The New Law of Estoppel

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The author examines the High Court of Australia cases of Waltons Stores (Interstate) Ltd *v* Maher *and* Commonwealth of Australia *v* Verwayen. *She argues that the law of estoppel now will not permit any unconscionable departure by a promisor from a promise on which a promisee has relied to her detriment. There is now no requirement that the parties be in a pre-existing contractual relationship. Estoppel may be pleaded as a cause of action or as a defence to an action by the promisor asserting her strict legal rights. Estoppel operates to create an equity in the promisee and it is remedied by an order for the compensation for the detrimental reliance of the promisee.*

I INTRODUCTION

The recent High Court of Australia cases of *Waltons Stores (Interstate) Ltd* v *Maher*[1] and *Commonwealth of Australia* v *Verwayen*[2] mark a turning point in the law of estoppel. Estoppel has been set free from its traditional limitations. The doctrine, at its widest, is now one which will not permit an unconscionable departure by a promisor[3] from a promise, concerning the present or the future, on which a promisee has relied to his or her detriment.

The purpose of this paper is to provide lawyers with an understanding of the new estoppel and an appreciation of its potential. The paper proceeds in three parts, as follows:

i Part II places the discussion in context with an overview of the evolution of estoppel;

ii Part III provides a detailed analysis of the two High Court of Australia cases. The section draws out two conflicting approaches evident in the judgments and sets them in the context of basic understandings in the law of obligations; and

iii Part IV moves beyond the decided cases to begin the task of filling out the content of the new estoppel in the form of a practical framework for analysis.

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1 (1988) 76 ALR 513. The citation of this judgment will not be given hereafter.

2 (1990) 95 ALR 321. The citation of this judgment will not be given hereafter.

3 The new estoppel applies, of course, not only to promises but also to representations and statements of fact. For convenience, however, this paper uses the terminology "promisor", "promisee" and "promise" to indicate, in turn, the person who made the promise/representation/statement; the person to whom it was made and the promise/representation/statement itself.

II OVERVIEW: THE EVOLUTION OF ESTOPPEL

A *The Historical Formulation of Estoppel*

The law has long recognised the basic principle that someone who has acted to her detriment in reliance upon an assumption induced by another should in certain circumstances have a remedy at law. There may be no contract but the breach of the assumption gives rise to a perception of injustice. The law's response has been the development of a doctrine called "estoppel".

Estoppel has traditionally represented a number of conceptually and practically distinct doctrines:[4] the three main doctrines being estoppel by representation;[5] promissory estoppel;[6] and proprietary estoppel.[7] Each of these doctrines had its own subject matter, operation and limitations.

Estoppel by representation was outlined by Dixon J in *Thompson* v *Palmer*[8] as follows:

> The object of an estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment.

Triggered by an unjust departure from an assumption - the requirements for injustice being set down in a number of cases[9] - the operation of estoppel by representation was

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4 The complexities of the estoppel doctrines were many. See for further detail: DMJ Bennett "Equitable Estoppel and Related Estoppels" (1987) ALJ 540; Mark Dorney "The New Estoppel" (1991) 7 Australian Bar Review 19, 20-23; PD Finn "Equitable Estoppel" in PD Finn (ed) *Essays in Equity* (Sydney, Law Book Co, 1985); RP Meagher, WMC Gummow and JRF Lehane *Equity: Doctrines and Remedies* (2ed, Sydney, Butterworths, 1984), 392-418; and Spencer Bower and Turner *The Law Relating to Estoppel by Representation* (3ed, London, Butterworths, 1977).

5 Estoppel by representation was also, confusingly, known as estoppel *in pais*, estoppel by conduct and common law estoppel. Estoppel by representation operated in both law and equity, although the term is often used to refer only to its operation in law. The doctrine had the same characteristics in law and equity: *Pickard* v *Sears* (1837) 6 Ad & E 469; 112 ER 179.

6 Promissory estoppel is often incorrectly termed equitable estoppel. Equitable estoppel in fact comprised both the equitable operation of estoppel by representation; promissory estoppel, which operated only in equity; and proprietary estoppel.

7 This doctrine encompassed both what was earlier termed estoppel by acquiescence, the leading case of which was *Ramsden* v *Dyson* (1865) LR 1 HL 129, and what had always been called proprietary estoppel, the leading case of which was *Dillwyn* v *Llewelyn* (1862) 4 De GF & J 517.

8 (1933) 49 CLR 507, 547. See also *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641.

9 See in particular the five probanda in *Willmott* v *Barber* (1880) 15 Ch D 96. *Willmott* v *Barber* concerned estoppel by acquiescence or proprietary estoppel (above n8) but the probanda became used more widely in cases of estoppel by representation - see for example *Wham-O MFG Co* v *Lincoln Industries* [1984] 1 NZLR 641.

complex. First, it concerned only assumptions of present fact and did not extend to promises or statements about the future.[10] Secondly, the doctrine operated not to create a right in one party against the other but to provide an evidential basis for a cause of action; the assumption constituting the new state of affairs on which the legal relationship between the parties was to be ascertained.[11] Thirdly, the doctrine could only be pleaded if the parties were already in a legal relationship, such as contract. The representations could relate only to the modification or abrogation of rights already existent between the parties.

The result of these limitations was that estoppel could not be used as a cause of action, to enforce a representation made by one party to another and to create new rights where none had existed before. Further, the effect of its operation was to compel the promisor to adhere to the assumption as the new basis for the relationship between the parties; the remedy was not tied to compensation for detriment suffered as a result of reliance.

Promissory estoppel was given its modern expression in *Central London Property Trust Ltd* v *High Trees House Ltd*[12] where Lord Denning proposed that "a promise intended to be binding, intended to be acted upon and in fact acted on, is binding."[13] Promissory estoppel was a creation of equity and its major advance was that it applied to statements or promises about future conduct.[14] It operated not as a rule of evidence but as an "equity" which bound the conscience of the person estopped[15] and the remedy varied, therefore, with the circumstances of the case.[16]

Promissory estoppel retained, however, the other limitations of estoppel by representation. The requirement of the pre-existing legal relationship continued and promissory estoppel could be used only as a "defensive equity", as a response to the other party's insistence on their strict legal rights.[17]

It was only in proprietary estoppel that the limitations surrounding estoppel by representation and promissory estoppel were lifted. Proprietary estoppel operated on the same basis as promissory estoppel; it covered representations as to future conduct; it could be used as a sword and did not require a pre-existing contractual relationship. The

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10 This was decided with regard to equity in *Jorden* v *Money* (1854) 5 HLC 185; and affirmed in law in *Yorkshire Insurance Co Ltd* v *Craine* [1922] 2 AC 541.

11 This was established in *Seton* v *Lafone* (1887) 19 QBD 68; *Low* v *Bouverie* [1891] 3 Ch 86; *Re Ottos Kopje Diamond Mines, Ltd* [1893] 1 Ch 618.

12 [1947] 1 KB 130. Lord Denning found its parentage primarily in the cases of *Hughes* v *Metropolitan Railway Co.* (1877) 2 App Case 439 and *Birmingham and District Land Co* v *London and NorthWestern Rail Co.* (1888) 40 Ch D 268. See in particular for an overview of the doctrine, Spencer Bower and Turner, above n4, 367-401.

13 Above n12, 134.

14 See *Legione* v *Hateley* (1983) 46 ALR 1.

15 Brennan J wrote that "[p]erhaps equitable estoppel is more accurately described as an equity created by estoppel" (*Waltons Stores*, 532).

16 See PV Baker and P St J Lagan *Snell's Principles of Equity* (28ed, London, Sweet and Maxwell, 1982), 562.

17 *Combe* v *Combe* [1951] 2 KB 215.

doctrine was limited, however, to promises concerning land and its application was tightly defined.[18]

The combined effect of these doctrines was the exclusion of many promises from estoppel's ambit. The only promisees protected by the law were those in pre-existing legal relationships or whose assumptions involved land. Promisees who had relied on a gratuitous promise or a statement made in negotiations towards a legal relationship were, unless they could bring their claims within existing doctrines of tort or contract,[19] left without remedy. These limitations on traditional estoppel were, however, deliberate. The major constraint on traditional estoppel was the concern that an expansive estoppel would outflank the rules of contract: "it would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently relying on it".[20] The limitations may have appeared arbitrary but they ensured that estoppel did not become an alternative method of promise enforcement.

B The New Estoppel

In the late 1970's and early 1980's, traditional understandings began to be questioned and the English Court of Appeal found an underlying theme - "unconscionability" - in what had previously been conceived as the distinct doctrines of estoppel.[21] The questioning came to its climax, however, in the High Court of Australia.[22] In the two seminal cases of *Waltons Stores* and *Verwayen*, estoppel was released from its traditional limitations and set upon the new basis of unconscionability.[23] The court found the essence of the new doctrine in three key concepts.

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18 See the test for proprietary estoppel laid down by Lord Kingsdown in *Ramsden* v *Dyson*, above n7, 170.

