while another, to his knowledge, improves the owner's property under a mistaken belief in his own title. Proprietary estoppel by encouragement occurs when an owner creates or encourages an expectation in another that he has or will receive a proprietary interest, which leads the other to change his position so that he would be prejudiced if the owner were permitted to repudiate the expectation he had created or encouraged.[7]

1–003 The equitable doctrine of promissory estoppel recognised in *Hughes v Metropolitan Railway Co*[8] and *Central London Property Trust Ltd v High Trees House Ltd*[9] arises when the holder of a right makes a voluntary promise that he will not enforce that right which induces the promisee to change his position. The promisor can revert to his strict rights once the promisee has been restored to his original position unless this is no longer possible.

Development of estoppel by representation

1–004 Estoppel in *pais* remained confined to the law of real property until developments in the courts of common law during the 18th and 19th centuries led to the decision in *Pickard v Sears*[10] in 1837. As Ashburner said[11] the modern doctrine was almost unknown to the courts of law in the 18th century. The history is not referred to in *Pickard v Sears* or other 19th century cases. According to Ashburner, whose view was accepted by Holdsworth,[12] the wider doctrine was imported from equity.[13] Holdsworth said that the development of mercantile law initiated by Lord Mansfield, which included the recognition of estoppels between parties to bills of exchange, encouraged this process. Estoppel by representation had been developed by the Court of Chancery during the 17th century. As Lord Macnaghten said: "the doctrine . . . is a very old head of equity".[14] At first it was based on fraud but estoppel by innocent

[7] Para 11–004.

[8] (1877) 2 App Cas 439 *(Hughes)*, followed in *Birmingham and District Land Co v London and North Western Rail Co* (1888) 40 ChD 268 CA *(Birmingham Land)*.

[9] [1947] KB 130 *(High Trees)*.

[10] (1837) 6 Ad & El 469. Denman CJ only cited *Heane v Rogers* (1829) 9 B & C 577 and *Graves v Key* (1832) 3 B & Ad 313 note (a).

[11] "Principles of Equity" 1st ed 1902 p.628.

[12] Holdsworth,"History of English Law" 1926 Vol 9 pp.160–2.

[13] It began in *Montefiore* (1762) 1 Wm Bl 363. A fraud was devised by two brothers to persuade a woman to marry one of them in the belief that a promissory note given by the other was genuine and her future husband a man of means. The case came before the Kings Bench on cross motions to set aside or enforce the award of an arbitrator who had ordered delivery up of the note on the grounds that it had not been given for value. Lord Mansfield CJ said (364) "Where, upon proposals of marriage, third persons represent anything material, in a light different from the truth . . . they shall be bound to make good the thing in the manner in which they represented it. It shall be as represented to be". This was the principle on which the Court of Chancery acted in enforcing representations of fact during negotiations for a marriage. The tort of deceit was not extended beyond contracting parties until *Pasley v Freeman* (1789) 3 TR 51 but fraud in equity had never been limited in this way. The process of incorporating rules of equity into the common law begun by Lord Mansfield, was continued by Buller J, and others. The roles of Lord Mansfield and Buller J were mentioned by Lord Eldon LC in *Evans v Bricknell* (1801) 6 Ves 173, 183a.

[14] *George Whitechurch Ltd v Cavanagh* [1902] AC 117, 130 *(Whitechurch)*; *Fry v Smellie* [1912] 3 KB 282, 295 per Farwell LJ.

representation was recognised in 1683[15] and became established.[16] This borrowing from Chancery was noticed by Jordan CJ in the Supreme Court of New South Wales in 1935,[17] by the High Court of Australia in 1983[18] and by Potter LJ in 2002.[19] It is of more that antiquarian interest as Courts have been searching for coherence in this area without the insights from history.

Estoppel by representation

An estoppel by representation resolves a contradiction between an earlier statement of fact by the representor and his later statement on the same subject by treating his earlier statement as the truth.[20] Where a representor by his words or conduct has made a representation which justified the representee in believing that a certain state of fact exists, and in that belief the representee altered his position, the representor is not permitted to affirm against the representee that a different state of fact existed at that time[21] if the representee would be materially prejudiced by his change of position if a departure from the representation were permitted.[22] The representee must take the objection at the proper time, or it will be waived.[23] 1–005

The elements of estoppel by representation

The following elements must concur to create an estoppel by representation: 1–006

(a) a statement or other conduct that constitutes a representation of fact (Ch 2);

[15] *Hobbs v Norton* (1683) 1 Vern 136 (innocent misrepresentation on sale of annuity) and *Hunsden v Cheyney* (1690) 2 Vern 150 (innocent misrepresentation during negotiations for marriage settlement) considered by Kay LJ in *Low v Bouverie* [1891] 3 Ch 82, 108 CA.

[16] *Beverley* (1689) 2 Vern 131, 133 (marriage settlement); *Raw v Pote* (1691) 2 Vern 239 (same); *Mocatta v Murgatroyd* (1717) 1 P Wms 393 (first mortgagee of ship who silently attested later mortgage was postponed); *Savage v Foster* (1722) 9 Mod Rep 35 (standing by in silence representation of authority); *Teasdale* (1726) Sel Cas Ch 59 (marriage settlement); *Neville v Wilkinson* (1782) 1 Bro CC 548 (marriage settlement); *Burrowes v Lock* (1805) 10 Ves 470; *Low v Bouverie* [1891] 3 Ch 82, 101, 108 CA; *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81.

[17] *Franklin v Manufacturers Mutual Insurance Ltd* (1935) 36 SR (NSW) 76, 80. He did not refer to authority but was familiar with Holdsworth.

[18] *Legione v Hateley* (1983) 152 CLR 406, 430 per Mason and Deane JJ. They did not refer to authority but probably knew of this judgment of Jordan CJ. Unfortunately the equitable origins of the doctrine and the fact that the principles at law and in equity were the same were overlooked in the trilogy of estoppel cases: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 *(Waltons Stores)*; *Foran v Wight* (1989) 168 CLR 385; and *The Commonwealth v Verwayen* (1990) 170 CLR 394 *(Verwayen)*. The judgments in these cases contain many references to "common law estoppel", the impact of equity following (so called) fusion, and the emergence of a unified doctrine.

[19] *National Westminster Bank v Somer International Ltd* [2002] QB 1286, 1304 CA *(Somer International)*, citing Cooke "The Modern Law of Estoppel" pp.19–22. The cases cited in nn 15–16 show that the authorities in equity were not confined to marriage settlements.

[20] Paras 1–021–2.

[21] Based on the speech of Lord Birkenhead LC in *Maclaine v Gatty* [1921] 1 AC 376, 386 (although a Scots appeal).

[22] Para 1–008.

[23] Paras 17–003–7.

(b) its communication to the representee (Ch 3);

(c) the representee's justifiable belief in its truth and his alteration of position in that belief (Ch 5);

(d) an attempt by the representor to contradict his representation (Ch 4);

(e) prejudice to the representee as a result of his alteration of position if contradiction of the representation were permitted (Ch 5);

Causation

1–007 The justice of holding a party to an estoppel by representation,[24] or convention, or a promissory estoppel depends on his responsibility for the representee's change of position. This is defined by law and the best general statement of the principles is that of Dixon J (later Dixon CJ) of the High Court of Australia in *Grundt v Great Boulder Proprietary Gold Mines Ltd*[25] which has frequently been approved.[26] He said[27]:

> "The principle upon which estoppel in *pais* is founded is that the law should not permit an unjust departure[28] by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations. This is . . . a very general statement. But it is the basis of the rules governing estoppel [which] work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption . . . Before anyone can be estopped, he

[24] The author favours pensioning off "estoppel in *pais*" which is seldom found in modern judgments. It cannot be replaced by "common law estoppel" because, as we have seen (para 1–004), estoppel by representation originated in equity. Estoppel by representation will be used instead.

[25] (1938) 59 CLR 641, 674–7 *(Grundt)*.

[26] *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371, 380 CA per Denning LJ; *Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co Ltd* [1971] 2 QB 23, 44 *(Woodhouse)* per Roskill J; *Moorgate Mercantile Co Ltd v Twitchings* [1976] 1 QB 225, 241–2 CA *(Moorgate)* per Lord Denning MR; *Taylors Fashions Ltd v Liverpool Trustees Ltd* [1982] QB 133, 154 *(Taylors Fashions)* per Oliver J; *The Odenfeld* [1978] 2 Lloyd's Rep 357, 376 per Kerr J; *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, 121 CA *(Texas Bank)* per Lord Denning MR; *The August Leonhardt* [1985] 2 Lloyd's Rep 28, 35 CA per Kerr LJ; *In re Exchange Securities Ltd* [1988] Ch 46, 55 per Harman J; *Hammersmith LBC v Top Shop Ltd* [1990] Ch 237, 254 per Warner J; *Bruton v London & Quadrant Housing Trust* [1998] QB 834, 844 CA per Millett LJ *(Bruton)*; *Gillett v Holt* [2001] Ch 210, 232–3 CA and *Scottish Equitable plc v Derby* [2001] 3 All ER 818, 830 CA *(Derby)* per Walker LJ; *William Grant & Sons Ltd v Glen Catrine Ltd* [2001] SC 901, 914, 921 per Lord Rodger of Earlsferry when Lord President who described the judgment as luminous, 942, 944 per Lord Clarke; *Somer International* [2002] QB 1286, 1299 CA per Potter LJ, 1309 per Clarke LJ; *Prime Sight Ltd v Lavarello* [2014] AC 436, 444, 448–9; *Bestkey Development Ltd v Incorporated Owners of Fine Mansions* [1999] 2 HKLRD 662, 668 CA *(Bestkey)*; *Ryan v Moore* (2005) 254 DLR (4th) 1, 27 SC; *Unruh v Seeburger* (2007) HKCFAR 10 [129]–[130], [136]. The Australian citations are too numerous to mention.

