the Court of Appeal does not only side-step both the doctrine of part performance and estoppel it also seems to render the Statute of Frauds superfluous. The Statute strikes at the situation where agreement has been concluded. If a contract can only be binding when it is signed by the parties then surely form takes precedence over substance.

In *Whitaker* the Court of Appeal appears to have allowed its desire to do justice to an elderly and ailing litigant to assume such dominance that it arrived at a conclusion not based upon part performance or estoppel or the substance of contract theory, but upon form.

Conclusion: Possible Future Trends

Although the original purpose of the Statute of Frauds has long since passed into history, its function (the requirement of written evidence of certain contracts before they may be enforced) remains, albeit tenuously, intact. There is of course always the possibility that the remnants of the Statute will be repealed. However there is presently no indication that such will happen. The granting to the courts of a discretion to avoid the requirements of the Statute in appropriate circumstances has a long and extremely respectable provenance. The doctrine of part performance, now recognised by statute,[115] has traditionally provided the vehicle whereby that

114 Supra, n 108.
115 Contracts Enforcement Act 1956 (NZ), s 2(3).

discretion has been exercised. So long as a requirement of written evidence exists, it is reasonable to assume that a "doctrine of part performance" of some description will continue to exist.

Although the judicial discretion to avoid the Statute may never have been exercised systematically or consistently, it is submitted that it has been exercised rationally. A nice balance between the need to do justice in individual cases and the wider policy requirement of the need for written evidence has been retained. The present situation would appear to be one with which the commercial community is quite comfortable.

Throughout its long history the doctrine has successfully shifted in orientation to accommodate the ever changing complexion of its contractual environment. In this respect the present state of the doctrine has been seen as the completion of a cycle.[116] To some extent the doctrine has reverted to its free-wheeling, pre-nineteenth century state, and is now operating once more as a substantive principle of equity, applied at the discretion of the court. There are however, clear differences. The doctrine must now be administered in deference to the presence of a very well established system of common law contract and a commercial community which requires certainty in the law.

The broad framework within which part performance is now dispensed may be summarised as follows. At present the doctrine is inhibiting a shadowy world between two major heads of jurisdiction which are fundamentally dissimilar in respect to the basic manner in which obligation is imposed. Although the doctrine has clearly detached itself from the rigid evidentiary role which was ascribed to it in the later years of the last century, it has not finally succeeded in settling upon any other well-identified doctrinal basis. In this indeterminate state, part performance has been enveloped by the bourgeoning development of estoppel, and assumes a similar conceptual identity and doctrinal basis to that of estoppel.

The underlying policy rationale for the present revival of estoppel is the prevention of unconscionable conduct, or the rectification of an unconscionable situation. In this exercise the courts perceive as the proper focus of their inquiry an examination of the total "conduct and relationship"[117] of the parties. There will thus be an emphasis upon the on-going, overall relationship between the parties. The inquiry will not be limited to determining such narrow issues as whether consensus has been arrived at or whether or not consideration is present. Obligation is no longer regarded as entirely self-imposed but may be imposed by the court. Clear techniques whereby a party may limit his liability in estoppel have not yet been fully evolved. While the protection of the expectionary interest is the basic objective of contract there is no limit to the interest which may be protected by estoppel. It is for the court to divine the equity and to determine how best to satisfy it.[118]

But in applying estoppel, the courts have paid quite remarkable deference to the principles of common law contract and have been mindful of the

116 Wade, supra n 59.
117 Per Lord Scarman in *Crabb,* supra n 46 at 192.
118 See eg *Inwards* v *Baker,* supra n 86 at 37; *E R Ives Investment Ltd* v *High,* ibid at 395.

intention of the parties regarding the conclusion of a contract. Thus the presence or absence of a contract will be but one aspect of the on-going relationship between the parties. The courts clearly do not perceive any necessary conflict between estoppel and contract. Presently, it seems, estoppel and contract will continue to operate as complementary, and not competing, regimes of personal obligations.

It is within this broad rubric that the doctrine of part performance will continue to exist. After having assessed the entire conduct of the parties, the court could well decide that the obligations of the parties should derive from a contractual relationship, even if that contract is putative, or has not even come into existence. A contractual relationship will be permitted to control the relationship of the parties in those instances where no obligations can be seen as deriving from any other source save the contractual relationship.[119] Here no equity can be seen as arising apart from that of a normal expectationary nature deriving from a contract. There will be no equity deriving from reliance damage. In such circumstances the doctrine of part performance will be applied to defeat any possible plea of the Statute (where there is inadequate written evidence) should the application of the Statute stand in the way of a solution which the court saw as rectifying an unconscionable situation or proscribing unconscionable conduct. This will sometimes involve striking down an alleged contract and in this respect orthodox part performance is still quite useful to the courts as a weapon to achieve the underlying policy objective.

So long as a statutory requirement of written evidence continues to exist alongside a coherent and well-recognised system of contract, the doctrine of part performance will continue to exist. Obviously part performance cannot revert back to being a mere appendage of contract law; as fulfilling no other function than providing evidence of a contract. It will continue, in the guise of orthodox theory, to fulfil such a function. But the doctrine, within itself, must be set upon a much wider basis. An estoppel-based version of the doctrine will clearly become more acceptable. This will be necessary if the courts are to continue applying the doctrine to achieve the objective of proscribing unconscionable conduct. Orthodox part performance theory, although useful towards this purpose, is not sufficient as it cannot, for example, deal with a situation where there are acts not in execution of the actual contract or which are not "unequivocally referable" to the alleged contract.