19 For example, a claim for misrepresentation or a collateral contract.

20 *Commonwealth* v *Scituate Savings Bank* (1884) 137 Mass 301, 302 (Holmes J).

21 See *Ajayi* v *RT Briscoe (Nigeria) Ltd* [1964]1 WLR 1326; *Ward* v *Kirkland* [1967] Ch 194; *Crabb* v *Arun District Council* [1976] Ch 179; *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] QB 84; *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] QB 133. See also the later case *Attorney-General of Hong Kong* v *Humphreys Estate Ltd* [1987] 1 AC 114.

22 The New Zealand courts have accepted the general movement from the traditional estoppel towards a more generalised obligation but have not yet had an opportunity to fully explore it. See in particular, *Burbery Finance Ltd* v *Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA); *Gillies* v *Keogh* [1989] 2 NZLR 327 (CA); *Stratulatos* v *Stratulatos* [1988] 2 NZLR 424 (HC).

23 The court "comes to the relief of the plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption" (*Waltons Stores*, 524 (Mason CJ)). The court traced this principle through a long line of authority, following on from the English Court of Appeal (above n21) and reaching back to their own earlier decisions in *Thompson* v *Palmer* and *Grundt* v *Great Boulder Pty Gold Mines Ltd,* above n8. Other cases mentioned by the court include *Hughes* v *Metropolitan Railway Co,* above n12; *Dillwyn* v *Llewelyn* , above n7; *Olsson* v *Dyson* (1969) 120 CLR 365; *Chalmers* v *Pardoe* [1963] 1 WLR 677.

First, the basis of estoppel is in unconscionable conduct[24] and its genesis is in equitable principle. The court, as a court of conscience, responds to the justice of the situation and imposes an obligation of good faith and fair dealing on a promisor even though no legal obligation has been assumed. A remedy is granted where it would be unconscionable in the circumstances for a promisor to insist on his or her purely legal rights.

Secondly, in terms of structure, the new estoppel forms, on the most far-reaching conception, a single doctrine: the three traditional doctrines simply collapse into one.[25] As Mason CJ and Deane J agreed in *Verwayen*, there can be no acceptable reason why, in a modern Judicature Act system, there should continue to be a distinction between the operation of a doctrine at law and in equity, with respect to land or any other subject-matter.[26] Such distinctions "[confound] principle and common sense"[27] and represent only the arbitrary and complex anomalies of an historical case-law development.[28]

The third key aspect of the decisions in *Waltons Stores* and *Verwayen* is the unanimous rejection of the old limitations.[29] Estoppel can now be used not only as a shield but as a sword, a cause of action, and the promisee can thus enforce an estoppel

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24 This basic principle links estoppel developments with other developments in the law of obligations. See the High Court of Australia judgments in *Stern* v *McArthur* (1988) 62 ALJR 588 (relief against forfeiture); *Commercial Bank* v *Amadio* (1983) 151 CLR 447; 46 ALR 402 (unconscionable dealings); *Muschinski* v *Dodds* (1986) 160 CLR 583 (constructive trust); *Baumgartner* v *Baumgartner* (1988) 62 ALJR 29.

25 The unified approach has not, however, been embraced by all the members of the High Court of Australia. In *Verwayen,* Brennan J does not mention the issue and Dawson and McHugh JJ expressly reserve it (363 (Dawson J); 396 (McHughJ)). These judges continue with a two-fold classification - between estoppel by representation (operating in law and with its old limitations intact) and the new equitable estoppel (comprising the equitable operation of common law estoppel, promissory and proprietary estoppel, operating in equity without the old limitations). However, given the logic of the unified doctrine, it seems likely that universal acceptance will follow. This paper proceeds on that assumption.

26 331-333 (Mason CJ), 353 (Deane J). This, of course, involved a refusal to follow *Jorden* v *Money,* above n10. The process towards this conclusion was a long one: the first intimations were made by both Mason and Deane JJ in *Legione* v *Hateley*, above n14. Deane J stated that his "present inclination" was to accept such a conclusion in *Waltons Stores,* 555-560 and he did so in *Foran* v *Wight* (1989) 88 ALR 413, 449. Mason CJ raised the possibility in *Waltons Stores*, 520; decided on a concurrent jurisdiction in *Foran* v *Wight*, 430-431 and accepted fusion in *Verwayen.*

27 *Verwayen*, 333 (Mason CJ).

28 Deane J put it thus (*Waltons Stores*, 556):

> To ignore the substantive effect of the interaction of doctrines of law and equity within that fused system in which unity, rather than conflict, of principle is now to be assumed is, however, unduly to preserve the importance of past separation and continuing distinctness as a barrier against the orderly development of a simplified and unified legal system which fusion was intended to advance.

29 For those judges not supporting the overarching doctrine, the limitations that have been stripped are from equitable estoppel.

outside an existing legal relationship. There is now no distinction necessary between statements of fact and law,[30] present and future, whether concerning land or not.[31]

The change in estoppel must not be under-estimated: it is an enormous expansion. Estoppel's sphere of operation has become such that its future significance in the law of obligations is guaranteed. The substantive effect of the new doctrine is most vividly illustrated by the decisions in *Waltons Stores* and *Verwayen.*

Waltons Stores involved negotiations between a retail company, Waltons, and land developers, a Mr and Mrs Maher, for the construction and lease of a store on land owned by the Mahers. Negotiations were urgent: the building had to be completed in a strict time frame. On 7 November 1983, the Mahers' solicitor informed Waltons' solicitor that agreement would have to be concluded "within the next day or two". Waltons' solicitor then sent the draft lease, which had been agreed by the parties but had some minor amendments made by agreement of the solicitors, to the Mahers' solicitor. Waltons' solicitors believed that their clients would approve the amendments and undertook to let the Mahers' solicitor know the next day if any amendments were not agreed. No objection was ever made and the Mahers' solicitor sent back the executed documents to Waltons' solicitor "by way of exchange". Waltons never completed the exchange[32] but the Mahers proceeded with construction, to Waltons' knowledge. On 19 January 1984 Waltons told the Mahers that they believed there was no contract.

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30 There had been a distinction sometimes drawn between assumptions of fact and law. This was finally rejected as "arid technicality" in *Foran* v *Wight,* above n26, 448 (Deane J) and *Verwayen,* 333 (Mason CJ); 356 (Deane J).

31 *Waltons Stores* 521-522 (Mason CJ/Wilson J); 539-540 (Brennan J); 557-561 (Deane J); *Verwayen*, 333 (Mason CJ); 355-357 (Deane J). There is, however, an essential distinction between a representation of fact and one of opinion. As Deane J pointed out in *Foran* v *Wight*, above n28, 449: "any estoppel founded upon the representation [of opinion] will ordinarily be of no use to the representee since it will extend no further than precluding a denial that the represented opinion was truly held."

32 This exchange procedure represented a common conveyancing practice in New South Wales and caused considerable difficulties in the case. (It should be noted that essentially the same practice with regard to land usually applies in New Zealand - see *Carruthers* v *Whitaker* [1975] 2 NZLR 667.) The majority - Mason CJ and Wilson J (in a joint judgment) and Brennan J - found that in view of the procedure, it was doubtful whether the Mahers reasonably believed that, without receipt of the documents executed by Waltons, there was a binding contractual arrangement. The assumption made by the Mahers was only that a binding contract *would come* into existence and that exchange *would be* completed - a case of promissory estoppel.

The minority - Deane and Gaudron JJ - found that in the context of the procedure, the Mahers believed and were entitled to believe that there *was* a binding agreement and that physical exchange was a formality. This belief of the Mahers was found to exist as a matter of fact by both the court of first instance and the Court of Appeal on a rehearing. Deane J's explanation of what are somewhat confused judgments makes this quite clear (545-553). The relevant assumption was, therefore, one of *existing* fact and the case was decided on the basis of estoppel by representation. On Deane J's analysis of the facts, it is unclear why a contract was not found, particularly as Deane

Verwayen concerned a Royal Australian naval officer injured in a collision at sea in 1964. Because of the state of negligence law at the time, Verwayen did not sue. Later cases, however, led Verwayen to commence proceedings against the Commonwealth in November 1984. He was substantially out of time. The Commonwealth did not plead the Limitation of Actions Act 1958 and stated repeatedly both before and after the commencement of proceedings that it would not do so. In November 1985, however, the Crown reconsidered, obtained leave to amend its pleadings and pleaded the statute in its defence at the May 1986 trial.

We see in both of these cases an attempt to plead as a cause of action, an assumption of future fact made outside a pre-existing legal relationship[33] either in pre-contractual negotiations or arising out of a bare promise. On the traditional formulation, there could be no estoppel. The High Court of Australia, however, responded to what it felt was a clear injustice and gave a remedy to the plaintiffs: in both *Waltons Stores* and *Verwayen,* responsibility for the representation was upheld.[34]

C *Conclusion*

The High Court of Australia has presented us with a new species of obligation, a new means of responding to the injustice of a situation where one party has relied on an assumption induced by another. The court did not provide, however, a unified conception of the scope of the new obligation. The decisions in *Waltons Stores* and *Verwayen* reveal a fundamental difference between the approach of Mason CJ and Brennan J, on the one hand, and Deane J, on the other, concerning the purpose and place of the new estoppel.[35] An analysis of these conflicting approaches forms the focus of the next part.

J considered that the writing requirement of s54A of the Conveyancing Act 1919 (NSW) could be overcome by the fact of part performance.

It may be noted here that Brennan J rejected part performance on the grounds that Maher's acts were "not unequivocally and in their nature referable to an agreement for a lease of the Maher's land"(545). This would seem to be an unduly restrictive application of the doctrine, particularly as the court found for the purposes of estoppel that Waltons Stores knew that the Mahers had commenced work and must have known that such action was in reliance on the assumption that a lease would be entered into (542).

33 In *Verwayen,* there did exist the legal relationship of plaintiff and defendant. It was, therefore, possible to bring the analysis on the basis of existing law as involving the Commonwealth abrogating its rights as defendant. The case was not, however, decided on this limited basis and contains much more wide-ranging statements of principle.

34 In *Waltons Stores,* despite the split as to categorisation of the estoppel (above n25), all 5 judges decided on the basis of estoppel. In *Verwayen,* the decision was again split: Deane, Dawson, Gaudron and Toohey JJ enforced the promise, the first three on the basis of estoppel and Toohey J for waiver; Mason CJ, Brennan and McHugh JJ found an estoppel but remedied it by an award of costs only.

35 The other High Court of Australia judges seem to adopt versions of the main approaches and these will be mentioned when necessary.

III ALTERNATIVE APPROACHES

This part provides an outline of the two main approaches to the new estoppel developed in the High Court of Australia.[36]

A The Mason/Brennan Approach

The Mason/Brennan approach stands in the High Court of Australia as the majority approach to estoppel.[37]

1 Operation

The Mason/Brennan approach sees the new estoppel as operating in the same way as promissory and proprietary estoppel, as a cause of action or source of rights for the promisee. The estoppel, triggered by unconscionable conduct, creates an equity in the plaintiff which must be satisfied by the promisor. The extent of the equity, and, therefore, what is necessary to satisfy it, responds to the particular circumstances of the case: "in moulding its decree, the court ... goes no further than is necessary to prevent unconscionable conduct".[38] What constitutes that unconscionable conduct is, therefore, crucial.

2 Unconscionability

The typical estoppel fact situation involves a non-contractual promise made by one party to another on which that other acts in reliance. The breach of that promise will lead to detriment for the promisee as a result of the actual reliance made. What is the unconscionable conduct?[39]

The Mason/Brennan approach makes it clear that the breach of the promise is not in itself unconscionable: "failure to fulfil a promise does not of itself amount to unconscionable conduct ... [s]omething more [is] required."[40] Breach of promise per se

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36 The fullest exposition of the approaches was in *Verwayen* but there is also important analysis in the earlier judgments in *Waltons Stores* and to a lesser extent in *Foran* v *Wight* (above n16) and the earlier case of *Legione* v *Hateley* (above n14).

37 The approach was advanced in *Waltons Stores* by three of the five judges: Mason CJ and Wilson J and Brennan J. In *Verwayen*, it was supported by five of the six judges who decided on the basis of estoppel - Mason CJ, Brennan J, McHugh J, Dawson J and Gaudron J - but was misapplied by Dawson J and Gaudron J who gave the remedy of the Deane approach.

38 *Waltons Stores*, 535 (Brennan J).

39 It should be noted that, depending on the existence of other factors, the promisee may have an alternative remedy in tort or restitution.

40 *Waltons Stores*, 525 (Mason CJ and Wilson J). See also Mason CJ in *Verwayen*, 335: "The breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence or remedy the consequent loss. In the same way with estoppel, something more than a broken promise is required." See generally CNH Bagot "Equitable Estoppel and Contractual Obligations in the Light of *Waltons* v *Maher*" (1988) 62 ALJ 926, 933.

is for contract alone; it is not the responsibility of the law of estoppel.[41] The specific concern of the estoppel obligation is rather with the detriment that will result from a breach of such a promise - the actual effect of the breach on the promisee.

Unconscionable conduct will occur, therefore, where a promisee suffers detriment in reliance[42] upon another when that other has a responsibility to prevent that occurring. The factors establishing such a relationship of responsibility may be given at this stage as "the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party".[43]

The Mason/Brennan approach, therefore, takes "unconscionability" as its starting point but goes further to define its elements which, in practice, form the basis for analysis.

3 Remedy

The Mason/Brennan approach establishes a close connection between the wrong and the remedy. The unconscionable conduct is the suffering of detriment in reliance upon the promise and the remedy is compensation for that detriment.[44] The key idea is proportionality; as Mason CJ emphasises, the court must ensure that:[45]

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41 See Mason CJ's comments that "equity has set its face against the enforcement of [voluntary] promises and representations as such ... equitable estoppel has its basis in unconscionable conduct, rather than the making good of representations" (*Waltons Stores,* 524).

42 It is important to emphasise that the detriment must actually be suffered *in reliance* upon the assumption and would not have been occasioned anyway. See, for example *Milchas Investments Pty Ltd* v *Larkin* (1989) ATPR 40-956 where there was an alleged promise by the plaintiff to sell a property to the defenbdant. The plaintiff claimed to have suffered detriment in reliance upon this promise by passing up an opportunity tio buy another property. The court found, however, that this decisuion to pass up wasmade *after* he was told that his assumption was invalid. See also *Osborne Park Co-operative Society Limited* v *Wilden Pty Ltd* (1989) 2 WAR 77 where the court found that the action alleged to be in reliance upon the promise to extend the lease would have been taken even if the promise had not been made and *Valbirn Pty Ltd* v *Powprop Pty Ltd* [1991] 1 Qd R 295 where it was found that "the appellant was extremely anxious to enter into a lease with the respondent , and was 'prepared to risk the expense of the alterations in the hope that it might achieve the result it wanted' ".

43 *Waltons Stores*, 525 (Mason CJ and Wilson J). This relationship of responsibility is considered in detail in Part IV below.

44 This approach removes the difficulties had under traditional estoppel in ascertaining what was sufficient detriment to establish the estoppel - see *Je Matiendrai* v *Quaglia* (1981) 26 SASR 107. Here, there is no separate requirement of sufficiency; the promisee is only compensated for that detriment actually suffered.

45 *Verwayen*, 333 (Mason CJ).

> there [is] a proportionality between the remedy and the detriment which it is [the law's] purpose to avoid. It would be wholly inequitable and unjust to insist on a disproportionate making good of the relevant assumption.

Remedial options include damages; an injunction to restrain the exercise of legal rights either absolutely or on condition; and the giving of an equitable lien on property for the expenditure which a party has made on it.[46] The court may also suspend the promisor's enforcement of strict legal rights for a period in order to give the promisee time to resume his or her position.[47] Given the proportionality principle, however, it is only in exceptional cases that the court will order that the party estopped be held to the assumption created. Mason CJ suggests that reliance for an extended period, reliance which has resulted in detriment which is substantial and irreversible, or reliance which cannot be satisfactorily compensated or remedied may make fulfilment of the assumption the only effective means of satisfying the promisor's equity.[48]

The conception of detriment is, therefore, critical to the analysis. The Mason/Brennan approach makes a key distinction between "broad" or "hypothetical" detriment and "narrow" or "relevant detriment".[49] As Mason CJ stated in *Verwayen*:[50]

> When a person relies upon the correctness of an assumption which is subsequently denied by the party who has induced the making of the assumption, two distinct types of detriment may be caused. In a broad sense, there is the detriment which would result from the denial of the correctness of the assumption upon which the person has relied. In a narrower sense, there is the detriment which the person has suffered as a result of his reliance upon the correctness of the assumption.

The broad detriment occasioned in a situation where a promisor departs from a promise is the promisee's loss of the benefit of the promise, the loss of the chance.[51]

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46 See Brennan J in *Waltons Stores* at 535 quoting *Snell's Principles of Equity* above n16, 562. See also *Stratulatos*, above n22, 438.

47 See for example *Hughes* v *Metropolitan Railway Co.* , above n12.

48 *Verwayen*, 335. It will be important for the Mason/Brennan approach, however, that this list of factors does not allow the court a convenient "escape route". Even where detriment is irreversible and cannot be compensated in monetary terms, the promisee should only receive the benefit of the assumption where its value is proportionate to the amount of detriment suffered - anything else would be inequitable. Subsequent cases have, however, fulfilled the assumption in situations where compensation would be merely "difficult" to assess - see Priestley J's minority judgment in *Austotel Pty Ltd* v *Franklins SelfServe Pty Ltd* (1989) 16 NSWLR 582, 616. Others do not appear to appreciate that that the basic remedy is compensation for detrimental reliance: *Marvon Pty Ltd* v *Yulara Development Co Ltd* (1989) 98 FLR 348; *Collin* v *Holden* [1989] VR 510; *Kurtovic* v *Minister for Immigration, Local Government and Ethnic Affairs* (1988) 86 ALR 99; *Dowell* v *Tower Corporation* unreported, 4 September 1990, High Court Christchurch Registry CP 54/86.

49 *Verwayen*, 334-335 (Mason CJ); 345 (Brennan J).

50 At 334.

51 "Those 'detriments' [flow] from the defendant's failure to fulfil its promise, but not from any act done or omission made by the plaintiff in reliance upon the making of the promise. They are not relevant detriments": *Verwayen*, 345 (Brennan J).

Such detriment is certainly necessary to found the estoppel - "it would be strange to grant relief if such detriment were absent"[52] - but does not itself establish the unconscionable conduct or provide the basis for remedy. The detriment with which estoppel is concerned is that "occasioned by actual reliance on a promise, that is, detriment occasioned by acting or abstaining from acting on the faith of a promise which is not fulfilled."[53] The plaintiff must have altered his or her position on the basis of the assumption and be in a position to suffer actual detriment if the assumption is not fulfilled.[54]

The Mason/Brennan approach to remedy is thus consistent with their conception of the purpose of estoppel. The trigger is detrimental reliance; the remedy is compensation for that reliance.[55]

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52 *Verwayen*, 335 (Mason CJ).

53 *Verwayen*, 345 (Brennan J).

54 A point which has caused difficulty concerns the nature of the detriment suffered. In *Verwayen*, Brennan J appeared to doubt whether the plaintiff's ill-health could constitute a specific act in reliance - that is, a narrow detriment - or whether it could only be a broad detriment flowing from the failure to fulfil the promise. He wrote: "it was not suggested that any exacerbation of the plaintiff's ill-health flowed from some act done...in reliance on the defendant's promise..." (345). This reluctance has since been echoed in comments which indicate that relevant detriment must result, in the natural chain of causation, in actual or temporal damage, that is loss of money or moneys worth capable of quantification and assessment: *Osborne Park*, above n42, 101. This discounting of certain types of detriment seems wrong. If a sufficient causal link can be made between reliance on the assumption and mental suffering, there would appear to be no reason why the law should not give compensate for mental distress and damages on that basis have now been given in contract (*Rowlands* v *Collow* [1992] 1 NZLR 178) and equity (*Mouat* v *Clark Boyce* [1992] 2 NZLR 559) on the same basis as other damages, subject to the principle of remoteness. See, however, *Baltic Shipping Co* v *Dillon* (1991) 22 NSWLR 1.

55 The Mason/Brennan approach is clearly formulated in this way in both *Waltons Stores* and *Verwayen*. The difficulty, however, is that in *Waltons Stores*, the judges do not appear to have actually applied their own approach. In that case, the Mahers incurred considerable costs in reliance upon their understanding that Waltons would complete the contract. There was no attempt made in the judgments, however, to quantify this detriment and Mason CJ and Wilson J and Brennan J, without discussion, awarded damages in lieu of specific performance. The Mahers were effectively compensated not for their actual reliance but for the breach of the promise. Brennan J, in *Verwayen*, attempted to explain the decision: "The remedy is not designed to enforce the promise although, in some situations (of which *Waltons Stores* v *Maher* affords an example), the minimum equity will not be satisfied by anything short of enforcing the promise". With respect, this reasoning is dubious - why was *Waltons Stores* an "exceptional case"? Perhaps the only way to explain the decision on remedy is to recognise that *Waltons Stores* should have been decided in contract (see above n39) and, for this reason, it *did* appear just that the Mahers be given the benefit of the promise. It may have been this factor which led to the misapplication of the approach. The misapplication is certainly of concern but it is important to recognise that, in the later case of *Verwayen*, both Mason CJ and Brennan J did apply their approach and, further, placed considerable emphasis on it as the proper approach to remedy.

4 *The place of estoppel*

The major concern surrounding the new estoppel has been that "a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises".[56] The concern is addressed by the Mason/Brennan approach as follows:[57]

> If the object of the principle of equitable estoppel in its application to promises were regarded as their enforcement rather than the prevention of detriment flowing from reliance on promises, the courts would be constrained to limit the application of the principles of equitable estoppel in order to avoid the investing of a non-contractual promise with the legal effect of a contractual promise .... [T]he better solution of the problem is [however] reached by identifying the unconscionable conduct which gives rise to the equity as the leaving of another to suffer detriment occasioned by the conduct of the party against whom the equity is raised. Then the object of the principle can be seen to be the avoidance of that detriment and the satisfaction of the equity calls for the enforcement of a promise only as a means of avoiding the detriment and only to the extent necessary to achieve that object. So regarded, equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side-wind. Equitable estoppel complements the tortious remedies of damages for negligent misstatement and fraud and enhances the remedies available to a party who acts or abstains from acting in reliance on what another induces him to believe.

The new estoppel is an independent obligation with its own discrete purpose. It is not an alternative to contract but a completely separate obligation. In certain exceptional circumstances, estoppel and contract may operate to achieve the same result but there remain significant differences between them.[58]

5 *Conclusion*

The new estoppel presented by Mason CJ and Brennan J is a defined and confined obligation. It has a clear purpose in its desire to prevent the suffering of detriment in reliance upon a breached assumption and occupies a specific place in the law of obligations.

B *The Deane Approach*

The Deane approach is a minority approach which has not been concurred in by any other judge or followed in subsequent cases.[59] It is important, however, in the wider questions which it raises with respect to the law of obligations.

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56 *Waltons Stores*, 538 (Brennan J). See above n 23.

57 See *Waltons Stores*, 540 (Brennan J). See also 521 (Mason CJ/Wilson J).

58 See *Waltons Stores*, 539 (Brennan J).

59 Although the result reached on the approach has been either the unanimous or majority result in all cases so far, see above n42.

1 Operation

Deane J's estoppel operates on the basis of estoppel by representation.[60] Estoppel does not, by itself, constitute a cause of action but it is used evidentially as the basis for an action. This operation is demonstrated by Deane J using the example of A, the owner of Whiteacre, who promises, in circumstances giving rise to an estoppel, to transfer ownership of Whiteacre to B.[61] B cannot enforce the promise directly but can sue A for breach of trust: "a promise by A (later broken) to transfer Whiteacre to B is equivalent to promising that a trust will come into existence vesting in B the beneficial ownership of Whiteacre".[62] The new estoppel operates to compel the parties to adhere to the assumption that underlies their dealings and on which the cause of action may be based: B gets the benefit of A's promise to transfer Whiteacre.[63]

The remedy given for the new estoppel is the fulfilment of the assumption and the establishment of the promise as the evidential basis for a cause of action. "The party who acted to his detriment", commented Dawson J with regard to estoppel by representation in *Verwayen*, is "in effect, given the benefit of the assumption. It is all or nothing".[64] The Deane approach does not involve, therefore, the same tight link as the Mason/Brennan approach between right and remedy, detriment and compensation.

The operation of estoppel by representation is, however, modified to some extent by Deane J in *Verwayen*. Its operation becomes prima facie only: the court is able to grant a lesser form of relief where fulfilment would be "inequitably harsh".[65] For example, Deane J gives the example of holding the promisor to a promise concerning a million dollar piece of land, on which the promisee has relied only to the extent of building a hundred dollar shed, as constituting a disproportionate remedy. It may be doubted, however, whether this variation is more than reassuring rhetoric: Deane J did not even

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60 *Waltons Stores*, 554-550; *Verwayen*, 346-353. Deane J reaches this conclusion by arguing that promissory estoppel is an emanation of estoppel by conduct. Deane J supports this approach not on principle but on a re-interpretation of the case law. This is problematic. First, it is a unique interpretation of the cases, receiving no support elsewhere. Secondly, the development of the new estoppel has clearly rejected formalism, rigid rules and strict adherence to precedent in favour of a return to principle. To be persuasive, therefore, Deane J must support his analysis on principle - as Mason CJ and Brennan J do the alternative approach (Mason CJ, *Verwayen*, 333). Deane J does not do this.

61 *Verwayen*, 351.

62 B Morgan "Estoppel and Gratuitous Promises: A New Liability" (1990) 13 Syd LR 211, 215.

63 This operation is criticised by Morgan as "a tortuous and circuitous route to a destination more easily reached by accepting that estoppel independently generates rights" (above n62). It is submitted that the artificiality of the operation arises from Deane J's expansion of estoppel by representation to include parties not in pre-existing legal relationships whose representations relate to the modification of the rights between them. In such a situation, the Deane approach is forced to create a relationship between the parties - such as trustee/beneficiary - in order for there to be an "evidential basis" for the cause of action.

64 At 363.

65 The onus will be on the defendant.

stop to consider whether fulfilling Verwayen's assumption and exposing the Commonwealth to a potentially very large negligence claim might not be in disproportion to Verwayen's legal fees. Further, as we see in the next section, the Deane approach does not specify exactly what conduct triggers a finding of unconscionability. The court has no basis, therefore, on which to exercise its discretion, to quantify how much injustice has been done in a particular case and thus how much compensation is just.

The operation of the new estoppel is, therefore, as a modified form of estoppel by representation.

2 *Unconscionability*

The Mason/Brennan approach defines unconscionabilty in specific terms, as the occasioning of detrimental reliance in a situation for which the promisor had responsibility. The Deane approach, in contrast, refuses to confine the concept in this way. There may be list of typical factors and "main but not exhaustive" categories but the ultimate test remains whether the court's conscience is provoked by the breach of the assumption in the instant case. "The most that can be said", wrote Deane J in *Verwayen,* "is that 'unconscionable' should be understood as referring to what one party 'ought not , in conscience, as between [the parties] to be allowed to do'".[66] The question of whether conduct is unconscionable in particular circumstances involves, therefore, " 'a real process of consideration and judgment' in which the ordinary processes of legal reasoning by induction and deduction from settled rules and decided cases are applicable but are likely to be inadequate to exclude an element of value judgment in a borderline case such as the present".[67]

The focus of Deane J's estoppel is clearly not avoidance of detriment. Detrimental reliance is not the key element in unconscionable conduct. It is a factor which may or may not be present. Further, Deane J makes no distinction between broad and narrow detriment. The purpose of the new estoppel is not merely to allow the court to address a situation of detrimental reliance but to give it the ability to intervene in any situation where a breach of an assumption appears to be unjust.

3 *The place of estoppel*

The new estoppel is, on the Deane approach, a broad and flexible obligation, an all-purpose means whereby the courts can achieve justice in the individual case. Estoppel serves as an auxiliary jurisdiction.[68] The movement is back, therefore, to equity's

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66 At 353. Deane J also quotes Lord Scarman in *National Westminster Bank plc* v *Morgan* [1985] AC 686, 709: definition "is a poor instrument when used to determine whether a transaction is or is not unconscionable...".

67 *Verwayen,* 353-354.

68 The term "auxiliary jurisdiction" is used to refer to the operation of equity as correcting the strict operation of the common law. See Meagher, Gummow and Lehane, above n5, 3:

equitable origins: "Equity comes in, true to form, to mitigate the rigours of strict law".[69] The new estoppel may fulfil an assumption even if contract will not.

This conception of the place of estoppel has serious implications for the issue of estoppel's relationship with contract. The object of estoppel in relation to promises might not be their enforcement but that is its usual effect. Deane J's estoppel may be said to justify the fears of those who saw the expansion of estoppel as entailing the investing of non-contractual promises with the legal effect of contractual ones.[70] Deane J, however, does not see it as a problem. He states in *Waltons Stores:*[71]

> Nor would the extension of the doctrine of estoppel to that category of case undermine the general position of the doctrine of consideration in the fields in which it presently holds prima facie sway. To the contrary, the extension of the existing applicability of estoppel by conduct in those fields to that category of case would, if anything, strengthen the overall position of the doctrine of consideration by overcoming its unjust operation in special circumstances with which it is inadequate to deal.

Where contract is unable to deal with situations such as gratuitous promises and pre-contractual negotiations, estoppel may be an alternative means of promise enforcement.[72]

C Evaluation

The High Court of Australia is divided over the purpose and place of the new estoppel. On a practical level, this is significant. Although the judges may have reached the same conclusion in *Walton Stores*, the importance of the division became only too apparant in *Verwayen*. On the Mason/Brennan approach, Verwayen's detrimental reliance was remedied by an order for costs; whereas the Deane approach gave an order estopping the Commonwealth from disputing its liability to Verwayen. The reality of the difference in approach was a substantial amount of money.

On a theoretical level, the division reflects a fundamentally different conception of the purpose and place of the new estoppel. The Mason/Brennan approach sees the new estoppel as an independent obligation, complementing the existing obligations of contract, tort and restitution. Its purpose is specific: to address the injustice in a situation where a promisee relies to their detriment on an assumption induced by another. It operates to impose an obligation on people in their dealings with others,

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> Equity can be described but not defined. It is the body of law developed by the Court of Chancery in England before 1873. Its justification was that it corrected, implemented and amended the common law. It softened and modified many of the injustices inherent in common law, and provided remedies where at law they were either inadequate or non-existent.

69 *Crabb* v *Arun District Council* [1976] Ch 179, 187.

70 Above n20.

71 At 560-561.

72 See B Mescher "Promise Enforcement by Common Law or Equity" (1990) 64 ALJ 536, 547.

holding them accountable for detriment occasioned in circumstances in which they have a responsibility. The Deane approach is an altogether wider analysis. The law's intervention is triggered by unconscionable conduct - conduct which is unfair, unjust or affronts minimum standards of fair dealing - and it operates to compel the promisor to fulfil the promise.The new estoppel functions, not in a confined territory, but as a back-up doctrine, across the law of obligations.

The High Court of Australia division raises issues which lie at the heart of the law of obligations and which are the subject of considerable controversy. There is, unfortunately, no space to go into that debate here.[73] It may suffice to say, however, that the Deane approach challenges understandings basic to our conception of the law of obligations. Whilst the basis of the challenge can be discerned in movements within the law,[74] there is a strong argument that those movements have not yet come together in a way which legitimises a full-scale upheaval of the law of obligations. In that absence of that culmination, the Deane approach must be rejected as lacking the coherence with generally accepted principle that the Mason/Brennan approach demonstrates.[75]

It is submitted, therefore, that the Mason/Brennan approach is the preferable alternative of the two approaches to estoppel seen in the High Court of Australia. It is also, as has been noted[76], the majoity approach. It is, therefore, on the basis of this conception of the purpose and place of estoppel that the paper proceeds.

III FILLING OUT THE NEW ESTOPPEL

A Introduction

The Mason/Brennan conception of the new estoppel has provided us with an outline only of the new estoppel. We are now in a position from which to begin to define its

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73 See, however, JM Munro "The New Estoppel", unpublished paper on file at Victoria University of Wellington; FMB Reynolds "Contract: Recent Developments" [1990] NZLJ 393; PD Finn "Australian Developments in Common and Commercial Law" (1990) JBL 265, 273 and "Commerce, the Common Law and Morality" (1989) 17 Melb ULR 87; Sir Frank Brennan "Opening Address" (1990) 3 Journal of Contract Law 85; Sir Anthony Mason "Themes and Prospects" in PD Finn (ed) *Essays in Equity* (1985) 242; Sir Robin Cooke "The New Zealand National Legal Identity" [1987] 3 Cant LR 171; JC Brady "Judicial Pragmatism and the Search for Justice Inter Partes" (1986) 21 Ir Jur 47; CJ Rossiter and M Stone "The Chancellor's New Shoe" (1988) 11 UNSWLJ 11, 23-27; LJ Priestley "Contract: The Burgeoning Maelstrom" (1988) 1 Journal of Contract Law 15, 30-32; PS Atiyah *From Principles to Pragmatism: Changes in the Function of the Judicial Process of the Law* (Clarendon Press, Oxford, 1978).

74 See, for example, the case comment on the constructive trust: *Powell* v *Thompson* [1991] 1 NZLR 597; *Pasi* v *Kamana* [1986] 1 NZLR 603; *Elders Pastoral* v *Bank of New Zealand* [1989] 2 NZLR 180; *Day* v *Mead* [1987] 2 NZLR 443; *Gillies* v *Keogh*, above n22; *Goldcorp* case.

75 For a discussion of the importance of coherence as a test of legal validity see S Hurley *Natural Reasons* (New York, Oxford University Press, 1989).

76 Above n37.

scope. What are the circumstances in which the law will find that a promisor is responsible for the detriment suffered by another in reliance upon her promise? When will a breach of a promise be unconscionable?

This part makes a start in this analysis. It proceeds first, to identify the general principles under which the law determines that one party owes a duty to another; and, secondly, to present a framework whereby such principles may be brought into practical operation in the context of estoppel.

B Establishing the Relationship of Responsibility

It would generally be accepted that a basic principle of the law is that individuals are responsible for their own actions and their consequences: the principle of individual responsibility. In an increasing number of situations, however, an exception is being made: individuals are being held responsible for others with whom they deal otherwise than on the basis of obligations they have assumed towards each other. The law is imposing a duty of neighbourhood responsibility:[77] "[i]ndividualism has to accommodate itself to a new concern: the idea of 'neighbourhood'...is abroad".[78] We see the effects of this in every area of our obligations law: in the expansion of negligence, especially negligent misstatement; the acceptance of unjust enrichment as a distinct basis for liability; the expansion in equity - fiduciary duties; breach of confidence; the constructive trust; and the imposition of obligations of fair dealing within contract. Concepts such as reasonable expectations, good faith and unconscionability resound.

In what circumstances will the law impose such a duty on individuals? The answer may be made that the law looks to the standards of conduct expected by the community. As Flannigan put it, "the matter ... reduces merely to a determination of the kind of regulation we, as a community, wish to apply ...".[79] A useful means of making the determination is to consider the question in terms of risk assumption. Finn puts it in the following way:[80]

> In common with negligence in tort, it is not the object of good faith to enforce general altruism in relationships. One's duty to a neighbour is offset, some would say

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77 The tension between these concepts of individual and neighbourhood responsibility is discussed in a recent case concerning exclusion clauses: *Livingstone* v *Roskilly* unreported judgment, 2 March 1992, High Court Auckland Registry. There, Thomas J states that today's social and economic climate requires individuals to exhibit a high degree of self-reliance and responsibility but emphasises that there remain "fundamental notions of fairness which will not budge" and which the court will enforce. He illustrates this perception with the Commerce Act and the Fair Trading Acts, both of 1986: "Parliament, representing the people, enacted the first to promote vigorous competition in the economy but, at the same time, passed the second in order to enforce basic concepts of fairness in the conduct of commercial and other transactions."

78 Finn, above n 73 , "Commerce, the Common Law and Morality", 92.

79 R Flannigan "Fiduciary Obligation in the Supreme Court" (1990) 54 Saskatchewan Law Review 45.

80 Finn, above n73, "Commerce, the Common Law and Morality", 97.

> but lightly, by that neighbour's own responsibility of care for self: hence, contributory negligence and the volenti defence. Equally the rules of proximity and remoteness gird potential liability with practical limitations. Similar limitations, though as yet far more muted, curtail good faith and fair dealing. These are compelling us to encounter what are for us relatively unfamiliar concepts in the law governing consensual relationships: they are "risk assumption" and "risk allocation."

It has become the role of the courts to identify, in the context of each class of obligation, "those factors which will result in the responsibility which one party would ordinarily bear for the consequences of his own actions justifiably being transferred to the other".[81]

One important issue in this area has been seen to be the position of commercial parties. Should the law be imposing obligations on one corporation to look out for the interests of another substantial and well-advised commercial corporation? There has been much debate on this issue[82] but it is submitted that the problem is overstated. The courts simply adjust their judgments concerning responsibility commensurate with the positions of the parties, be they substantial commercial enterprises or vulnerable individuals.[83]

The new estoppel is a significant part of the movement in the law towards the imposition of neighbourhood obligations on individuals towards each other. This section takes the general principles we have discussed and places them in a framework whereby we may begin to define, in the context of estoppel, the circumstances in which conduct will be considered unconscionable and responsibility imposed on one party for detriment suffered by another.

C A Framework for Analysis

A framework on which to analyse the circumstances in which unconscionable conduct will be found has been given by both Mason CJ and Brennan J. Mason CJ stated in *Waltons Stores* that unconscionable conduct raising an equity would be found

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81 Finn, above n73, "Commerce, the Common Law and Morality", 98.

82 See Finn, above n73, "Australian Developments in Common and Commercial Law", 271; above n73, "Commerce, the Common Law and Morality", 98-99; *Austotel*, above n48, 585-586 (Kirby P); *State Rail Authority of New South Wales* v *Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170, 177 (Kirby P); *Johnson Matthey Ltd* v *A C Rochester Overseas Corp* (1990) 23 NSWLR 190, 195-196.

83 Some have argued that the imposition of this sort of obligation leads to considerable uncertainty for commercial parties. Might they incur, in pre-contractual negotiations specifically, obligations which they never intended? This, too, is overstated. Commercial parties currently have to deal with imposed obligations such as in negligence; duties of reasonableness within contract; fiduciary duties etc and the courts are careful not to impose liability contrary to commercial expectations - see *Austotel*, above n48. If the parties act in bad faith and unfairly, however, then the courts will not hesitate to intervene. Further, there are simple means available to the commercial party who does not want to incur unintended liability: parties can use an express disclaimer of liability pre-contract, as in *Humphreys Estate*, above n21 - see discussion in Dorney, above n4, 45.

in "the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party".[84] Brennan J in the same case presented an alternative list of six factors[85] but he essentially elaborates on the same points and the Mason test[86] has been preferred by subsequent courts.[87] The Mason test will, therefore, form the basis of the analysis in this part.

The part outlines the three main components of the Mason test: the content of the assumption; the creation or encouragement of the assumption; and knowledge. Whilst a number of unresolved issues surround these elements of estoppel, we now have a baseline perspective in the themes of responsibility and risk assumption from which to approach them.

1 The content of the assumption

The basic principle established in the estoppel cases is that the promise must lead the promisee to assume that the promisor is bound by the promise. The assumption must be "that a particular legal relationship exists between the plaintiff and the defendant or that a particular legal relationship will exist between them and, in the latter case, that the defendant is not free to withdraw from the expected legal relationship".[88] It would not seem necessary, however, that a promisee direct her attention to the law: what is required is a perception of a seriousness of intention rendering the promise safe to be acted upon. Such an assumption may be contrasted with a situation where the promisee merely hopes that a binding obligation will be achieved. Such a promisee has only herself to blame for any detriment she may suffer in reliance upon that hope:[89] to rely on what is expressed as a possibility, even a highly likely one, is to take a gamble and the gambler must bear the risks.[90]

The promisee must establish, therefore, that she made an assumption that a binding obligation existed.[91] This does not in itself require the promisor to establish that the

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84 *Waltons Stores,* 525. This test essentially follows that given in *Humphreys Estate,* above n21. It is interesting to note that Mason CJ adds into the test a knowledge requirement not present in the *Humphreys Estate* formulation but which was emphasised in the course of that case.

85 *Waltons Stores,* 542.

86 Or its predecessor, the *Humphreys Estate* test.

87 See *Silovi* v *Barbaro* (1988) 13 NSWLR 466, 472; *Austotel,* above n48, *Milchas,* above n42, 50-438; *Stratulatos,* above n22, 435-436; *Gillies* v *Keogh* , above n22, 347 (Richardson J).

88 *Waltons Stores,* 542 and also 536-537 (Brennan J). Clearly actual knowledge by the promisee that the representation is untrue will prevent an estoppel: *Standard Chartered Bank Australia Ltd* v *Bank of China* (1991) 23 NSWLR 164, 180-181.

89 There may, however, be another cause of action available - in tort for example.

90 See Brennan J in *Waltons Stores,* 357.

91 Brennan J states in *Waltons Stores* that "the promise must be intended by the promisor and understood by the promisee to affect their legal relations"(536). With respect, this statement is dubious. The focus is surely on the promisee's

assumption was reasonable[92] but, if it was not, it will be difficult to prove that the promisee *actually* made and relied upon the assumption. The matter will be evidential and tied strictly to the circumstances of each case but it is possible to comment on some possible fact situations.

There is a basic assumption that parties to pre-contractual negotiations do not consider themselves bound to each other at any point prior to signing of the final contract.[93] Their expectation is of a possible legal relationship only and they retain their freedom to withdraw. Sometimes, however, it may appear that the parties *do* consider themselves bound, despite the formal contract not having been concluded. Negotiations towards a contract may have reached such a point, as in *Waltons Stores,* whereby "a party induces another party to believe that he, the former party is already bound and that his freedom to withdraw is gone...".[94] Certain factors will be relevant in determining into which of these situations the particular facts fall. The insistence that a preliminary agreement is "subject to contract", as in *Humphreys Estate,*[95] indicates the parties' express intention not to be bound prior to contract, as does a discrepancy between the terms of the offer and the acceptance; the contemplation of a final meeting to finalise terms of the agreement; the complexity of the agreement; the amount of money involved; and the parties' contemplation that their solicitors would be brought in prior to conclusion of the agreement.[96] Where, however, agreement has been reached on almost all details and it seems that the parties regarded the remaining exchange of contracts as a mere formality, as in *Waltons Stores*, the court may find that the parties considered themselves already bound.

An interesting question concerns the effect of a finding that essential terms of the contract were *not* agreed. Are the courts likely to hold that a promisee assumed that the promisor was already bound? The cases of *Austotel*[97] and *Hoffman* v *Red Owl Stores*[98] are central in this regard.

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understandings; if the promisor did not communicate this intention then its existence would seem to be beside the point. At most, the promisor's intention, ascertained objectively, may be relevant for the discussion of the reasonableness of the assumption, see below.

92 The additional existence of a reasonableness requirement is discussed below.

93 *Waltons Stores*, 537-538 (Brennan J).

94 *Waltons Stores*, 538 (Brennan J).

95 Above n21. Their Lordships observed, however, that "[i]t is possible but unlikely that in circumstances at present unforeseeable a party to negotiations set out in a document expressed to be "subject to contract" would be able to convince the court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transactions envisaged by the document"(124).

96 This list of factors was given in *Tie Rack (Aust) Pty Ltd* v *Inglon Pty Ltd* [1989] NSW Conv R 55-546.

97 Above n48.

98 133 NW 2d, 267.

In *Austotel*, the parties, the plaintiff supermarket chain and the defendant property developer, had been negotiating for over a year towards a lease of commercial premises which were in the course of construction. The parties had maintained a close relationship throughout the period, with the supermarket being built to the plaintiff's specifications, the plaintiff helping with financial backing and letters of intent being exchanged. Further, the plaintiff company terminated their existing lease and acquired special equipment for the new supermarket. Almost every detail had been agreed except, significantly, the rent. The failure to conclude the agreement was, in fact, directly due to the deliberate decision of the plaintiff to refrain from addressing the question of rental in the hope of obtaining a financial advantage.[99] The plaintiff, the court found, did not assume that the parties were bound.[100] The court declined to find an estoppel.

In *Hoffman* v *Red Owl Stores,*[101] the plaintiff wanted to establish a grocery store under franchise to the defendant. The parties began discussions in late 1959. In late 1960, acting on the advice of the defendants, the plaintiff bought a store to gain experience in the trade. The defendant monitored his progress and soon advised the plaintiff to sell and that the defendant would start looking for a bigger store for him to start up the franchise. The parties together found a suitable site in June 1961 and the plaintiff put money down on it. The plaintiff also, acting in the advice of the defendants, sold his bakery business. With regard to finance, the defendant had repeatedly assured the plaintiff that the $18 000 he had to invest was sufficient. The details of the contract, however, were never finalised and, in late 1961, the defendants began to demand that the plaintiff invest considerably more money. The plaintiff pulled out. The court found an estoppel and awarded damages for detrimental reliance.

The fact that a contract is unconcluded would not, therefore, appear to be fatal, although, in ordinary circumstances, it is unlikely that the court would accept that a promisee did believe the parties already bound to enter into a contractual relationship.[102] In *Hoffman*, however, the circumstances did support such an inference. The continued and significant reliance by the plaintiff on the defendant over a number of years demonstrated a firm faith in the defendant and the deal: the plaintiff clearly did not perceive himself to be taking a chance. The failure to agree could in no way be taken to indicate a deliberate holding back. By contrast, in *Austotel*, although considerably more of the agreement had been concluded and significant reliance had been made, the crucial finding was that the failure to agree was deliberate. The promisor did not believe the parties to be bound.[103] The critical distinction that emerges is that "between a situation where the parties simply fail to address a question necessary for a complete and

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99 See Rogers A-JA, 619-621.

100 The parties were playing what counsel for Austotel called a "cat and mouse game": *Austotel*, above n48, 585. It is interesting that Rogers A-JA puts the court's finding in terms of risk assumption: "The deliberate gamble that the plaintiff had embarked upon failed and it is not for equity to put the plaintiff into the position it would have been in had it never embarked on the gamble"(620).

101 Above n98.

102 See *Valbirn Pty Ltd* v *Powprop Pty Ltd* (1991) 1 Qd R 295 (de Jersey J).

103 The situation in *Austotel* is effectively equivalent to that in *Humphreys Estate* except that in *Austotel* the intention not to be bound was implied rather than express.

concluded agreement and [one] where there is a deliberate and conscious decision to refrain form coming to an agreement on a term".[104]

With regard to gratuitous promises, not part of pre-contractual negotiations, one view has it that "generally speaking, a plaintiff cannot enforce a voluntary promise because the promisee may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract".[105] The inference is clear: the court is unlikely to believe that a promisee assumes a gratuitous promise to be binding. There is cause to question this. As Sutton points out, the layperson does not know that there must be consideration for a promise to be enforceable: "a businessman still regards a 'firm' offer as binding".[106] Indeed, the actual assumption will not often be that a contract has or will come into existence but simply that the promise will be performed. The crucial factor should be the seriousness of intention with which the promise is made. For example, Mason CJ emphasised in *Verwayen* that, although it would generally be unreasonable "to assume that an implied promise not to amend the pleadings ... would be enforceable in the absence of consideration", "the fact that the circumstances pointed to the existence of a definitive government policy which had been followed to the point of judgment on other occasions supports the conclusion that the assumption was a reasonable assumption for a person in the plaintiff's position to make".[107]

The content of the assumption is a critical first hurdle. Whether it is cleared will depend upon a close analysis of the facts in the individual case.

2 The creation or encouragement of the assumption

The second major requirement is that the promisor have created or encouraged the promisee's assumption: the promisor cannot be held liable for an assumption that was not caused by her.[108] The meaning of this requirement is, however, problematic.

On one view, the promisee must have reasonably derived her assumption from the promisor's promise or representation.[109] If the assumption is unreasonable, its

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104 *Austotel*, 620 (Rogers A-JA).

105 *Waltons Stores*, 523 - Mason CJ and Wilson J are citing *Texas Bank*, above n21.

106 K Sutton "Contract by Estoppel" (1989) 1 Journal of Contract Law 205, 211.

107 At 334. Mason CJ emphasised that this reasonableness analysis is not relevant in itself: "The relevance of this conclusion [that the assumption was reasonable] is that there is no reason to doubt the respondent's assertion that he made the assumption and continued his action against the Commonwealth in reliance upon it" (334). See the later discussion of reasonableness.

108 The causation language is used specifically in *Thompson* v *Palmer*, above n8, 507 where Dixon J states that an estoppel may arise where the promisor's "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".

109 *Franklin* v *Manufacturers Mutual Insurance* (1935) 36 SR(NSW) 86 required that the representation must have been made "in such circumstances that a reasonable man would regard himself as invited to act upon it in a particular way ... and that the representation should have been material in inducing the person to whom it was made to act on it in that way". See also *Low* v *Bouverie* [1891] 3 Ch 82, 106, 113; *Western*

substantive cause is not the promisor's statement but the expectations of the promisee. The promisor should not be held responsible for what has effectively been created or encouraged by the promisee him or herself.[110] The alternate view is unconcerned with reasonableness. That the promisee actually made an assumption on the basis of the promise to the knowledge of the promisor is sufficient basis on which to impose a duty on the promisor.[111] The difference between these approaches is in their perception of the responsibility owed by one individual to another. The issue is not addressed directly in the cases and this section looks briefly at the features of each approach.

The reasonableness test which forms the basis of the first approach involves the court in a consideration of all the circumstances of the case, including the positions of the parties.[112] One issue concerns the effect of a legal adviser. Does the fact that a promisee had access to legal advice which would have disabused them of their assumptions had they requested it absolve the promisor from the requirement of care or

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Australian Insurance Co Ltd v *Dayton* (1924) 35 CLR 335, 375; *Standard Chartered Bank,* above n88 ,180-181; *Davis Properties Limited* v *Burrowes Appliances Limited* unreported judgment, 31 October 1983, High Court Auckland Registry, A 3/83; *Travel Agents Association of New Zealand Incorporated* v *NCR (NZ) Ltd* unreported judgment, 27 March 1991, High Court Wellington Registry, CP 1069/90; *Burbery Mortgage Finance & Savings Ltd* v *Hindsbank Holdings Ltd* [1989] 1 NZLR 356, 359 (Cooke P).

110 See A Leopold "Estoppel: A Practical Appraisal of Recent Developments" (1991) 7 Australian Bar Review 47, 63 for example: "The requirement for reasonableness presumably arises because, if the assumption or expectation were unreasonable, it would not in any event be unjust or unconscionable to disregard it, because the 'guilty' party's conduct could not truly be said to have played a part in the formation of the assumption or expectation".

111 In *Waltons Stores*, Brennan J appears to advance this alternative analysis (541-542), as does Deane J (554). It is more difficult to ascertain Mason CJ's position. In *Waltons Stores,* he states that "generally speaking, a plaintiff cannot enforce a voluntary promise because the promisee may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract"(523). Similarly, in *Northside Developments Pty Ltd* v *Registrar-General* (1990) 64 CLR 427, 455 he states that "[i]f the [promisee] has knowledge of facts or ought to have knowledge of facts putting him or her to further inquiry, that is a matter which tells against the former having played such a part in the adoption of the assumption that he or she should be held to it". In *Verwayen*, however, he writes that "[t]he relevance of this conclusion [that the assumption was reasonable] is that there is no reason to doubt the respondent's assertion that he made the assumption and continued his action against the Commonwealth in reliance upon it". See also *Marvon,* above n48, 351 where Kearney J commented that "[e]ven if the facts did not establish that there was an active inducement by the defendant, I consider that the defendant should nevertheless be held to have so induced the plaintiff since it knew that the plaintiff was renovating the premises for the defendant to occupy ... and, knowing that detriment could be caused ... failed to deny to the plaintiff that it would lease the premises ...". The importance of a knowledge requirement where the assumption is unreasonable is discussed below.

112 It is here that the courts are able to bring commercial understandings into consideration, for example.

remove them from being the proximate cause of the promisee's adopting and acting upon the assumption?[113] The answer will depend on the facts of the case. For example, in *Waltons Stores*, Mason CJ and Wilson J considered the problem of establishing the estoppel to be "magnified in the present case where the parties were represented by their solicitors" but still found the assumption to be reasonably made. Gaudron J in the same case emphasised that a duty to inform cannot be evaded if a promisor has lulled the promisee into a sense of false security, a belief that inquiry is unnecessary. Such conduct effectively "shuts out" the promisee from the knowledge of her agent. Further, it should be recognised that in many commercial deals, solicitors do not form an integral part of the process and come in only at the final documentation stage: not consulting solicitors at an earlier point may in such circumstance be reasonable.[114]

A further issue concerns the part played by the promisor in inducing the assumption. Will the promisor have caused the adoption of an assumption and thereby assumed responsibility for it even where such an assumption was already held by the promisee? Will the encouragement rather than the creation of an assumption found an estoppel? The case law has accepted that the promisor may be responsible in the case of encouragement[115] but has not gone as far as delimiting the particular requirements. It would seem essential, however, on this first view, that the promisor's conduct be a substantive cause of the promisee's assumption. A promisor should not be responsible for an assumption to which she contributed only minimally.

A further issue concerns the effect of silence. Can the promisor stand by in silence when it knew of the promisee's reliance? The case law establishes that the promisor cannot where the omission constitutes conduct which may reasonably be said to have induced the promisor's assumption.[116] In *Waltons Stores*, for example, the urgency surrounding the transaction and the fact that the conduct omitted was regarded as a mere formality gave added meaning to the effect of the silence: "the appellant's inaction, in all the circumstances constituted clear encouragement or inducement to the respondents to continue to act on the basis of the assumption which they had made".[117]

This approach, however, creates difficulties for damages assessment which do not appear to have been recognised by courts or commentators. What should happen in a situation where a promisee forms and relies on an assumption which is not reasonable at the time but, because of subsequent conduct by the promisor, subsequently becomes reasonable,[118] as in *Waltons Stores*?[119] Ordering compensation for the whole of the

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113 *Waltons Stores*, 553-554 (Deane J).

114 For example, in *Corpers Pty Ltd* v *NZI Securities Australia Ltd* (1989) NSW Conv R 58,450, 58,455, it was held that the plaintiff's reliance on a letter approving finance was reasonable even though the plaintiff could have obtained legal advice that no binding agreement existed, as did the defendant.

115 See *Waltons Stores*, 525-526 (Mason CJ); 541 (Brennan J).

116 *Waltons Stores*, 525-526 (Mason CJ/Wilson J); 541-542 (Brennan J); 553 (Deane J).

117 *Waltons Stores*, 526 (Mason CJ/Wilson J).

118 The same situation arises with respect to a lack of any of the estoppel elements, for example, where the promisor only realises some time afterwards that a promisee is relying on an assumption induced by her.

detrimental reliance would be disproportionate. The court will potentially be involved in a very difficult process of ascertaining the point at which reliance became reasonable and when, therefore, responsibility for detrimental reliance was incurred. Further, if the promisor only partially contributed to the promisee's assumption, it would seem unreasonable to hold the promisor liable for the full amount of the detriment.[120] In developing this area, tort doctrines such as contributory negligence, will provide valuable reference points.

The alternative view is unconcerned by lack of reasonableness. Even if the promisee's assumption is objectively unreasonable, there will still be an estoppel in circumstances where the promisor intended or knew of the promisee's assumption. The promisor has *in fact* created or encouraged the promisee's assumption and has a duty to correct it if she believes it to be mistaken: "it is unconscionable to refrain from making the denial and then to leave the other to bear whatever detriment is occasioned by non-fulfillment of the assumption or expectation".[121] To do otherwise is to contravene standards of good faith and fair dealing. This view rests, however, on a particular understanding of the responsibility that members of the community hold towards each other; it, in a sense, obligates us to be our brother's and sister's keepers.

What we see in the division over the meaning of this "creation or encouragement" requirement are conflicting perceptions of the appropriate extent of responsibility and risk assumption. The significance of the framework which we have identified, however, is in that it allows us openly to appreciate and evaluate the value judgments that must be made.

3 Knowledge

The requirement of the promisor's knowledge of the promisee's reliance was given as part of both the Mason[122] and Brennan[123] tests and was a necessary element in

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119 In *Waltons Stores*, the Mahers started to demolish the existing building almost immediately after receiving the letter from Waltons' solicitors advising that the amendments were still to be agreed to. It may be doubted whether such reliance was immediately reasonable or whether it only became so after a period of silence.

120 Consider the situation where reliance is partly upon the representation and partly on the hopes of the promise. For example, in *Marvon*, above n48, the plaintiff made very expensive alterations to its building on the basis that the defendant would take up a 12 month lease. It was clear that the plaintiff could not possibly have recouped their expenditure in this time. The whole of the expenditure could not, therefore, have been able to be attributed to reliance on the basis of the assumption. The court in that case gave the remedy as the rental which the plaintiff expected to receive for the 12 month period but it is very difficult to ascertain which detriment was incurred in reliance upon the assumption and which as a general risk.

121 *Waltons Stores*, 542 (Brennan J).

122 *Waltons Stores*, 525.

123 Brennan J states (*Waltons Stores*, 538):

It is essential to the existence of an equity created by estoppel that the party who induces the adoption of the assumption or expectation knows or intends that the party

traditional estoppel.[124] The new estoppel has been taken in some cases, however, as an opportunity to remove the knowledge requirement: *Taylors Fashions*[125] and *Texas Bank* [126] were followed in this regard by a line of New Zealand cases.[127] There appears also to be another option, that of requiring constructive knowledge only and this, rather than actual knowledge,[128] has been the interpretation put on the knowledge requirement by a number of judges.[129]

It would appear sensible to accept a constructive knowledge requirement; as Leopold points out, equity does not often insist upon actual knowledge.[130] If we do so, it may be that the dispute over the necessity of knowledge is more apparent than real: there *will* be knowledge in every case where the other estoppel factors are satisfied. To demonstrate, if the promisee's assumption is reasonable then the promise on which it is based will be "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee". If the assumption is not reasonable,[131] then it may be that actual knowledge by the promisor of the promisee's reliance *is* necessary to found unconscionability. It would surely be to impose an overexacting standard to hold a promisor liable for reliance made unreasonably by the promisee and without the promisor's knowledge.

D Conclusion

This part has provided a preliminary answer to the question of the scope of the new estoppel. A basic framework has been suggested on which the courts can base a

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who adopts it will act or abstain from acting in reliance on the assumption or expectation.

124 See *Willmott* v *Barber* (1880) 15 Ch D 96: "... the defendant , the possessor of the legal right must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights".

125 Above n21 .

126 Above n21.

127 *Andrews* v *Colonial Mutual Life Assurance Society Ltd* [1982] 2 NZLR 556; *Westland Savings Bank* v *Hancock* [1987] 2 NZLR 21; *Industrial Buildings Ltd* v *Angus Group Ltd* unreported judgment, 14 March 1989, High Court Wellington Registry CP 980/88.

128 The requirement of actual as opposed to constructive knowledgr was affirmed in the context of the new estoppel in *Cadorange Pty Ltd (in liq)* v *Tanga Holdings Pty Ltd* unreported, Supreme Court of NSW, 15 March 1990.

129 See Deane J in *Verwayen*: "a critical consideration will commonly be that the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt ... the assumption" (356); and also Mason CJ and Wilson J in *Waltons Stores* - "was the appellant entitled to stand by in silence when it must have known..." (525). The US *Restatement on Contracts 2d* provides an example of such a constructive knowledge requirement: the relevant statement must be "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee..." (cited by Mason CJ/Wilson J in*Walton Stores*, 522.).

130 Above n110, 60.

131 Providing that this is acceptable - see above discussion.

judgment that a duty of responsibility should be imposed: the promisor will, in these circumstances, be liable to compensate the promisee for detriment she has suffered in reliance upon the promise.[132] A number of issues within this framework remain outstanding and must be left for later courts and commentators to resolve. We have now, however, a clear and focussed basis from which to proceed.

IV SUMMARY: THE NEW ESTOPPEL

This paper has traced the transformation that has occurred in the law of estoppel: the law has clearly moved on from traditional estoppel to the recognition of a comprehensive category of obligation. The scope of the new obligation, however, has been left open. This paper has attempted to fill out its content.

It has been suggested that estoppel is an independent obligation which stands alongside, and complements, the laws of contract, tort and restitution. The purpose of this new obligation is to protect those who suffer detriment in reliance upon an assumption induced by another in circumstances for which that other has responsibility. The law will impose such a duty of responsibility where a promisor has created or encouraged the promisee's assumption that a contract will come into existence or a promise will be performed and that the promisee has acted in reliance on that assumption to her detriment to the knowledge, actual or constructive, of the promisor.

The assumption must concern the legal relationship between the parties but it may be based on a promise or representation of fact or law, present or future. There is no requirement that the parties be in a pre-existing contractual relationship. Estoppel may be pleaded as a cause of action or as a defence to an action by the promisor asserting her strict legal rights. Estoppel operates to create an equity in the promisee and it is remedied by an order for the compensation for the detrimental reliance of the promisee. Only in exceptional circumstances will such compensation necessitate fulfilment of the assumption.

This, it is submitted, is the new estoppel, ready to take up its place in the law of obligations.

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132 See the original discussion of the Mason/Brennan approach for consideration of the detriment and reliance concepts.