[27] (1938) 59 CLR 641, 674–6. He also said (674): "Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another".

[28] In *Legione v Hateley* (1983) 152 CLR 406, 431 Mason and Deane JJ said that Dixon J's reference to unjust departure was not seen by him "as a charter for idiosyncratic concepts of justice and fairness", or it might be said of unconscionability.

> must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied."

The test is whether the departure from the assumption would be unfair or unjust. This is determined objectively by reference to the causative effect of the representor's conduct which induced the adoption of the assumption and the effect that departure from that assumption would have on the party who changed his position. There is no need to consider the representor's state of mind when he seeks to depart from the assumption, and in particular there is no need to consider whether his conduct is unconscionable. Dixon J identified the kinds of conduct that will expose the representor to an estoppel[29]:

> "Whether a departure by a party from the assumption should be considered unjust or inadmissible depends on the part taken by him in occasioning its adoption . . . He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations . . . or because he has exercised against the other party rights which would exist only if the assumption were correct,[30] . . . or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so[31]; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption."

Briggs J has suggested[32] that there may be a wider principle that would support an estoppel where the representation enabled the representor to obtain a benefit. This should not be accepted. If the benefit was the result of the representee's change of position the estoppel would be supported on that basis. If it accrued without any change of position there would be no injustice to support an estoppel.

Where the representor owes the representee a duty to speak, his silence in breach of this duty is a representation that there is nothing to report. This gives rise to an estoppel if it induces the representee to change his position or refrain from taking measures for his protection.

[29] *Ibid* at 676.

[30] Dixon J cited *Ambu Nair v Kelu Nair* (1933) LR 60 Ind App 266, paras 2–017, 15–015; he could have added *Yorkshire Insurance Co v Craine* [1922] 2 AC 541, 546–7 *(Craine)* (entry by insurer into possession of fire damaged premises pursuant to policy was a representation that claim lodged out of time was valid).

[31] *West v Commercial Bank of Australia Ltd* (1935) 55 CLR 315.

[32] *Revenue & Customs Commissioners v Benchdollar Ltd* [2010] 1 All ER 174, 188, 191 *(Benchdollar)*.

Detrimental change of position

1–008 A change of position induced by a representation, convention, or voluntary promise is not enough without more because, viewed in isolation it may be beneficial. For this reason the prejudice of the representee or promisee must be assessed when the representor or promisor attempts to depart from the assumption or promise. Dixon J explained[33]:

> "[T]he rules governing estoppel . . . work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice."

An estoppel by representation is established when the change of position by the representee induced by the representation would occasion him prejudice if the representor were permitted to contradict his representation. The focus here and elsewhere is on the representee,[34] and the orthodox tests for a change of position and prejudice apply objective standards.[35]

Estoppel by representation: evidentiary or substantive

1–009 Estoppels by representation are said to be part of the law of evidence because they place an evidentiary barrier in the way of a claim or defence which might otherwise succeed.[36] One cannot sue on such an estoppel which is not a source

[33] *Grundt* (1938) 59 CLR 641, 674–5; n 28; *Litwin Constructions (1973) Ltd v Pan* (1989) 52 DLR (4th) 459, 470 BCCA.
[34] Paras 1–016, 5–002–7.
[35] The topics in paras 1–007–8 are examined in greater depth in Ch 5.
[36] *Seton Laing & Co v Lafone* (1887) 19 QBD 68, 70 CA *(Seton Laing)*, per Lord Esher MR:

of legal obligation[37] and does not create a cause of action.[38] In *Texas Bank* the appellant argued that a cause of action cannot be founded on an estoppel by representation or convention which can only be used as a shield. Brandon LJ dismissed the argument[39]:

> "[M]uch of the language used in connection with these concepts is . . . semantics . . . the true proposition of law [is] that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which . . . he would . . . have failed."

1–010 An estoppel by representation compels adherence to an assumption of fact[40] by preventing the representor asserting the contrary. Because it operates in this way the estoppel is necessarily "all or nothing". The estoppel cannot have a partial or discretionary operation because the contrary evidence is excluded.[41] This does not preclude a distributive operation where the representee's change of position is not co-extensive with the representation. There is scope for this where, for example, the recipient of a mistaken payment can only establish a detrimental change of position for part of the sum received.[42]

"An estoppel does not in itself give a cause of action; it prevents a person from denying a state of facts"; *Low v Bouverie* [1891] 3 Ch 82, 101 CA per Lindley LJ: "Estoppel is not a cause of action – it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself"; *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618, 628 CA per Bowen LJ: "No cause of action arises upon an estoppel itself. The court must look for the cause of action elsewhere"; *Henderson v Williams* [1895] 1 QB 521, 535 CA per A L Smith LJ: "The action is founded on trover . . . The plaintiffs succeed . . . upon an estoppel by misrepresentation, but the action . . . is nonetheless an action of trover"; *Lloyd's Bank Ltd v Cooke* [1907] 1 KB 794, 804 CA: "Estoppel creates a cause of action as between the parties to the estoppel because it enables the plaintiff to prove some element of a cause of action which he could not otherwise establish"; *Re Goldcorp Exchange Ltd* [1995] 1 AC 74, 94 *(Goldcorp)*. In *Dawson's Bank Ltd v Nippon Menkwa Kabushiki Kaisha* (1935) LR 62 Ind App 100, 108 *(Dawson's Bank)* Lord Russell of Killowen said: "Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying . . . some fact essential to . . . the cause of action, or . . . by preventing a defendant from asserting the existence of some fact . . . which would destroy the cause of action". In *The Hannah Blumenthal* [1983] 1 AC 854, 916 Lord Diplock said: "estoppel in the strict sense . . . is an exclusionary rule of evidence, though it may operate . . . to affect substantive legal rights inter partes"; *Somer International* [2002] QB 1286, 1303 CA Potter LJ said that it was not open to the Court of Appeal to depart from the traditional view that an estoppel by representation is enforced by a rule of evidence. It is thought that the cases cited in n 44 allow the court to recognise its substantive operation; *Waltons Stores* (1988) 164 CLR 387, 458 per Gaudron J.

[37] *Waltons Stores* (1988) 164 CLR 387, 414 per Brennan J.
[38] *Texas Bank* [1982] QB 84, 105 per Robert Goff J; *Waltons Stores* (1988) 164 CLR 387, 415 per Brennan J "If the estoppel relates to the existence of a contract . . . the estoppel is not a source of legal obligation except in the sense that the estoppel compels the party bound to adhere to the assumption that a contract exists"; in *Air Tahiti Nui Pty Ltd v McKenzie* (2009) 77 NSWLR 299, 307–8 CA *(Air Tahiti)* a contract for carriage by air was established by estoppel; para 15–015 n 96.
[39] *Texas Bank* [1982] QB 84, 131–2. Robert Goff J said at 105 "it is . . . not of itself a bar to an estoppel that its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist"; *Johnson v Gore Wood & Co* [2002] 2 AC 1, 40.
[40] *Kelly v Fraser* [2013] 1 AC 450, 460.
[41] Representations as to the existence of private legal rights are representations of fact, para 2–014.
[42] Paras 1–023–4, 5–027–34.

This would allow evidence of the truth, ie the mistake, to be excluded for one purpose, establishing an estoppel for that part, but not for another purpose, establishing an entitlement to the balance.

1–011 There has been growing recognition that the doctrine is more than just a rule of evidence. The fact that it is part of the law of misrepresentation[43] suggests that it is substantive. In *London Joint Stock Bank Ltd v Macmillan*,[44] Viscount Haldane said that estoppel "is hardly a rule of what is called substantive law in the sense of declaring an immediate right or claim. It is rather a rule of evidence, capable not the less . . . of affecting . . . substantive rights". Lord Wright said in *Mercantile Bank of India v Central Bank of India*[45] that estoppel "may have the effect of creating substantive rights against the person estopped" and in *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd*[46] he said that:

> "Estoppel is a complex legal notion, involving a combination of several essential elements, the statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as, indeed, it may be so described. The whole concept is more correctly viewed as a substantive rule of law."[47]

1–012 In *Moorgate*[48] Lord Denning MR said "Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity". In *Canada Sugar* Lord Wright[49] quoted Sir Frederick Pollock's statement that estoppel was "perhaps the most powerful and flexible instrument to be found in any system of Court jurisprudence".[50] If it is not just a rule of evidence it must be partly substantive, and aspects of the doctrine reflect this. In most cases it must be pleaded or it will be waived. In *Texas Bank* Robert Goff J a said[51]:

> "It was suggested . . . that no cause of action in contract could be erected by an estoppel but that . . . is inconsistent with . . . two decisions of the Privy

[43] Para 1–020.
[44] [1918] AC 777, 818 *(Macmillan)*. *Evans v Bartlam* [1937] AC 473, 484 per Lord Wright; *Maritime Electric Co v General Dairies Ltd* [1937] AC 610, 620 *(Maritime Electric)*.
[45] [1938] AC 287, 297 *(Mercantile Bank of India)*.
[46] [1947] AC 46, 56 *(Canada Sugar)*. A further passage is quoted n 97. This was a considerable development on his views since *Evans v Bartlam*, n 44.
[47] In *Waltons Stores* (1988) 164 CLR 387, 449, Deane J said that "the doctrine of estoppel by conduct is one of substantive law"; and in *Verwayen* (1990) 170 CLR 394, 413, 444, 487. In *Cambodia v Thailand* [1962] ICJ 6, at 41 Alfaro J quoted Sir Frederick Pollock saying that the concept in English law "is more correctly viewed as a substantive rule of law". He did not cite the source, and the author has not been able to find it.
[48] [1976] QB 225, 241 CA.
[49] [1947] AC 46, 55 quoted n 97.
[50] *Enrico Furst & Co v W E Fricher Ltd* [1960] 2 Lloyd's Rep 340, 349 per Diplock J: ". . . a variation alters the obligation to be performed under the original contract, whereas waiver and estoppel are conduct . . . which does not alter the terms of the contract but merely affects the remedies in respect of a breach of those terms by the other party". In *Williams v Frayne* (1937) 58 CLR 710, 734 Dixon J referred to an estoppel by silence in breach of duty where "the sanction . . . is preclusion, not liability".
[51] [1984] QB 84, 106.

> Council[52] . . . [W]here one party has represented to another that a transaction between them has an effect which in law it does not have it may . . . be unconscionable for the representor to go back on his representation, despite the fact that the effect is to reduce his rights or enlarge his obligations."

In *Waltons Stores* Brennan J said[53]:

> "The assumed state of affairs to which a party may be bound to adhere . . . may include the legal complexion of a fact as well as the fact itself i.e. a matter of mixed fact and law."

The substantive nature of an estoppel by representation and a promissory estoppel was recognised by Lord Hoffmann who said[54]: "[It] is based upon a policy of giving a limited effect to non-contractual representations and promises."

The fact that it has its own remedy of preclusion[55] confirms its substantive character. Charactering it as a rule of evidence does not deny its substantive operation. The Privy Council has held that a *res judicata* estoppel created a substantive right and the reasons of Lord Hobhouse apply to the other forms of estoppel. He said[56]:

> "It is true that estoppels can be described as rules of evidence . . . But that is to look at how estoppels are given effect to, not at what is the nature of the private law right which the estoppel recognises and protects. For example a party who has attorned to another is estopped from denying that he holds the relevant goods for that other; the attornment has created a legal relationship and legal rights which the attorning party must recognise."

The Hong Kong Court of Appeal agreed[57]:

> "[E]stoppel by convention is a matter of substance . . . it clearly affects the existence, extent or enforceability of the rights and duties of the parties and it is not simply directed to governing or regulating the mode or conduct of court proceedings."

The substantive character of these estoppels is relevant when considering their operation in the conflict of laws.

[52] *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR 19 Ind App 203 *(Sarat Chunder)*; and *Calgary Milling Co Ltd v American Surety Co of New York* (1919) 3 WWR 98 *(Calgary Milling)*; followed in *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330 *(De Tchihatchef)*.
[53] (1988) 164 CLR 387, 415. He cited *Sarat Chunder* (above) (validity of a conveyance) and *Craine* [1922] 2 AC 541, 553 (validity of claim under fire policy out of time).
[54] *Carter v Ahsan* [2008] 1 AC 696, 707.
[55] N 50.
[56] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041, 1048 PC; "an accrued right" n 117.
[57] *First Laser Ltd v Fujian Enterprises(Holdings) Ltd* [2011] 2 HKLRD 45 [86] CA per Cheung JA *(First Laser)*.

Equitable estoppels create rights

1–013 In *Waltons Stores* Brennan J said[58]:

> "Equitable estoppel . . . does not operate by establishing an assumed state of affairs . . . it is the source of a legal obligation arising on an actual state of affairs."

Gaudron J said in the same case[59]:

> "Equitable estoppel operates . . . to compel adherence to an assumption as to rights. Sometimes that . . . can only be compelled by the recognition of an equitable entitlement to a positive right . . . and the enforcement of correlative duties on the part of the person against whom the estoppel is successfully raised."

Estoppel by representation in the conflict of laws

1–014 An estoppel (other than the purely equitable estoppels which are causes of action), unlike most rules of evidence, must, if possible, be specially pleaded.[60] In this respect such an estoppel is akin to limitation provisions,[61] and the Statute of Frauds and its derivatives.[62] The principal reason for characterising laws as either procedural or substantive for domestic purposes is for the application of the presumption that Parliament does not intend to interfere with vested rights. There is no such presumption for laws dealing with procedure.

1–015 The characterisations for conflicts and domestic purposes are inconsistent. Limitation provisions which only bar the remedy have been characterised as procedural for conflicts purposes, but as substantive for the application of the presumption that legislation is not intended to interfere with vested rights.[63] In a limitation case Dixon CJ referred to[64] "the inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance".[65] Estoppel by representation has been characterised as substantive for conflicts purposes. In

[58] (1988) 164 CLR 387, 416; *Verwayen* (1990) 170 CLR 394, 500 per McHugh J "the doctrines are concerned with the creation of new rights".
[59] *Ibid* at 458.
[60] Paras 17–005–7.
[61] *Huber v Steiner* (1835) 2 Bing NC 202; *Don v Lippmann* (1837) 5 Cl & F 1; *Ruckmaboye v Mottichund* (1851) 8 Moo PC 4.
[62] *Leroux v Brown* (1852) 12 CB 801 (Statute of Frauds applied to action in England on contract made abroad); *Irvani v G & H Montage Gmbh* [1990] 1 WLR 667 CA (same). The Court of Appeal of Western Australia, following decisions of the High Court that limitation provisions are substantive, has held the s 4 of the Statute of Frauds (guarantees) is substantive: *Tipperary Developments Ltd v Western Australia* (2009) 38 WAR 488, 510 CA *(Tipperary)*.
[63] *Maxwell v Murphy* (1957) 96 CLR 261; *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553.
[64] *Ibid* at 267.
[65] In *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 56, 65 the Court said in a joint judgment that limitation provisions "entail consequences which are substantive in that, by barring the remedy, they will effectively extinguish both rights and liabilities".

Allen v Hay[66] the Supreme Court of Canada held that an action on a promissory note succeeded, despite the lack of consideration, because a different rule of estoppel applied under the proper law.

The question was considered in *The Amazonia*[67] in the context of an estoppel by convention. A charterparty for a voyage from Australia contained a London arbitration clause and disputes were referred without the parties realising that the clause may have been void under the Australian Sea Carriage of Goods Act 1924. The owners later took the point that the arbitrators had no jurisdiction but the charterers established an estoppel by convention supporting an ad hoc submission which was not affected by the statute. Staughton LJ held that the ad hoc submission was governed by English law[68]:

> "It seems to me that . . . an estoppel by convention will be effective or not, in the case of illegality [the clause could only have been void] under foreign law, in the same circumstances as a contract in like terms . . . In a case of estoppel by convention where a foreign element is involved, one has . . . to look for something which can conveniently be called the proper law of the estoppel."

The Hong Kong Court of Final Appeal has held that an estoppel by convention was a matter of substance, not procedure, and as such was governed by the proper law of the contract.[69] However the initial proper law will not necessarily apply to a post-contractual convention[70] which, as in *The Amazonia*, may be more closely connected with another legal system. This applies with special force to an ad hoc submission, because arbitration clauses are severable and are not affected by the invalidity, termination, or rescission of the principal contract.[71]

Focus of estoppel by representation on the representee

1–016 The focus of this form of estoppel is on the effect of the representation on the mind and conduct of the representee. In *Freeman v Cooke* Parke B said[72] that it was not necessary for the representor to represent as true what he knew to be false. This was confirmed in *Sarat Chunder* where Lord Shand said[73]:

> "The law of this country gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted

[66] (1922) 69 DLR 193. The promissory note was given without consideration to create a false appearance of assets to deceive a Bank regulator. The case was within *Montefiore* (1762) 1 Wm Bl 363, n 13 but that point was not taken.
[67] [1990] 1 Lloyd's Rep 236 CA; paras 8–019, 8–021. The Federal Court has since held that the Act only applies to bills of lading: *Dampskibsselskabat Nordon A/S v Gladstone Civil Pty Ltd* (2013) 216 FCR 469.
[68] *Ibid* at 247.
[69] *First Laser* (2012) 15 HKCFAR 569, 611.
[70] *Whitworth Street Estates Ltd v Miller* [1970] AC 583, 611, 615.
[71] *Fiona Trust & Holding Corporation v Privalov* [2008] 1 Lloyd's Rep 254 HL *(Fiona Trust)*.
[72] (1848) 3 Ex 654, 663.
[73] (1892) LR 19 Ind App 203, 215.

with an intention to mislead or deceive, [and] conduct short of positive acts is sufficient. What the law . . . mainly regard[s] is the position of the person who was induced to act."

In *Craine* Isaacs J said in a passage that has often been approved[74]:

"[T]he law of estoppel looks chiefly at the situation of the person relying on the estoppel . . . the knowledge of the person sought to be estopped is immaterial . . . it is not essential that the person sought to be estopped should have acted with any intention to deceive."

This was reaffirmed by Lord Steyn[75]: "Estoppel by representation is bilateral in character and focuses on the impact on the representee."

Representor required by equity to make representation good

1–017 When the Court of Chancery began to enforce estoppels by innocent representation after 1683[76] it required the representor to make good his representation. In *Maunsell v Hedges* the House of Lords held that equity could require this to be done if the representation had contractual force[77] and in *Jorden v Money* it held that a representation of existing fact could also be enforced by an estoppel.[78] The jurisdiction of a Court of Equity[79] to require a representor to make good his representation continued to be recognised and occasionally enforced.[80] This is how Equity enforced representations by trustees as to the

[74] (1920) 28 CLR 305, 327 (affirmed on other grounds [1922] 2 AC 541); approved in *Taylors Fashions* [1982] QB 133, 150 per Oliver J; *The Mihalios Xilas* [1979] 1 WLR 1018, 1034 HL per Lord Scarman, by Kerr J at first instance [1978] 1 WLR 1257, 1266, whose judgment was expressly approved in the House of Lords [1979] 1 WLR at 1024, 1028, 1032; and in *The Happy Day* [2002] 2 Lloyd's Rep 487, 506 CA per Potter LJ.

[75] *Super Chem Products Ltd v American Life and General Insurance Co Ltd* [2004] 2 All ER 358, 368 PC *(Super Chem)*; *Taylors Fashions* [1982] QB at 145, 149–150; *Revell v Litwin Construction (1973) Ltd* (1991) 86 DLR (4th) 169 BCCA.

[76] Para 1–004.

[77] (1854) 4 HLC 1039, 1055–6.

[78] (1854) 5 HLC 185, 215 per Lord Cranworth LC "it is no misrepresentation of a fact which the party is afterwards held bound to make good as true".

[79] These included the Palatine Chancery Courts. Until the first half of the 19th century the Court of Exchequer also had a jurisdiction in equity.

[80] *Citizens' Bank of Louisiana v First National Bank of Orleans* (1873) LR 6 HL 352, 360 *(Bank of Louisiana)*; *Brownlie v Campbell* (1880) 5 App Cas 925, 936; *Derry v Peek* (1889) 14 App Cas 335, 360; *Fatimatulnissa Begum v Soonder Das* (1900) LR 27 Ind App 103, 108 "amounts to a representation which he is bound to make good"; *Mills v Fox* (1887) 37 ChD 153; *Nocton v Ashburton* [1914] AC 932, 952; *Forbes v Ralli* (1925) LR 52 Ind App 178, 187 ("it gives effect to the representation"); *Fry v Smellie* [1912] 3 KB 282, 295 CA per Farwell LJ. Hence the statement of Mason CJ in *Verwayen* (190 CLR at 411) that "Equity was concerned, not to make good the assumption, but to do what was necessary to prevent the suffering of detriment", was, in relation to estoppels by representation, bad equity and bad history; *Delaforce v Simpson-Cook* (2010) 78 NSWLR 483 CA *(Delaforce)*; Ch 11.

value or extent of a beneficiary's interest.[81] Lord Selborne stated the principles in *Brownlie v Campbell*[82]:

"A man is going to deal for valuable consideration with a particular subject, and the value of the return which he is to receive depends entirely upon a particular fact which is, or ought to be, in the knowledge of a particular person . . . If his memory has failed, still it was the case of a man who once had certain knowledge of the fact and who could have no right to answer one way or the other a fact as of his own knowledge upon such a subject unless he possessed that knowledge; and if he did assert it he was bound to make the assertion good."

An estoppel by representation otherwise has the same effect at law as in equity.[83]

Mills v Fox[84] is an example, after the Judicature Act, of equity enforcing 1–018
a representation of fact in this way. The Court sanctioned the defendant's marriage and marriage settlement while she was an infant and ward of Court. The settlement purported to convey certain freehold land to the trustees, but the Court was not told that the land had been resumed, and the settlement did not assign the compensation money. The wife was ordered to make good her representation by transferring the compensation to the trustees. Stirling J referred to the speeches of Lord Cranworth LC in *Jorden v Money*[85] and of Lord Selborne LC in *Bank of Louisiana*[86] and said[87]:

"[T]he proposals for the settlement carried in on behalf of [the wife] and the affidavit in support . . . constituted a representation of fact made on [her] behalf . . . that she was . . . tenant in tail of the property . . . and had power to convey it . . . and the Court, being applied to by her to sanction her contemplated marriage, gave such sanction on the faith of such representation and on the terms that the property . . . be . . . conveyed to trustees . . . Under these circumstances the case appears to me to be brought within the principle laid down by Lord Cranworth and Lord Selborne."

In *Ramsden v Dyson* Lord Kingsdown, applied this principle to an equitable estoppel by encouragement[88], saying that ". . . a Court of Equity will compel the landlord to give effect to such promise or expectation".

[81] *Evans v Bicknell* (1801) 6 Ves 173, 183; *Burrowes v Lock* (1805) 10 Ves 470, 475; *Low v Bouverie* [1891] 3 Ch 82, 101, 108 CA; *Williams v Pinckney* (1897) 67 LJ Ch 34, 37, 40 CA; *Whitechurch* [1902] AC 117, 130; *Fry v Smellie* [1912] 3 KB 282, 295–6 CA per Farwell LJ; *Nocton v Ashburton* [1914] AC 932, 952.

[82] (1880) 5 App Cas 925, 935–6.

[83] *Jorden v Money* (1854) 5 HLC 185, 210; *Simm v Anglo-American Telegraph Co* (1879) 5 QBD 188, 206 CA *(Simm)*; *Whitechurch* [1902] AC 117, 130.

[84] (1887) 37 ChD 153.

[85] (1854) 5 HLC at 210, 212.

[86] (1873) LR 6 HL at 360.

[87] (1887) 37 ChD at 165. The wife's liability to the estoppel was based on representations made by her next friend and solicitor.

[88] (1866) LR 1 HL 129, 170; *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699, 713 *(Plimmer)*.

Rationale of estoppel by representation

1–019 Coke said that "estoppels are odious"[89] but an estoppel by representation upholds what the representee has accepted as the truth, and this is perfectly just. Viscount Haldane said that "generally speaking [it was] a mere application not of any technical rule, but of common sense".[90] Lord Blackburn said[91]:

> "Now sometimes there is a degree of odium thrown upon the doctrine of estoppel . . . But the moment the doctrine is looked at in its true light, it will be found to be a most equitable one . . . without which the law of this country could not be satisfactorily administered. When a person makes to another the representation . . . [that] such and such things do exist, and you may act upon that basis, it seems to me of the very essence of justice that, between these two parties, their rights shall be regulated, not by the real state of facts, but by that conventional state of facts . . . upon the basis that that is accurate which you induced the other side to take as the basis upon which he was to act."

In *Allison Ltd v Limehouse & Co*[92] Lord Goff said "the principle of estoppel is essentially a principle of justice" and Lord Shaw said[93]: "Estoppel is a well known refuge for litigants in distress; the refuge is also well known to be frequently insecure". Other eminent judges have referred to the justice of the doctrine,[94] its utility and convenience,[95] and the injustice which would result from a refusal to apply it.[96] In *Canada Sugar* Lord Wright said[97]:

> "There was, perhaps, a time when estoppels were described as odious and . . . viewed with suspicion and reluctance . . . But in more modern times the law of estoppel . . . has become recognised as a beneficial branch of law. That great lawyer Sir Frederick Pollock has described the doctrine of estoppel as 'a simple and wholly untechnical conception, perhaps the most powerful and flexible instrument to be found in any system of court jurisprudence'."

If the claim defeated by the estoppel was unfounded, it might be said that the estoppel was unnecessary. But a trial on the merits of that issue will involve delay, expense and risk and the party with the benefit of the estoppel is entitled to be relieved of these burdens.

[89] 2 Coke on Litt 365b; *Lampon v Corke* (1822) 5 B & Ad 606, 611; *Howard v Hudson* (1853) 2 E & B 1; *Baxendale v Bennett* (1878) 3 QBD 525, 529 CA; *Batten-Pooll v Kennedy* [1907] 1 Ch 256, 269.

[90] *Macmillan* [1918] AC 777, 817.

[91] *Burkinshaw v Nicholls* (1878) 3 App Cas 1004, 1026.

[92] [1992] 2 AC 105, 126 *(Allison)*.

[93] *Bradshaw v McMullen* [1920] 2 Ir R 412, 423 HL.

[94] *Jorden v Money* (1854) 5 HLC 185, 210, 214; *Foster v Mentor Life Assurance Co* (1854) 3 E & B 48, 76; *Cuthbertson v Irving* (1859) 4 H & N 742, 758; *Cave v Mills* (1862) 7 H & N 913, 927–8; *Rolt v White* (1862) 3 De G J & Sm 360.

[95] *Swan v North British Australasian Co* (1863) 2 H & C 175, 177 *(Swan)*; *Knights v Wiffen* (1870) LR 5 QB 660, 666; *Simm* (1879) 5 QBD 188, 202 CA; *Bloomenthal v Ford* [1897] AC 156, 165 per Lord Halsbury LC; *Whitechurch* [1902] AC 117, 130 per Lord Macnaghten.

[96] *Board* (1873) LR 9 QB 48, 63; *Gandy* (1885) 30 ChD 57, 82 CA; *Lloyd's Bank Ltd v Cooke* [1907] 1 KB 794, 804 CA.

[97] [1947] AC 46, 55; a further passage is quoted n 46.

Estoppel by representation part of the law of misrepresentation

Isaacs ACJ said in the High Court of Australia[98]: 1–020

> "Estoppel by representation is neither mysterious . . . arbitrary nor technical. It is nothing else than the justice of the common law intervening to prevent a lawful and righteous claim or defence being defeated by misrepresentation."

He cited *Lloyd's Bank v Cooke* and *In re Sugden's Trusts*. In the former Cozens-Hardy LJ said[99]:

> "[A] person cannot be allowed to set up the truth . . . where by his conduct he has rendered it unjust and unfair that he should do so."

In the latter Neville J said[100]:

> "He never . . . can be heard to say that the representation he made was untrue . . . he cannot give evidence of the truth because the truth is inconsistent with the representation . . . by which he induced a . . . party to alter his position."

Harman J said[101] that estoppel is "a rule of honesty which does not allow a man to say 'I now resile from the lies I told you'."A party who establishes an estoppel by representation is in the position he would have been in if the representation had been true.[102] The references to misrepresentation were explained by Lord Cranworth LC in *Jorden v Money*[103] who said that the representor "shall not afterwards be allowed to set up that what he said was false and to assert the real truth in place of the falsehood which has so misled the other". Accordingly the effective operation of an estoppel by representation is limited to misrepresentations of a past or existing fact which could have been falsified when made. Thus there is logic in the decision in *Jorden v Money* that there can be no estoppel by a so-called representation as to future conduct. This was articulated by Gaudron J in *Waltons Stores*[104]:

> "It is clear from *Jorden v Money* and the many cases in which it has been applied that a representation as to future conduct[105] will not found [an] . . . evidentiary estoppel. That . . . is not merely a matter of authority, but also a matter of logic—at least in so far as the representation gives rise to an assumption as to a future

[98] *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355, 372 *(Dayton)*.

[99] [1907] 1 KB 794, 804 CA.

[100] [1917] 1 Ch 511, 516. In *Piggott v Stratton* (1859) 1 De G F & J 33, 49 Lord Campbell LC said that when an estoppel by representation is proved the representee "is entitled . . . to object to any denial of its truth".

[101] *In re Exchange Securities Ltd* [1988] Ch at 54.

[102] *Foster v The Tyne Pontoon & Dry Docks Co* (1893) 63 LJQB 50, 55 per Collins J *(Foster)*.

[103] (1854) 5 HLC 185, 210; para 1–010. Mason CJ made the point succinctly in *Verwayen* (1990) 170 CLR 394, 411 when he said that estoppel by conduct traditionally "prevents a person denying what he previously represented".

[104] (1988) 164 CLR at 459.

[105] This is normally only a representation of the then state of mind of the person referred to, para 2–005–6.

event. Because . . . evidentiary estoppel operates by precluding the assertion of facts inconsistent with an assumed fact, the assumption must necessarily be as to an existing fact and not as to a future fact."

Lord Hoffmann said[106] "estoppel [by representation] . . . is based upon a policy of giving a limited effect to non-contractual representations." This principle underpins the limitation of estoppel by representation to statements of existing fact. Promises for the future are not representations, and representations of an existing intention seldom support a useful estoppel.[107] They prevent the representor proving that he had a different intention, but do not stop him changing his mind.

Estoppel by representation resolves conflicting versions of fact or mixed fact and law

1–021 An estoppel by representation resolves a conflict between two statements about the same subject matter. The first is the representation; the second is the inconsistent version the representor wishes to assert. The estoppel has no further operation. This is illustrated by *Fung Kai Sun v Chang Fui Hing*[108] where owners waited three weeks after learning of the existence of forged mortgages over their property before notifying the mortgagee. The latter was not prejudiced, but argued that the owners were estopped because they failed to tell him what they knew about the forger. The Privy Council held there was no estoppel. Lord Reid[109] said:

"[T]his argument is based on a misconception of the nature of estoppel . . . their Lordships can find neither principle nor authority to support the proposition that although one party may have clearly stated to the other at the right time the fact which he now wishes to prove, yet he will be estopped from continuing to assert that fact because he has withheld some other information which it was in his power to give."

Election between estoppel and truth

1–022 A claimant cannot, in the same proceedings, invoke both the truth and an estoppel on the same subject matter but must elect.[110] As Lord Selborne LC said[111]: "you cannot at once rely upon estoppel and set up the facts". Where, in a case of alternative liability, one party is bound to a contract by estoppel

[106] *Carter v Ahsan* [2008] AC 696, 707

[107] *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 884 *(Kammins)* per Lord Diplock. An anticipatory breach is only an apparent exception: *Fercometal SARL v Mediterranean Shipping Co SA* [1989] AC 788, 805–6 *(Fercometal)*; *Foran v Wight* (1989) 168 CLR 185; paras 2–006, 2–022.

[108] [1951] AC 489 *(Fung Kai)*.

[109] *Ibid* at 507.

[110] This is also the case with *res judicata* estoppel: In *re Savoy Estate Ltd* [1949] Ch 622, 634, 636 CA; *Keith v R Gancia & Co Ltd* [1904] 1 Ch 774, 789–90 CA.

[111] *Scarf v Jardine* (1882) 7 App Cas 345, 350.

and the other bound to the contract in truth, the claimant may sue both in the one proceeding and defer his election until final judgment.[112] Where the same defendant is involved it seems the election must be made before or at the trial. Devlin J said in such a case[113]:

"A man cannot in one breath invoke both the truth and an estoppel; he must make his choice . . . He cannot, in presenting a case against a defendant, mix fact and fiction in the proportions which suit him best. So, in this case, the plaintiff cannot say against the shipowner:- 'By issuing a bill of lading you represented that you had shipped the goods and so are estopped from denying a contract of carriage: but by issuing a bill of lading when in fact you had not shipped the goods you broke the contract you are estopped from denying'."[114]

The shipper was relying on the (false) representation that the goods were shipped for one purpose and the fact that they were not shipped for another purpose. The fact that a person has been held liable on the basis of an estoppel by representation in one proceeding does not prevent him relying on the truth against another party in other proceedings. This is so, particularly where his liability in the first proceeding was the result of innocently passing on a fraudulent misrepresentation made to him by the party sued in the later proceedings.[115]

Estoppel does not operate pro tanto and Court has no discretion

1–023 An estoppel by representation, by shutting out the truth, confers on the representee a right to have his legal relations with the representor determined on the facts represented. It is generally a case of all or nothing.[116] In *Roebuck v Mungovin* Lord Browne-Wilkinson said[117]:

"I know of no principle under which a party can be freed from [an] estoppel otherwise than by the agreement of the party to whom he made the representation."

The representor has no right to buy out the estoppel unless the Court has power to make orders, such as orders for costs,[118] which protect the

[112] Para 15–003.

[113] *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 1044.

[114] The plaintiff was the shipper who failed to ensure that the goods were shipped and could not rely on the Bills of Lading Act 1855 s 3. A remote holder of the bill would not be faced with this dilemma because, subject to *Grant v Norway* (1851) 10 CB 665, he could rely on the estoppel to prove the contract and the truth to establish non delivery at the destination. He would not have to prove that the goods were not shipped, merely that they were not delivered. The rule in *Grant v Norway* was abolished by the Carriage of Goods by Sea Act 1992 s 4.

[115] *Cleary v Jeans* (2006) 65 NSWLR 355 CA.

[116] *Avon CC v Howlett* [1983] 1 WLR 605, 622–4 CA *(Avon)*; *Verwayen* (1990) 170 CLR 394, 454 per Dawson J; *Lipkin Gorman v Karpnale* [1991] 2 AC 548, 579 *(Lipkin Gorman)* per Lord Goff; *Kelly v Fraser* [2013] 1 AC 450, 460.

[117] [1994] 2 AC 224, 235. This was also the view of the Court of Appeal in *County & District Properties Ltd v Lyell* [1991] 1 WLR 683, 688, 689 ("I do not see by what process . . . the Court has power to deprive him of . . . something akin to . . . an accrued right"), 690–1 ("I cannot find . . . any room for . . . discretion").

[118] *Ketteman v Hansel Properties Ltd* [1987] AC 189, 220 *(Ketteman)*; para 15–024–7.

representee from the detriment he would otherwise suffer. The estoppel prevents the representor contradicting his earlier representation, and the representee may recover damages or compensation, or be protected from an obligation, where the monies recovered or saved exceed the damages he could have recovered if the representation was actionable. "There is no need to correlate the detriment suffered with the amount of the claim defeated by the estoppel".[119] The loss of a real chance is sufficient. This is illustrated by *Ogilvie v West Australian Mortgage and Agency Corporation* where Lord Watson said[120]:

> "If . . . by keeping silence and allowing the forger to escape from the colony . . . the appellant had violated his duty to the bank, their Lordships are of opinion that these circumstances would . . . shew prejudice entitling the bank to have their plea of estoppel sustained to its full extent . . . It was argued for the appellant that . . . it was open to the jury to find the amount which the forger could have paid under compulsion of law, and to assess the damage sustained by the bank at that sum; and . . . that the appellant would not have been estopped from alleging forgery of the cheques except to the extent of the damage so found . . . There are some obiter dicta favouring the suggestion that . . . the estoppel against the customer ought to be restricted to the actual sum which the bank could have recovered from the forger. But these dicta . . . are contrary to all authority and practice."[121]

In *Greenwood v Martins Bank Ltd* the customer's failure to report the forgeries of his cheques, which caused the bank to lose its chance of suing the forger, led to an estoppel which relieved the bank of its obligation to restore the funds. Scrutton LJ said[122]:

> "The customer is not made liable by silence for the forged cheques because the payment . . . preceded and was not caused by the silence . . . But if the silence of the customer has caused the bank to lose its right of action the customer is estopped from alleging the fact which he ought to have disclosed—namely that the cheques were forged. If the claim of the bank were for damages for failure to disclose, it might be that the improbabilities of recovering anything in the action might be taken into account; but the authorities show that . . . where the question is whether the customer is estopped from alleging that certain bills are forgeries, if the bank has lost something, the value of that something is not the measure of its claim, but, the customer being estopped from proving the bills forgeries, the bank gains by the amount of the bills."

Where the representation related to a sum of money or another fungible the representation may be divisible, allowing a partial operation for any estoppel

[119] In *re Exchange Securities Ltd* [1988] Ch 46, 56 per Harman J; paras 5–026–33, 10–005.
[120] [1896] AC 257, 270 *(Ogilvie); McKenzie* (1881) 6 App Cas 82, 109.
[121] *Henderson v Williams* [1895] 1 QB 521, 535 CA; *Compania Naviera Vasconzada v Churchill & Sim* [1906] 1 KB 237, 251 *(Churchill & Sim)*.
[122] [1932] 1 KB 371, 383–4 CA, affirmed [1933] AC 51 *(Greenwood)*; *Fung Kai* [1951] AC 489, 504, 506; *Avon* [1983] 1 WLR 605, 611, 622, 624 CA, para 5–027. *Greenwood* and *Ogilvie* were approved in *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1991] 2 AC 249, 274 *(Banque Keyser)*; *Kelly v Fraser* [2013] 1 AC 450, 460.

where the representee's detrimental reliance was limited to a lesser sum or quantity.[123] In *Kelly v Fraser* Lord Sumption said[124]:

> "[T]he ordinary rule is that the detriment is not the measure of the representee's relief, and need not be commensurate with the loss that he would suffer if the representor did resile: see *Avon* . . . where the authorities are reviewed by Slade LJ. Indeed the detriment need not be financially quantifiable, let alone quantified, provided that it is substantial and such as to make it unjust for the representor to resile. A common form of detriment . . . is that as a result of his reliance on the representation, the representee has lost an opportunity to protect his interests by taking some alternative course of action. It is well established that the loss of such an opportunity may be a sufficient detriment if there were alternative courses available which offered a real prospect of benefit, notwithstanding that the prospect was contingent and uncertain."

1–024 There are statements in *Verwayen* that an estoppel by representation will not be enforced if the "remedy" would be "disproportionate" to the detriment of the representee.[125] This was said to flow from equitable principles in "a fused system", and from the recognition that the different forms of estoppel are aspects of a single overarching principle. There is no such single principle[126] and the Judicature Act did not fuse law and equity but only their administration. Estoppel by representation originated in equity, and, with a presently immaterial exception[127] the principles are the same in both systems.[128] Equity does not contradict itself by restraining reliance on an equitable doctrine available as of right.[129]

Effect of estoppel by representation on title

1–025 An estoppel by representation is personal to the parties and their privies and does not establish a good title against the world unless it binds the true owner. It prevents the representor denying a title[130] but does not affect third parties who do not claim through or under the representor.[131] When the

[123] *Derby* [2001] 3 All ER 818, 828–9 CA; *Somer International* [2002] QB 1286 CA; paras 5–027–8.
[124] *Kelly v Fraser* [2013] 1 AC 450, 461.
[125] (1990) 170 CLR 394, 403, 413, 441–3.
[126] Para 1–034.
[127] Paras 1–017–8.
[128] N 83.
[129] In *Verwayen* (1990) 170 CLR at 412–413 Mason CJ said: "it is anomalous and potentially unjust to allow the two doctrines to inhabit the same territory yet produce different results . . . There is no longer any purpose to be served in recognising an evidentiary form of estoppel operating in the same circumstances as the emergent rules of substantive estoppel". The concurrent operation of equitable doctrines with different results means that only one is orthodox.
[130] *Wilkinson v Kirby* (1854) 15 CB 430, 437 per Maule J: "The nature of an estoppel is not an assertion of right by the party pleading it, but a denial of the right of the other party to make the assertion or the defence".
[131] *Dixon v Hammond* (1819) 2 B & Ald 310, 313 per Abbott CJ: "The legal title . . . has nothing to do with the question. The right of the plaintiffs to recover here depends on the settled rule of law that an agent shall not be allowed to dispute the title of his principal . . . All the rest of

expressions "title by estoppel" or "estate by estoppel"[132] are used they refer, as Lord Lyndhurst LC said, to "a mere negative title".[133] However a relationship such as agency[134] or partnership[135] which is relevant to proof of title may be established by estoppel. An estoppel binds the representor and his privies for the benefit of the representee and his privies. Where A, the true owner, is estopped from denying that he has passed title to B, the latter acquires a real title[136] because a later purchaser from A will be bound. This also occurs when a grantor's estoppel is "fed" on his later acquisition of an estate or interest that will support his grant.[137] Where a vendor purports to transfer an unencumbered title but a mortgage is not discharged, he is estopped from setting up the title of the mortgagee,[138] and if he pays off the mortgage he cannot keep it alive for his own benefit.[139] Instead his estoppel will be fed and the legal estate or other title will automatically pass to the purchaser. The doctrine also applies to chattels.[140]

the world except the defendant might dispute the legal title of the plaintiffs . . . but he cannot"; *Bank of England v Cutler* [1908] 2 KB 208, 234 CA per Farwell LJ: "A title by estoppel is only good against the person estopped, and imports from its very existence the idea of no real title at all, yet as against the person estopped it has all the elements of a real title"; *Goldcorp* [1995] 1 AC 71, 100.

132 *Cuthbertson v Irving* (1859) 4 H & N 742, 754, 756; (1860) 6 H & N 135 Ex Ch, 139, 140.

133 *Bensley v Burdon* (1830) 8 LJOS Ch 85, 88. Brett LJ was careful to point out in *Simm* (1879) 5 QBD 188, 206 CA that ". . . an estoppel gives no title to that which is the subject matter of the estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying and the estoppel has no effect at all on the reality of the circumstances". In *Goldcorp* [1995] 1 AC 74, 94 the Privy Council held that an estoppel did not pass a real title to unascertained bullion forming part of a bulk stock and did not affect the title of a third party with a proprietary interest.

134 *Reynell v Lewis* (1846) 15 M & W 517, 527–8 per Pollock CB "[agency] may be created by the representation of the defendant to the plaintiff that the party making the contract is the agent of the defendant, or that such relationship exists as to constitute him one". The former is, quoad hoc precisely the same as a real authority given to the supposed agent", Ch 9.

135 In *Mollwo March & Co v Court of Wards* (1872) LR 4 PC 419, 435 the Privy Council said: "Where a man holds himself out as a partner, or allows others to do it, he is then properly estopped from denying the character he has assumed upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel"; para 5–012, n 60, para 9–009, para 13–016, n 88. It is a prima facie presumption of fact; Partnership Act 1890 s 14.

136 As to land: *Hopgood v Brown* [1955] 1 WLR 213 CA; *Flello v Baird* (1999) 172 DLR (4th) 741 BCCA, where representations by an owner to his neighbour that he would not dispute the boundary shown in a contentious survey created an estoppel; and *Chadwick v Abbotswood Properties Ltd* [2005] 1 P & CR 139 where an agreement between neighbours on the location of the boundary fence created an estoppel; goods: *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600, 611 CA (the result was to transfer a real title to the buyer "and not merely a metaphorical title by estoppel"); *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537, 577–8 CA; *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 803–4 CA; and *Moorgate* [1977] AC 890, 918 per Lord Edmund Davies: "the buyer acquires a good title to the goods and not merely a right to plead an estoppel".

137 Paras 7–004–6, 9–019–22; *Rajapakse v Fernando* [1920] AC 892, 897: "The English doctrine . . . that where a grantor has purported to grant an interest in land which he did not at the time possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee or, as it is usually expressed, 'feeds the estoppel'."

138 *In re Gibson* [1909] 1 Ch 367, 374.

139 *Cumberland Court Brighton Ltd v Taylor* [1964] Ch 29, 34–5; *Ghana Commercial Bank v Chandiram* [1960] AC 732, 745.

140 *Whitehorn Bros v Davison* [1911] 1 KB 463, 475, 481 CA; *Lucas v Smith* [1926] VLR 400;

Estoppel by another name

Many judgments based on estoppel do not use the term. It was not used in either *Pickard v Sears*[141] or *Freeman v Cooke*.[142] Synonyms such as conclude,[143] binding,[144] or precluded[145] have been used; or it has been said that it is not competent for the party, it does not lie in his mouth, or he shall not be allowed or heard to contradict his former representation.[146] In other cases judges have applied estoppel principles without such descriptions.[147] Estoppel was not mentioned in *Hughes*[148] or *Birmingham Land*[149] the seminal cases on promissory estoppel. 1–026

Unconscionability as an issue: the rise

Estoppel by representation was adopted by law from equity which applied objective standards to both representor and representee,[150] but focused on the representee.[151] It is remarkable that the unconscionability of the representor was suddenly thought relevant a hundred years or more after the Judicature Act. Unconscionability shifts the focus from the representee to the representor and encourages investigations into the latter's knowledge and motives hitherto thought irrelevant. This was made clear by Lord Shand in 1892[152]: 1–027

"What the law . . . mainly regard[s] is the position of the person who was induced to act; and the principle on which the law . . . rest[s] is that it would be most

Butterworth v Kingsway Motors [1954] 1 WLR 1286, 1295–6; *Patten v Thomas Motors Pty Ltd* [1965] NSWR 1457.

141 (1837) 6 Ad & El 469, 474; para 5–003 n 11.

142 (1848) 3 Ex 654, 663, but it did appear at 662; para 5–004.

143 *Pickard v Sears* (above); *Gaden v Newfoundland Savings Bank* [1899] AC 281, 286.

144 *Middleton v Pollock* (1876) 4 ChD 49, 52–3.

145 *Freeman v Cooke* (1848) 2 Ex 654, 653.

146 *Tolputt & Co Ltd v Mole* [1911] 1 KB 836, 839 CA.

147 In *Nickells v Atherstone* (1847) 10 QB 944 Lord Denman CJ insisted that surrender by operation of law was not the result of an estoppel; *Howard v Hudson* (1853) 2 E & B 1; *London & South Western Bank v Wentworth* (1880) 5 Ex D 96, 105; *Cooke & Sons v Eshelby* (1887) 12 App Cas 271, 283; *Fry v Smellie* [1912] 3 KB 282, 292 CA; *Lea Bridge District Gas Co v Malvern* [1917] 1 KB 803; *Re Sugden's Trusts* [1917] 1 Ch 511, 516, 518, 519.

148 (1877) 2 App Cas 439.

149 (1888) 40 ChD 268 CA.

150 In *Jorden v Money* (1854) 5 HLC 185, shortly after *Freeman v Cooke* (1848) 2 Exch 654, Lord Cranworth LC said (213) that the doctrine "was not confined to cases in equity". As to the representor he said (212) "it is not necessary that the party making the representation should know that it was false . . . But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he was misleading was to act upon what he was saying". As to the representee he adopted (213) the language of Parke B in *Freeman v Cooke*: "By the term wilfully' . . . we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon . . . and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it . . . the party making the representation would be equally precluded from contesting its truth."

151 Paras 1–016, 5–002–5.

152 *Sarat Chunder* (1892) LR 19 Ind App 203, 215–6.

other corporate officer[7]; the authority of the holder of a negotiable instrument signed in blank[8]; and that of an agent entrusted with goods or documents of title.[9] Buxton LJ said[10]:

> "[O]stensible authority covers two types of cases: where the agent has been permitted to assume a particular position that carries a usual authority; and where a specific representation has been made as to the agent's authority. If either type of conduct on the part of the principal gives rise to an estoppel, that is because of the understanding that it creates in the mind of the . . . representee. An alteration [by] . . . the principal of the relationship between himself and the agent cannot, once the estoppel has been created, alter or withdraw the representation if the alteration . . . is not communicated to the representee."

Holding out by conduct

9–003 The principal's representation may be express, or implied from conduct when, as Lord Keith explained[11]:

> "the principal has placed the agent in a position which in the outside world is generally regarded as carrying authority to enter into transactions of the kind in question. Ostensible general authority may also arise where the agent has had a course of dealing with a particular contractor and the principal has acquiesced in this course of dealing and honoured transactions arising out of it."[12]

There can be no ostensible authority if the outsider knows that the agent's authority is limited and does not extend to transactions of the type in question.[13] However an agent without authority to commit the principal to a transaction may have actual or ostensible authority to inform third parties that the principal has authorised a particular transaction. Lord Sumption explained[14]:

606 CA; Sale of Goods Act 1979 s 21(1) (estoppel), s 24 (seller remaining in possession and reselling or pledging), s 25 (buyer obtaining possession and selling or pledging); Factors Act 1889 s 2 (powers of mercantile agent in possession of goods with consent of owner), s 8 (seller remaining in possession and reselling), s 9 (buyer obtaining possession and selling).

7 *Freeman & Lockyer* [1964] 2 QB 480 CA (managing director).

8 *Garrard v Lewis* (1882) 10 QBD 30, 45; *Nash v de Freville* [1900] 2 QB 72, 83 CA; *Lloyd's Bank Ltd v Cooke* [1907] 1 KB 794 CA.

9 Paras 3–006, 3–019, 3–028–31; *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701, 706 CA.

10 *SEB Trygg Liv Holding AB v Manches* [2006] 1 WLR 2276, 2291 CA (*SEB*).

11 *Armagas* [1986] AC 717, 777; *Crabtree-Vickers* (1975) 133 CLR 72, 78; *Pharmed Medicare Private Ltd v Univar Ltd* [2003] 1 All ER (Comm) 321, 325 CA per Longmore LJ: "if a buyer puts forward his employees as being persons with whom a seller can contract and the buyer . . . performs the contracts so made, those employees will be regarded as ostensibly authorised to make further contracts".

12 *Yoong Sze Fatt v Pengkalen Securities Sdn Bhd* [2011] 4 MLJ 805 CA (appellant through his employer opened an account for share trading with respondent, and did not object to contract notes and statements recording transactions based on instructions from his employer. He was estopped from denying his employer's authority to operate on his account).

13 *Armagas ibid.*

14 *Kelly v Fraser* [2013] 1 AC 450, 459–60. Pension fund trustees, who alone had authority to approve transfers of a new employee's benefits from his previous fund, were estopped by the

> "An agent cannot be said to have authority solely on the basis that he has held himself out as having it. It is, however, perfectly possible for the proper authorities of a company (or for that matter any other principal) to organise its affairs in such a way that subordinates who would not have authority to approve a transaction are nevertheless held out by those authorities as the persons who are to communicate to outsiders the fact that it has been approved by those who are authorised to approve it or that some particular agent has been duly authorised to approve it. These are representations which, if made by someone held out by the company to make representations of that kind, may give rise to an estoppel."

Ostensible authority

In *Freeman & Lockyer* Diplock LJ said that ostensible authority[15]: 9–004

> "is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract . . . within the scope of the 'apparent' authority . . . [T]he representation as to the authority of the agent which creates his 'apparent' authority must be made by some person or persons who have 'actual' authority from the corporation to make the representation. Such 'actual' authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, upon the board of directors, or it may be conferred by those who under its constitution have the powers of management upon some other person to whom the constitution permits them to delegate authority to make representations of this kind."

Diplock LJ was considering the ostensible authority of a managing director and focussed on the board as the body with authority to appoint a managing director and represent that someone held that office. He was not considering the position of persons who would normally be appointed by a managing director. The de facto managing director in *Freeman & Lockyer*, who had ostensible authority to enter into the contract with the plaintiff, presumably also had ostensible authority to enter into contracts of employment. It is not clear why the managing director's ostensible authority did not extend to making representations as to the authority of such employees so as to bind the company via a chain of authority leading back to the board. That question was considered in *Armagas* by Robert Goff LJ who referred to the judgment of Diplock LJ and said[16]:

> "I . . . see no reason why the same principles should not be applicable to other acts by an agent, for example, the making of representations . . . provided that it

acts of the head of the employer's staff benefits division from disputing their approval of such a transfer. This was because (p.460) pension fund trustees "hardly ever communicate personally with contributors and beneficiaries. They make decisions which are then communicated and applied by professional managers."

15 [1964] 2 QB 480, 503, 504–5 CA; *Equiticorp Industries Ltd v The Crown* [1998] 2 NZLR 481, 720–1.

16 [1986] AC 717, 732 CA.

is clearly understood that, to give rise to ostensible authority, the representation by the principal must be to the effect that the agent is authorised to make the representation on his, the principal's behalf, so that the third party is entitled to rely upon it as such. On this basis, a representation by an agent within his ostensible authority may give rise to an estoppel against his principal."

Thus the ostensible authority of a managing director must include authority to make representations binding on the company as to the authority of subordinates who were not appointed by the board. This question was not relevant in *Armagas*, and it was not referred to in the House of Lords but earlier in *Crabtree-Vickers* the High Court of Australia expressed a contrary view[17]:

". . . a person with no actual, but only ostensible, authority to do an act or to make a representation cannot make a representation which may be relied on as giving a further agent an ostensible authority. Hence the stress by Diplock LJ [in *Freeman & Lockyer*] on the need that the person or persons making the representation must have actual authority to make the representation."

The Court did not spell out its reasons, but their dictum is not supported by the reasoning of Diplock LJ which, as we have seen, was directed to a different question. They acknowledged that a managing director can delegate,[18] and that if he has actual authority to make a contract he can represent that another person has that authority,[19] but did not accept that ostensible authority can work in the same way. The view of Robert Goff LJ is to be preferred.[20]

9–005 A representor who holds someone out as his agent for a purpose represents that his authority for that purpose is unqualified and continuing unless he states otherwise at some stage.[21] However the representee may learn of a qualification or revocation from another reliable source,[22] and there will then be no estoppel provided this information comes to his notice before he changes his position.[23]

Holding out by agent

9–006 Where A contracts on behalf of an unnamed principal he is not estopped from claiming to be the principal since the other party has treated the identity of the principal as immaterial.[24] Similarly one contracting with an agent purporting to act for a principal is not estopped from proving that the agent was the real principal, unless he expressly contracted as agent.[25] Where A represents that

[17] (1975) 133 CLR 72, 80 per Gibbs, Mason and Jacobs JJ.
[18] *Ibid* at 80.
[19] *Ibid* at 80.
[20] *SEB* [2006] 1 WLR at 2290–1 CA.
[21] Paras 3–028–31.
[22] *Baines v Swainson* (1863) 32 LJ QB 281, 287; *Edmunds v Bushell & Jones* (1865) LR 1 QB 97; *Garrard v Lewis* (1882) 10 QBD 30; *Vitol* [1996] AC 800.
[23] *Crabb* [1976] Ch 179, 193 CA.
[24] *Schmaltz v Avery* (1851) 16 QB 655 (persons who executed charter party as "agents for the freighters" were not estopped from claiming to be principals); *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545, 555 CA.
[25] *Gardiner v Heading* [1928] 2 KB 284, 290 CA; *Salim v Ingham Enterprises Pty Ltd* (1998) 55

his principal is X, he may be estopped from claiming that he or someone else is the principal[26] if X's identity is material.[27]

Holding out as principal

A representor may be estopped from claiming that he acted as agent. In earlier times women who held themselves out as a feme sole or widow to obtain credit were estopped from alleging that they contracted as agent for their husbands.[28] 9–007

Estoppel between agent and principal

Lord Atkin referred to the estoppel in this relationship in an Indian appeal[29]: 9–008

"The principle is well established that an agent entrusted with money or goods by a principal to be applied on his principal's account cannot dispute the principal's title unless he proves a better title in a third person and that he is defending on behalf of and with the authority of the third person. The same principle controls the relation of bailor and bailee, which may come into existence without the added relation of principal and agent."