Estoppel could thus assume a role, alongside orthodox theory, as a basis of the doctrine. Alternately estoppel may be seen as a completely distinct ground of avoidance of the Statute. The American courts have long recognised estoppel (as well as part performance) as providing an exception to the Statute of Frauds. Thus:[120]

119 *Boutique Balmoral* v *Retail Holdings,* supra n 110; *Ogilvie* v *Ryan* [1976] 2 NSWLR 504; *Daulia Ltd* v *Four Millbank Nominees Ltd* [1978] Ch 231; *A G Hong Kong* v *Humphreys Estate (Queens Gardens) Ltd* [1987] 1 AC 114.

120 Per Steere C J in *Lyle* v *Munson* 181 NW 1002 (1921). See also Williston, *A Treatise on the Law of Contracts* (3rd ed 1960, 1988 supplement) s 533A; *Anderson on the Uniform Commercial Code* (3rd ed 1982) Vol 2, s 2-201: 233, 125.

> Part performance, while an essential in the test, does not in itself comprehend the whole doctrine of equitable relief in this class of cases. Misleading, fraudulent conduct by act or acquiescence is the underlying thought which moves the chancery court under the principle of equitable estoppel to deny resort to the Statute of Frauds as an instrument of fraud.

In American law a clear line of demarcation has been drawn between acts which are set upon the actual part performance of the contract and those which are based upon other conduct of the defendant (which is relevant to the contract) but which does not amount to actual part performance yet nonetheless still gives rise to 'unconscionable injury'. The rectification of these latter situations is regarded as within the province of estoppel rather than part performance. Part performance is recognised only in regard to situations involving land. This absolves American courts from the need (which arises under English law) of attempting to fit situations where there has been little actual part performance (but where unconscionable conduct is present) into orthodox part performance in order to grant relief to a deserving litigant.[121]

The operation of both part performance and estoppel (complementary to each other) as exceptions to the Statute would seem to provide for a situation which is more conceptually comfortable than that presently existing under English law. It could be argued that the ultimate aim of both part performance and estoppel in these situations is the same and that ultimate aim is the prevention of the Statute of Frauds from itself being turned into an instrument of fraud, that is an instrument of unconscionable conduct.

Viewed in this light both doctrines can be seen as contributing to the maintenance of the integrity of the Statute. If reliance upon the Statute is a privilege rather than a right and if the Statute strikes at procedure, rather than form, then estoppel is probably a better conceptual vehicle for carrying the substance of a factual situation (subject to the Statute of Frauds) into legal effect than orthodox part performance.

But there will be many situations where the court will perceive the obligations of the parties as extending well beyond any contractual relationship, notwithstanding a contract may exist, or have been intended by one of the parties. Here the courts will no doubt look to estoppel in order to impose obligations that do not derive from a contract. Such obligations arise from the interaction of the parties, and, as yet, the conduct giving rise to estoppel-based obligations is not well defined. The courts presently see one of the major uses of estoppel in the rectification of reliance damage. The future development of part performance could be affected by the further development of reliance protection as a separate head of liability in its own right. But such a jurisdiction would probably not cover all the situations which are presently covered by the doctrine of part performance.

It is a moot point how far obligations law can move away from common law contract. There is no doubt that the dividing line between obligations

121 Cf *Steadman,* supra n 1.

arising from estoppel and those arising from contract will need to be very clearly drawn in the near future. It could be assumed that once such a boundary is established the doctrine of part performance will be more secure.

Many problems are evident in the existing administration of these areas of law. As a doctrinal basis for either estoppel or part performance, the proscribing of unconsionable conduct is both highly indeterminate and judicially-subjective. It provides for a system of obligations which is largely beyond the control of the individual parties. Once an expectation has been raised, the representor virtually loses control of the situation. Whether or not that representation becomes binding will depend upon how the representee acts at some time in the future. It is submitted that the present administration of estoppel is not evenly balanced between the parties. Making out a satisfactory defence to an action based upon estoppel is extremely difficult in the present state of the law.[122] It appears likely that there could be some resiling from the present application of estoppel by the courts.

A likely future development could be the segmentation of estoppel into a series of rules designed to provide a test as to whether or not a particular situation is unconscionable, or whether conduct by one of the parties is unconscionable. This could include such rules as whether or not the defendant was "under a duty to disclose his own rights" or whether the defendant was the "proximate cause" of the plaintiff's loss.[123] It is conjectured that this, in turn, could lead to a reversion back to categorisations of estoppel, such as "estoppel by acquiescence" or "estoppel where there is a duty to disclose".[124] This could assist in limiting the scope of estoppel and inhibit its tendency to invade the territory of the doctrine of part performance.

122 Cf the probanda of Fry J supra n 34. The probanda were laid down to provide a clear guide as to when legal rights could be set aside in favour of a claimant in equity. They provided a very effective defence to an action in estoppel based upon the *Ramsden* v *Dyson* principle. It is not possible in the course of this short dissertation to spell out in detail all the potential problems associated with the current jurisdiction in estoppel. Reference could also be made to the highly diffused and uncertain manner in which liability is secured, that is by the sustaining of "detriment". This expression has never been defined and is very much at the discretion of the court in individual instances. The present state of estoppel means, in effect, that the equitable jurisdiction in the prevention of unconscionable conduct, or situation, is being applied directly by the court. A further problem is the vexed issue of granting legal effect to a mere indulgence.

123 Cf C N H Bagot "Equitable Estoppel and Contractual Obligations in the Light of *Waltons* v *Maher*" (1988) 62 ALJ 926, 936.

124 The idea of judicial guidelines to qualify the question of unconscionable conduct is not new. According to Sir Owen Dixon in *Grundt,* supra n 21 at 675-676: "The law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied . . . (the party) may be required to abide by the assumption . . . because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption . . ."