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INTRODUCTION

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The previous Editions of this work did not pretend to completeness. The First was, self-avowedly, an ‘essay’ in the true sense of the word, an attempt to construct taxonomies of the ‘elusive’¹ and ‘vague’² concepts of waiver, variation and estoppel. As such it did not directly address what could be meant by completeness in this context. The Second Edition saw the addition of a general introduction to estoppel, a new chapter on *res judicata* and a new practice area—landlord and tenant. The Third Edition, as should be the case, has expanded on and consolidated the analysis of the second. This reflects not only the body of the case law over the last 14 years but also the fact that in several areas—in particular the law of waiver—much of the approach has been approved by the Courts. For some, however, the analysis will remain incomplete. This is not due to any stark omission from the contents page or indeed any theoretical failing. It flows more from the essence of these doctrines—their ‘complex’,³ ‘imprecise’⁴ if not ‘odious’⁵ natures. It is this basic issue that this Introduction seeks to address. 1.01

A. Complete Doctrines?

As will be seen from this work, these doctrines occur and recur throughout the law of obligations. As will also be apparent, they have been often deployed as ‘doctrines of last resort’ and sometimes without any thought as to whether that deployment is appropriate. 1.02

¹ See *Transgrain Shipping BV v Global Transporte Oceanico SA (The Mexico I)* [1990] 1 Lloyd’s Rep 507 at 514 per Mustill LJ (as he then was).

² See eg *Colley v Overseas Exporters* [1921] 3 KB 302 at 311–12 per McCaigie J.

³ *Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 at 56 per Lord Wright.

⁴ See *The Commonwealth of Australia v Verwayn* (1990) 170 CLR 394 at 406 per Mason CJ.

⁵ See eg *Baxendale v Bennet* (1878) 3 QBD 578 per Bramwell LJ at 529 (‘Estoppels are odious, and the doctrine should never be applied without a necessity for it’). Compare, however, Lord Upjohn’s rejection—‘All estoppels are not odious but must be applied so as to work justice and not injustice’—*Carl Zeiss Stiftung v Rayner & Keeler (No 2)* [1967] AC 853 at 947.

The result is that these doctrines can be viewed piecemeal, as a collection of doctrines, some contractual, some not, some evidential, some not. In part, this view is historical, a by-product of the doctrines' evolution in differing jurisdictions at different times and in response to particular issues. More interestingly for present purposes, it also flows from the tensions inherent within these doctrines between the need for commercial certainty as against a desire for remedial flexibility to reflect the merits of individual cases.

- 1.03** Those underlying issues of completeness and tension lead to a number of questions: what is the relationship between these doctrines and other protective principles—legitimate expectation, restitution, duress and undue influence? Are the doctrines capable of reduction to a unified theory? If not, do these doctrines form an interlocking series of tools capable of specific application to the facts of individual cases?

(1) Links to other doctrines?

Legitimate expectation

- 1.04** In *Council for the Civil Service Unions v Minister for the Civil Service*,⁶ Lord Diplock enunciated that which, with some reservations,⁷ is the classic exposition of the founding principles of judicial review. Lord Diplock stated:⁸

To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) . . . by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given opportunity to comment; or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. (I prefer to continue to call the kind of expectation . . . a 'legitimate expectation' rather than a 'reasonable expectation' in order thereby to indicate that it has consequences to which effect will be given in public law, whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable man', would not necessarily have such consequences. 'Reasonable' further bears different meanings according to whether the context in which it is being used is that of private law or of public law. To eliminate confusion it is best avoided in the latter.)

- 1.05** The resultant doctrine of legitimate expectation is now frequently deployed to prevent the State from resiling from a former course of conduct. The doctrine will apply alike to representations,⁹ promises,¹⁰ issued circulars¹¹ and established practices¹² whether made to individuals¹³ or by circular to the public as a whole.¹⁴

⁶ [1985] AC 374 at 408.

⁷ See eg *R v SSE, ex p Nottinghamshire CC* [1986] AC 240 at 249 per Lord Scarman.

⁸ Drawing on *AG for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *R v Liverpool Corpn, ex p London Taxi Fleet Operators' Assn* [1972] 2 QB 299.

⁹ As in oral assurances to a student that she would be permitted to re-enter the UK on return from her Christmas break in Nigeria—*Oloniluyi v SSHD* [1989] Imm AR 135.

¹⁰ *AG for Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.

¹¹ *R v SSHD, ex p Asif Mahmood Khan* [1984] 1 WLR 1337.

¹² *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *R v Brent LBC ex p Gunning* (1985) 84 LGR 168; *R v British Coal Corpn, ex p Vardy* [1993] ICR 720.

¹³ As in oral assurances to a student that she would be permitted to re-enter the UK on return from her Christmas break in Nigeria—*Oloniluyi v SSHD* [1989] Imm AR 135.

¹⁴ As in guidance as to the use of telephone taps—*R v SSHD ex p Ruddock* [1988] 1 WLR 1482.

In that formulation, legitimate expectation looks much like an estoppel,¹⁵ a similarity that is more apparent once it is appreciated that the subject must be aware of the representation¹⁶ and in certain cases must have relied on it to his or her detriment.¹⁷ The doctrine begins to resemble equitable forbearance once promises as to future conduct are given effect. The most striking example of this is *R v North and East Devon Health Authority, ex p Coughlan*.¹⁸ In *Coughlan*, a promise to the residents of a nursing home that the home would be one 'for life' was at issue. The Court of Appeal held that the residents could only be deprived of that home where there were overriding policy reasons necessitating withdrawal of the promise.¹⁹ The Court therefore entered into an analysis of the respective policy reasons before preventing the authority from closing the home. **1.06**

Despite that similarity, the Courts have persistently held that legitimate expectation is not an estoppel. Thus, there has been judicial resistance to the introduction of detrimental reliance into legitimate expectation as that would assimilate legitimate expectation with estoppel.²⁰ Further, since Lord Hoffmann's statement in *R v East Sussex CC, ex p Reprotech (Pebsham) Ltd*²¹ that to introduce estoppel into planning law would be 'unhelpful'²² and the comment that there 'is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority ... But it is no more than an analogy because remedies against public authorities have to take into account the interests of the general public which the authority exists to promote',²³ estoppels (of whatever kind) have had little or no role to play where public authorities are exercising public powers. **1.07**

There are obvious reasons for this. At root, legitimate expectation can be explained as a doctrine of 'fairness' and 'public policy'.²⁴ As such, the argument runs, estoppel, derived from private law, must be an unrelated doctrine. A difficulty with that argument is that certain 'estoppels' also derive from public policy.²⁵ As pointed out by Lord Hoffman, a further, remedial distinction can be drawn. Again, a difficulty with that is that the Courts already recognise remedial flexibility in proprietary estoppel and equitable forbearance.²⁶ Further, the impact that proprietary estoppel has on third party rights means that estoppel-based **1.08**

¹⁵ It cannot be a waiver—the issue of knowledge being irrelevant and there usually being no contract between the parties.

¹⁶ *R v Secretary of State for National Heritage, ex p J Paul Getty Trust*, *The Independent*, 7 November 1994.

¹⁷ See *R v IRC, ex p Matrix Securities Ltd* [1994] 1 WLR 334 (subject's expectation not protected where the relevant conduct was reversed before the State changed its approach); *R v IRC, ex p MFK Underwriting Agencies* [1990] 1 WLR 1545.

¹⁸ [2001] QB 213.

¹⁹ At para 60.

²⁰ *R v MAFF, ex p Hamble Fisheries (Offshore) Ltd* [1995] 2 All ER 714; *R v SSHD, ex p Jaramillo-Silva* [1995] 7 Admin LR 445.

²¹ [2002] UKHL 8.

²² At para 33 drawing on *Newbury DC v SSE* [1981] AC 578 at 616 per Lord Scarman; *R v Leicester CC, ex p Powergen UK Ltd* [2000] JPL 629 at 637. Previous statements as to the application of estoppel to public law were therefore to be ignored as deriving from a time when the doctrine of legitimate expectation was less well developed—para 35.

²³ At para 34.

²⁴ See *R v North and East Devon HA, ex p Coughlan* [2001] QB 213 at paras 70–1; see also *R v IRC, ex p Unilever Plc* [1996] STC 681.

²⁵ See the discussion of *Henderson v Henderson* at para 14.11 below. As set out in Chapter 14, we do not categorise *Henderson v Henderson* as an estoppel. The point is made here as part of the discussion of potential categorisation difficulties.

²⁶ See summary in paras 7.51 ff below.

remedial theory already takes account of the potential impact of the private law estoppel on the wider community. Finally, the objection that public authorities should not be estopped from performing their functions cannot be determinative. Public bodies are prevented from acting by a legitimate expectation (subject only to the parameters of *vires*). There is no practical difference between that situation and their being so prevented by an estoppel which is also subject to the parameters of *vires*. Further, there is no reason in principle why an authority acting *intra vires* and in a wholly private capacity should not be estopped like any other corporation or legal person. If an authority can contract, there is no reason why it cannot forbear from exercising those rights.

- 1.09** Despite the above, *Reprotech* is good law. Estoppel has no place in public law and any function that estoppel might serve is to be performed by legitimate expectation. It follows that the common law still draws a distinction between public law and private law and between legitimate expectation and estoppel/waiver. Two points flow. First, it is difficult to see the precise basis on which two doctrines that have the same effect and the same parameters are to be distinguished, yet they are. Second, by parity of reasoning, it becomes much more difficult to see why differing concepts with differing parameters—waiver by election and proprietary estoppel or estoppel by representation and proprietary estoppel—should be fused.

Restitution

- 1.10** The recognition of the defence of change of position in *Lipkin Gorman v Karpnale*²⁷ was also a recognition that ‘estoppel was not an appropriate concept to deal with the problem’²⁸ of restitutionary recovery of unjust enrichment. As discussed elsewhere,²⁹ this is because of the evidential nature of the relevant estoppel (estoppel by representation). On a traditional interpretation, the doctrine sets up a state of facts from which the legal consequences flow. Thus, once there is a representation, the recipient of the monies is entitled to retain all of them, irrespective of the actual merits of the case.³⁰ When compared with change of position, which permits of remedial flexibility focusing on the respective overall merits of each party,³¹ estoppel becomes a clumsy, indeed an inappropriate weapon. Thus it was said that there would be little future role for estoppel in restitutionary theory.³²
- 1.11** That is undoubtedly correct in the vast majority of cases. There are cases, however, when both estoppel and restitutionary principles are directly raised on the facts. This happened in *Scottish Equitable Plc v Derby*³³ and *National Westminster Bank Plc v Somer International Ltd.*³⁴ The result was that the tension between estoppel and restitutionary recovery arose. The possible resolutions of that tension in estoppel-based theory are discussed elsewhere;³⁵ what is pertinent for the current analysis are the restitutionary principles applied. It is clear that

²⁷ [1991] 2 AC 548.

²⁸ *Lipkin Gorman* at 579 per Lord Goff.

²⁹ See para 7.06 and paras 9.109 ff below.

³⁰ See *Avon CC v Howlett* [1983] 1 WLR 605.

³¹ *Lipkin Gorman* at 581–3.

³² See *Scottish Equitable Plc v Derby* [2001] 3 All ER 818; [2001] EWCA Civ 369 in which Lord Justice Robert Walker canvassed the possibility of the role of estoppel in restitution as withering away—at para 48.

³³ [2001] 3 All ER 818; [2001] EWCA Civ 369.

³⁴ [2002] 1 All ER 198; [2001] EWCA Civ 970.

³⁵ See paras 7.09 ff and 9.109 ff.

the respective Courts of Appeal considered that although there was a tension between the doctrines, there was no theoretical or practical overlap.³⁶ Lord Justice Robert Walker made the point explicit in *Scottish Equitable*³⁷ when he accepted as ‘convincing’ the argument that both estoppel and restitution reversed detriment.³⁸ When, therefore, restitution had reversed the detriment, there was nothing on which the estoppel could bite.³⁹ That approach—of an estoppel-based defence operating where change of position will not—has academic support.⁴⁰ It also means that there is a plain distinction between estoppel and restitution.

This distinction finds not only in the elements of the doctrines but on a wider theoretical footing. Although both reverse detriment, restitution does so in a purely subtractive manner. The detriment constitutes a payment in error, or the spending of money both of which are remedied by subtracting the benefit of the receipt. The scope of detriment in estoppel is much broader. Although one type of detriment may be the payment or retention of money, so may forgoing opportunities and losing rights to object. Such detriment cannot be reversed or remedied merely by subtracting from the other party.⁴¹ The position is particularly stark where what is being reversed is the representor’s refusal to abide by a previous representation as to future intent or performance.⁴² There subtractive remedies are irrelevant—the remedy being to bar the refusal. **1.12**

It flows from the above that links with restitution do little to resolve the underlying questions; the only stimulus being that recognised in *Scottish Equitable Plc v Derby*—namely the possibility of a unified theory.⁴³ **1.13**

Duress/undue influence

Both duress and undue influence protect those whose ability to contract or to modify freely the obligations assumed under a contract has been undermined. The obvious distinction is that duress is a common law doctrine requiring illegitimate pressure⁴⁴ and undue influence is an equitable doctrine based on more nebulous forms of coercion.⁴⁵ What is common to both, however, is that the doctrine is the overbearing of one party’s will so that he, she or it does not enter freely into the transaction. **1.14**

Clear distinctions can therefore be drawn between undue influence/duress and these doctrines. At a high level of abstraction, duress and undue influence examine the actions of **1.15**

³⁶ Both discussed estoppel and change of position as differing doctrines.

³⁷ [2001] 3 All ER 818; [2001] EWCA Civ 369.

³⁸ Waiver is irrelevant for these purposes. Not only does the mere payment of money by mistake not constitute a contract but no question of knowledge is in play.

³⁹ At paras 45–7.

⁴⁰ Peter Jaffey, ‘Change of position and estoppel’ [2002] *LMCLQ* 1.

⁴¹ It is for this reason that no assistance in analysing waiver and estoppel can be derived from mistake cases outwith the restitutionary arena. The identical distinction between types of detriment can be drawn.

⁴² The subtractive analogy at an abstract level would apply similarly with waiver. In waiver, rights are voluntarily lost by the representation. There is little left to subtract.

⁴³ [2001] 3 All ER 818; [2001] EWCA Civ 369 at para 48 per Robert Walker LJ. Discussed in this chapter below and at paras 7.09 ff. For a rejection of a unified theory based on unconscionability in a specifically restitution-based analysis, see Professor J Beatson QC and G Virgo, ‘Contract, Unjust Enrichment and Unconscionability’ (2002) 118 *LQR* 352.

⁴⁴ See *Universe Tankships Inc of Monrovia v International Transport Workers Federation* (*‘The Universe Sentinel’*) [1983] 1 AC 366 at 400B–E; *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 at 165G; *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 at 545, paras 131–2.

⁴⁵ See Meagher at 15-050.

one party to see whether that party should be deprived of the benefit of the agreement.⁴⁶ Thus it is not the state of mind of the weaker party that is in issue but the malign actions of the other.⁴⁷ If, therefore, the abstract injurious reliance versus injurious action distinction is adopted,⁴⁸ duress and undue influence fall into injurious action, waiver and estoppel into injurious reliance. At a less abstract level, none of consideration, unconscionability or mistake are at issue in duress or undue influence. As far as consideration is concerned, neither duress nor undue influence violate the parameter of enforcing obligations without consideration. What they do is relieve a party from an obligation supported by consideration, the nature or extent is irrelevant.⁴⁹ Unconscionability plays no role in duress—there the issue is illegitimate (that is tortious, criminal and contract-breaching)⁵⁰ action. As far as undue influence is concerned, although it may derive its force from equity's antipathy to fraud⁵¹ as does estoppel, none of the remedial considerations brought into play by unconscionability in, at the least, proprietary estoppel and equitable forbearance apply. Finally, mistake is irrelevant in undue influence and duress—the weaker party is not mistaken, its will is overcome.

Conclusions

- 1.16** It follows from the above that little theoretical assistance can be derived in resolving the issues underlying these doctrines from other areas of the law. What emerges is that these doctrines remain specific doctrines seeking to address specific issues. Their tensions and difficulties cannot therefore be resolved by external analogues.

(2) A unified theory?

- 1.17** As indicated above,⁵² one result of the interaction between restitution and estoppel has been the resurrection of the possibility of a unified theory governing all the doctrines considered in this work.⁵³ This is discussed in detail later in the book.⁵⁴ For present purposes, there are two candidates.
- 1.18** The first is a unified theory covering all the doctrines at issue in this work. This is the 'injurious reliance' theory canvassed in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal*,⁵⁵ which states that all forms of assurances as to rights from which one party seeks to resile can be reduced into a concept of injurious reliance. Quite apart from the fact that 'injurious reliance' cannot explain waiver which does not require reliance, the difficulty with

⁴⁶ See *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125; 28 ER 82. For an academic discussion of the links between undue influence and a free form doctrine of unconscionability, see Professor Andrew Phang and Professor Hans Tjio, 'The uncertain boundaries of undue influence' [2002] *LMCLQ* 231 at 241–3.

⁴⁷ *Huguenin v Baseley* (1807) 14 Ves 273; 33 ER 526.

⁴⁸ See *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 at 916 AC per Lord Diplock; para 7.14 below.

⁴⁹ See *Allcard v Skinner* (1887) 36 ChD 145 at 157–8; *Middleton v Brown* (1878) 47 LJ Ch 411; *Borrell v Dann* (1843) 2 Hare 440; 67 ER 181 and the proposition that Chancery mends no man's bargain—*Maynard v Moesley* (1676) 3 Swanst 651; 36 ER 1009.

⁵⁰ See discussion in R Bigwood, 'Economic Duress by (Threatened) Breach of Contract' (2001) 117 *LQR* 376.

⁵¹ See *Symons v Williams* (1875) 1 VLR (Eq) 199 at 216.

⁵² See para 1.11 above.

⁵³ For an example of the practical, but not theoretical, overlap between the doctrines, see *Glencore Grain Ltd v Flacker Shipping Ltd ('The MV Happy Day')* [2002] EWCA Civ 1068; [2002] 2 Lloyd's Rep 487.

⁵⁴ See Chapter 7 *passim*.

⁵⁵ [1983] 1 AC 854 per Lord Diplock at 916A–C.

that theory is that it is either correct as a matter of pure abstract generality or it falls foul of the distinctions between the various doctrines—not least consideration. If the former, the theory is at such a level of generality that it tells us nothing of the factual circumstances within which the doctrines operate. The theory therefore tells us nothing of the various natures of the various doctrines.⁵⁶ If the latter, the theory must bridge those cases where there is consideration and where there is not. The theory therefore must find some means of mitigating or avoiding a fundamental premise of contractual theory.

The second is a theory that attempts to reconcile the estoppels. This avoids the difficulty of consideration. The issue that it raises is whether all estoppels are to be subsumed or some. If just some (as per the Australian model),⁵⁷ the practical issues (as already canvassed by the Australian Courts)⁵⁸ are which and why?⁵⁹ The theoretical issue is why have such a partially complete theory—is a theory that engages some of the doctrines not others (i) possible; (ii) complete or coherent; (iii) useful? If the theory seeks to embrace all estoppels, then it must overcome the basic distinctions between the doctrines—not least the offensive nature of proprietary estoppel and the limiting effect of the doctrine of consideration. **1.19**

(3) A series of interlocking doctrines?

It will be apparent from the above that it is relatively clear that a unified theory neither exists nor has a role to play in this area.⁶⁰ For those for whom completeness connotes the resolution of these doctrines into a single, coherent entity, this work therefore remains incomplete. It does so not only because the common law⁶¹ has evolved these separate doctrines but also because the common law continues to evolve obvious analogues to these doctrines⁶² whilst refusing to accept that there is any overarching relationship between the analogues and these doctrines.⁶³ **1.20**

This work therefore takes a different route. The route taken is that these doctrines form a series of interlocking solutions to one particular issue. The issue is the role of consideration and the interplay between contractual theory and other areas of the law. Each of the doctrines has adopted a particular means by which obligations may be informally and practically modified. Those means place limits on the operation of the doctrines, for if they did not, **1.21**

⁵⁶ In an empirical, common law system, this must be the deductive route by which doctrines are arrived at.

⁵⁷ See *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 447–53; *Foran v Wight* (1989) 168 CLR 385 at 434–6; *Commonwealth v Verwayen* (1990) 170 CLR 394 at 431–46 all per Deane J and *Commonwealth v Verwayen* at 410–13 per Mason CJ. In *Roxburgh v Rothmans of Pall Mall Australia* (2002) 76 ALJR 203, this broad-based approach was extended into and purported to subsume restitutionary principles—per Gummow J at paras 63–4, 74.

⁵⁸ Thus, the majority of the High Court has stated that the estoppel by representation doctrine remains distinct from the unified theory of ‘equitable estoppel’ developed and expanded in that jurisdiction: see *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, *McCraith v Fraser* (1991) 104 FLR (Aus) 227.

⁵⁹ Meagher analyses the Australian doctrine and comes to the same conclusion as to the uncertainties of that which it may or may not include at 1725.

⁶⁰ This is also apparent from the case law since the Second Edition—where the trend has been firmly away from any unified theory.

⁶¹ In the sense of the body of English jurisprudence based on empirical reasoning not in that of a distinction between common law and equity.

⁶² eg, legitimate expectation—see above.

⁶³ See, in the context of legitimate expectation, *R v MAFF, ex p Humble Fisheries (Offshore) Ltd* [1995] 2 All ER 714; *R v SSHD, ex p Jaramillo-Silva* [1995] 7 Admin LR 445; *R v East Sussex CC, ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8 at paras 33–1.

consideration would be undermined. The result is that each of the doctrines addresses a particular situation—the voluntary relinquishing of rights, the action to detriment on a representation or a promise—and offers a specific remedial response. Thus, where it is necessary to confer rights against third parties—the area of real property—substantive rights are created. Where it is not so necessary, no rights are created.

B. The Scheme of the Text

- 1.22** The scheme of the text reflects that view. The text falls into two sections: an examination of the doctrines of waiver, variation and estoppel as means to establish their taxonomies; and an application of those propositions to practical issues that arise in ‘commercial’⁶⁴ law.
- 1.23** Further, as the analysis is of interlocking responses to the same issue—consideration—the text moves from the doctrine in which consideration is most apparent and required—variation—to the most powerful doctrine in which it is absent—proprietary estoppel. In so doing, a taxonomy of the doctrines is created. The underlying thesis is twofold. First, the law is reluctant to impose obligations on a party without that party’s specific consent supported by consideration. However, that reluctance does not extend to the deprivation of rights or of the benefit of obligations. A party may be deprived of those without consideration being present. Second, the broad distinctions between each of the doctrines result from the different but analogous limitations placed upon the circumstances in which modification occurs. Thus, consideration must be present for the variation of contracts; the requirement of knowledge is the analogous limitation in cases of waiver; and detriment performs that function in ‘estoppel’.⁶⁵
- 1.24** The consideration of variation in the abstract⁶⁶ is at Chapter 2. The consideration takes two interrelated forms. First, the elements necessary for a variation are discussed—offer, acceptance and consideration. Those elements have been consistently required since the early nineteenth century and, subject to developments in the law of consideration,⁶⁷ have remained unchanged. Whilst these requirements provide certainty by determining the circumstances in which obligations will be varied, these requirements are consistently undermined by the practices they seek to regulate.⁶⁸ The resultant tension manifests itself in the legal uncertainty as to the effects of unilateral and bilateral variations. The former may automatically determine the contract⁶⁹ and the latter may operate as an implied discharge of all extant obligations. Second, the results of this tension are discussed: namely that uncertainty as to the effects of a variation and the means by which the requirements for variation can be mitigated or avoided. In considering the means by which the requirements for a variation can be mitigated, two points must be borne in mind. First, the Courts have no difficulty in bypassing

⁶⁴ Used in a general sense to cover not only those areas which fall within the jurisdiction of the Commercial Court but also those areas which fall outwith that jurisdiction but remain ‘commercial’ in a loose sense of the word—see Chapter 15.

⁶⁵ ‘Estoppel’ in this context refers to equitable forbearance, estoppel by representation, estoppel by convention, by deed and proprietary estoppel.

⁶⁶ As opposed to the role that variation plays in specific areas of the law.

⁶⁷ See *Williams v Roffey Brothers* [1991] 1 QB 1.

⁶⁸ Seen most notably in the numerous cases of parties’ failure to comply with the formalities of the Statute of Frauds and the Sale of Goods Act 1893.

⁶⁹ See discussion of *White & Carter (Councils)* at paras 6.15 ff below.

the requirements where the parties have agreed in advance that the contract can be varied by particular means.⁷⁰ That is consistent with the traditional view that the parties' bargain is to be upheld. Second, greater difficulty arises as to whether a contract will be varied in the face of events which make performance of the contract extremely difficult but do not frustrate it. The most logical resolution of this difficulty and the Courts' reaction to it is to outline a nascent doctrine of variation by necessity.

1.25 Chapters 3 to 5 consider the doctrine of 'waiver'. Chapter 3 is definitional. It was pointed out in the First Edition that a definitional chapter was unusual. Given the way in which the case law has developed, not least by adopting the definitions,⁷¹ it was and is necessary. Once that approach is applied, three points emerge. First, 'waiver' in its true sense⁷² only applies to the loss of contractual rights. Thus, waiver cannot create additional obligations of any kind. By parity of reasoning, the elements required to establish the waiver must relate to the contractual obligations assumed by the parties. There will be no waiver, therefore, where there is no unequivocal representation as to whether or not particular contractual rights will be relied on. Second, there are four types of waiver depending on the right which is lost. Waiver can range from the loss of a contractual right unique to one party; to the loss of a right or rights before breach; the loss of rights after breach and to the loss of all rights, including that of claiming damages. Third, waiver in all these forms requires knowledge—this knowledge providing the limitation on the circumstances in which a party may be alleged to have lost its rights.

1.26 In Chapter 4, the types and elements of waiver are outlined. In each case, the basic definition is derived from waiver by election. The right most frequently lost is the right to elect arising from a repudiatory breach of the contract.⁷³ That analysis is applied to other forms of waiver because of the similarity between the rights being lost. A party which has a waiver in any form being raised against it will usually be seeking to rely on rights analogous to the right to elect. Further no distinction in principle can be constructed in this context between the right to elect and the other purely contractual rights being lost. Chapter 5 sets out the complications associated with waiver, in particular, whether waiver is suspensory or irrevocable. Here distinctions can and should be drawn between the types of waiver; distinctions which flow from the nature of the rights being lost.⁷⁴

1.27 Chapter 6 is concerned with election and its relation both to waiver and to acquiescence. The analysis of waiver as being based on, but not limited to, waiver by election leads to the suggestion that election is a subset of waiver. As such, for an election to be present the elements required for a waiver—an unequivocal representation made with the requisite knowledge—must also be present. Where those elements are not present, the party seeking to establish that the right to elect has been lost has two choices: to argue that no right to elect accrued or that the innocent party has been deprived of its right to elect by acquiescence or estoppel. As to the former, it would appear that the right to elect can be excluded by the terms of the

⁷⁰ For instance by the incorporation of rules into the contract which provide for their own variation without agreement.

⁷¹ As to unified theories.

⁷² Waiver of tort being a different doctrine falling outwith this work.

⁷³ Assuming that the contract does not automatically determine or the right to elect may be curtailed in certain types of contract—see paras 6.15 ff.

⁷⁴ See paras 5.02 and 5.05 below.

contract or, potentially, by the rule in *White and Carter (Councils) v McGregor*.⁷⁵ The former is uncontroversial and consistent with the Courts' desire to uphold the terms of the bargain reached. The latter represents not a fetter on the right to elect but equity intervening to curtail the innocent party's remedies accruing on repudiatory breach.

- 1.28** Chapter 7 marks the transition from waiver (of whatever kind) and its cognates to estoppel. Chapter 7 therefore concerns itself with points of general principle. The crucial issues are the existence or otherwise of the unified theory and a summary of the various estoppels. The latter is provided not only as an example of why there is no unified theory but also as a means of summarising the various differences in one place without discussion.
- 1.29** Chapters 8 to 11 move on to estoppel. As suggested above, the distinction between waiver and estoppel is that knowledge is required for the former, detriment for the latter. Further, within the doctrine of estoppel distinctions are drawn between the various doctrines dependent on whether representations, shared assumptions or property are at issue. Three points are common to the analysis of all types of estoppel. First, the distinctions drawn are and will remain necessary unless and until the English law adopts a unified theory of estoppel eradicating the distinctions which have existed and at present exist. Second, the element of detriment is common to all forms of estoppel and may well take the same form in each. Detriment is the prejudice triggered by withdrawal of the representation/assumption/promise; that prejudice itself arising from the change of position that has occurred. Third, this analysis of detriment makes explicit the conceptual underpinning of all estoppels. Estoppels are necessary because of the English law's focus on consideration, filling the lacunae left by that doctrine.
- 1.30** Following the trajectory set out above, Chapter 8 considers promissory estoppel or rather equitable forbearance. The location of the chapter and the name of the doctrine reflect its close relationship with waiver.⁷⁶ The doctrine occupies the interstice between waiver and estoppel by representation. As estoppel by representation cannot apply to promises and waiver requires knowledge, there must be some intermediary based on concessions and promises to forbear from enforcing existing rights. The distinction between waiver and equitable forbearance is therefore that waiver requires knowledge whereas equitable forbearance requires detrimental reliance. The distinction between equitable forbearance and estoppel by representation is that it applies to representations of future intention and promises. The elements of equitable forbearance are examined in turn, concluding that detriment is a prerequisite for its operation. The principles which determine when the doctrine will operate to suspend the rights forgone and when it will operate to extinguish them are assessed, drawing the conclusion that the prime aim of the relief is to avert detriment to the promisee. There is then an assessment of the status of the *Combe v Combe* principle restricting the doctrine to forbearance of existing rights rather than the creation of new obligations.
- 1.31** Chapter 9 considers estoppel by representation and Chapter 10 considers estoppel by convention. There are obvious similarities, the main difference being the nature of the triggering representation. In estoppel by representation, the requirement for a clear representation remains. In estoppel by convention, the clear representation is unnecessary—being replaced by a shared assumption.

⁷⁵ [1962] AC 413.

⁷⁶ The terms have often been used interchangeably by the Courts.

Chapter 11 addresses proprietary estoppel. As pointed out, proprietary estoppel is the most muscular of these doctrines having substantive effect as against third parties. It is for this reason that it is confined to property rights. The curiosity is the remedial flexibility it shares with equitable forbearance and does not, at first glance, share with estoppel by representation and estoppel by convention. The anomalous link with equitable forbearance may flow from the fact that both relate to promises. Where the Court is remedying detriment flowing from a promise, remedial flexibility is required. The alternative view may be to regard estoppel by representation, at the very least, as not as remedially challenged as was once thought. **1.32**

Chapters 12 to 14 consider a series of anomalous doctrines. Chapter 12 addresses estoppel by deed, a doctrine that stands on its own for historical reasons. Chapters 13 and 14 consider two doctrines that are titled as estoppels or waivers but are not. Chapter 13 considers the *Panchaud Frères* doctrine and 'contractual estoppel'. Although *Panchaud Frères* is often cited as forming part of the doctrine of waiver, on analysis, the doctrine has few, if any, of the necessary hallmarks. Further, as the doctrine can arguably be confined to the context of shipping law⁷⁷ or that of sale of goods,⁷⁸ it is difficult to see how waiver in the true sense of the word is in play. *Panchaud* is therefore treated as an anomaly confined, at best, to shipping law. There are similar difficulties with 'contractual' estoppel. Although said to be an estoppel, it is one which uniquely does not require detriment. Chapter 14 turns to various *res judicata* and associated doctrines. As is apparent from the title—'Procedural Doctrines'—and the discussion, the only link that *res judicata* has with the modern law of estoppel is a common semantic and historic root. **1.33**

Chapters 15 and following form the second section of the work—the application of the doctrines to various areas of the law. Although these chapters are designed to be free-standing, some reference back will have to be made to the doctrines as defined. As Chapter 15 points out, the areas chosen are self-selecting; the frequency with which these doctrines are considered suggesting that it is appropriate to include a particular area. Further, as the focus of this book is the modification of commercial obligations, it seems appropriate to consider the interaction of these doctrines with 'commercial law' in its loosest sense. The traditional areas of commercial practice—banking, insurance and shipping—therefore appear as do agency, company, construction, and landlord and tenant. **1.34**

⁷⁷ See Chapter 13, *passim*.

⁷⁸ See *Glencore Grain Rotterdam BV v Lebanese Organisation for International Commerce* [1997] 4 All ER 514 at 530j per Evans LJ.