Partnership

The Partnership Act 1890 deals with estoppels affecting partners. Each partner is both an agent of the firm and a principal. A person who is not a partner, but represents that he is, may be estopped from disputing his liability as such (s 14(1)). An estoppel can arise when a person represents personally, or by an agent, that a partnership exists between himself and another.[30] A representee who acts on such a representation, in the belief that the firm had a new partner,[31] may establish an estoppel without proving that but for the representation he would not have done business with the firm. The representee must prove reliance in fact, but does not have to prove the hypothetical "but for" negative.[32] The representor "should have been known as a member of the firm to the plaintiffs either by direct transactions or public notoriety".[33] 9–009

NSWLR 7 CA where persons purporting to act on behalf of companies were held to be the real principals.
[26] The real principal would only be estopped if A had actual or ostensible authority to make the representation: *Armagas* [1986] AC 717.
[27] *Rayner v Grote* (1846) 15 M & W 359, 365. In *Moore v Peachey* (1891) 7 TLR 748 the defendant was estopped from relying on the Gaming Act by his representation that he was a turf commission agent, who are not within the protection of the Act.
[28] *Lea Bridge District Gas Co v Malvern* [1917] 1 KB 803, 807; *cf Paquin Ltd v Beauclerk* [1906] AC 148. These cases are now only relevant as illustrations.
[29] *Raja Bhawani Singh v Maulvi Misbah-ud-din* (1929) LR 56 Ind App 170, 172. The principle was applied in *Blaustein v Maltz Mitchell & Co* [1937] 2 KB 142 CA; para 1–025 n 131.
[30] *Re Fraser* [1892] 2 QB 633, 637 CA; *Nationwide* [1998] Ch 482, 488 CA.
[31] *Lynch v Stiff* (1943) 68 CLR 428, 435; *Nationwide* [1998] Ch 482, 488 CA; para 1–025 n 135, para 5–012 n 60. In *Sidhu* (2014) 251 CLR 505, 532 Gageler J expressed doubts about *Lynch v Stiff*, but the plurality made no comment; the author considered this question in greater detail in "Causation in Misrepresentation" (2015) 131 LQR 275, 277–81.
[32] Para 5–010.
[33] *Carter v Whalley* (1830) 1 B & Ad 11, 14.

Partners who retire are liable for the obligations of the new firm to persons who knew them as partners of the old firm unless and until those persons receive notice of the change (s 36(1)). A person who disclaims the status of a partner may be estopped from asserting otherwise.[34]

Continuing representations

9–010 Where A has held out X as his agent to B, or to a class of which B is a member, this representation continues until it is acted on, withdrawn or lapsed after a reasonable time. A cannot rely on its withdrawal by a private communication to X unless this was communicated to B before he acted on the representation.[35] A withdrawal communicated in time is a good affirmative answer.[36] If the representation was made to a class it may be acted upon before it lapses by a member who is not aware of its withdrawal unless this was communicated to the class as effectively as the original representation.[37]

II. Miscellaneous

9–011 An estoppel may arise from a representation that a person is a solicitor.[38] An employer who represented to an employee that he would remain eligible for superannuation in his new position was estopped and bound to pay the appropriate allowances.[39] Representations of ownership are considered in paras 2–014 and 3–028.

III. Landlord and Tenant

Introduction

9–012 A landlord and his tenant are estopped by convention from denying that the landlord has an estate which would support the lease, and that the tenant has a right to possession as such. The estoppel continues while the tenant is in possession, and thereafter for purposes relevant to his past possession,[40] The estoppel is a legal incident of all leases[41] and each party is estopped from

[34] *Palmer v Moore* [1900] AC 293.
[35] *Debenham v Mellon* (1880) 6 App Cas 24, 33; *Hambro v Burnand* [1904] 2 KB 10; *SEB* [2006] 1 WLR 2276, 2291 CA.
[36] Paras 3–015, 16–007.
[37] *Williams v Keats* (1817) 2 Starke 290; *Trueman v Loder* (1840) 11 Ad & El 589; *Willis Faber & Co Ltd v Joyce* (1911) 16 Com Cas 190 (notice of revocation of underwriter's authority could have been posted at Lloyd's); *Re Fraser* [1892] 2 QB 633 CA, para 16–007.
[38] *In re Helen & Lewis* [1892] 2 QB 261 an unqualified person was estopped from denying that he was a qualified solicitor amenable to the summary jurisdiction of the Court. Such an estoppel failed on the facts in *Re Hurst & Middleton Ltd* [1912] 2 Ch 520 CA but the earlier decision was doubted. An estoppel cannot normally confer jurisdiction which would not otherwise exist.
[39] *Algar v Middlesex CC* [1945] 2 All ER 243.
[40] *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580 CA *(Industrial Properties)* (tenant's liability for dilapidations).
[41] *E H Lewis & Son Ltd v Morelli* [1948] 2 All ER 1021, 1024 CA.

setting up a title adverse to that of the other,[42] and from denying "one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate".[43] The Court "is not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding on third parties . . . [I]t is the fact that the agreement is a lease which creates the proprietary interest . . . [I]t is not the estoppel which creates the tenancy but the tenancy which creates the estoppel".[44]

The estoppel applies even when the defect in the landlord's title appears on the face of the lease[45] or it is known to both parties.[46] The importance of mutuality is illustrated by *Otago Harbour Board v Spedding*[47] where the landlord, which could not be estopped from setting up its statute to invalidate the lease, could not estop the tenant from doing so. The estoppel is eminently fair. As Martin B said[48]:

> "This state of law . . . tends to maintain right and justice and the enforcement of contracts which men enter into with each other (one of the great objects of all law); for so long as a lessee enjoys everything which his lease purports to grant, how does it concern him what the title of the lessor, or the heir or assignee of his lessor, really is?"

Estoppel by payment of rent

Payment of rent as such to the person who let the occupier into possession or 9–013
his successors and assigns acknowledges the payee's title and estops the payer from disputing it.[49] Where the payee claims to be the assignee of the reversion payment of rent is only prima facie evidence of his title and a tenant who was not aware of all the facts is not estopped.[50] If the payee did not misrepresent the facts the tenant must show that another is the real assignee who could recover in ejectment, and proof that the payee has no title will not be enough. His receipt of rent is sufficient evidence of title until a better one is shown.[51] Submission to a distress for rent also gives rise to an estoppel because it acknowledges the distrainor's rights as landlord.[52]

[42] *Cooke v Loxley* (1792) 5 TR 4; *Mackley v Nutting* [1949] 2 KB 55 CA.
[43] *Bruton* [2000] 1 AC 406, 415–6 per Lord Hoffmann.
[44] *Ibid*; an agreement which confers a right of exclusive possession is a lease notwithstanding any statements in the document to the contrary: *Radaich v Smith* (1959) 101 CLR 209; *Street v Mountford* [1985] AC 809.
[45] *Duke v Ashby* (1862) 7 H & N 600, 602.
[46] In *Agar v Young* (1841) 1 Car & M 78 the landlord told the tenant that he had no title. In *Grundt* (1938) 59 CLR 641, 676 Dixon J said: "A tenant may know his landlord's title is defective, but by accepting the tenancy he adopts an assumption which precludes him relying on the defect"; *E H Lewis & Son Ltd v Morelli* [1948] 2 All ER 1021, 1024 CA.
[47] (1886) 4 NZLR 272.
[48] *Cuthbertson v Irving* (1859) 4 H & N 742, 758.
[49] *A-G v Stephens* (1855) 6 De G M & G 111; *Batten-Pooll v Kennedy* [1907] 1 Ch 256.
[50] *Hindle v Hick Bros Manufacturing Co Ltd* [1947] 2 All ER 825 CA.
[51] *Ibid* at 827.
[52] *Cooper v Blandy* (1834) 1 Bing NC 45, 52.

Attornment

9–014 A tenant or occupier who attorns to another landlord or licensor is estopped from disputing the latter's title,[53] and if this is done with the consent of his former landlord he is released by estoppel from his former estoppel.[54] The tenant may defeat the estoppel if he was not aware of material facts affecting the title of the new landlord, particularly if the latter misrepresented them.[55] An equitable assignee who obtained the landlord's consent to a legal assignment and paid rent was estopped from disputing that he was a legal assignee liable for rent.[56] Payment by the person in possession to a head landlord is equivocal because he may have paid either as agent for the tenant, as assignee, or as sub-tenant. Such a payer is not estopped from denying that he is a legal assignee but is estopped from denying the head landlord's title.[57] An occupier can be bound by different estoppels in favour of different landlords at the same time for example when a mortgagor attorns tenant to more than one mortgagee.[58]

Acts of landlord

9–015 These are counterparts of the acts by which a tenant acknowledges his landlord's title. The grant of a lease and the acceptance of rent estop the landlord disputing the tenant's right to possession and the validity of the lease.[59] A landlord who levies a distress is also estopped from disputing the tenant's right to possession.[60] Acceptance of rent from a stranger in possession after the death of the tenant does not estop a landlord ignorant of the facts.[61] A demand for rent that accrued after the expiration of a valid notice to quit will not waive the notice because the tenancy has come to an end.[62] Such conduct may create a new tenancy if that was the intention of the parties.[63] Acceptance of rent by the landlord will prevent him enforcing a forfeiture if he had knowledge of the relevant facts, but this depends on an election.[64]

[53] *Rennie v Robinson* (1823) 1 Bing 147, 149; *Morton v Woods* (1869) LR 4 QB 293, 303; *Terunnanse* [1968] AC 1086.
[54] *Downs v Cooper* (1841) 2 QB 256, 262–3 (the landlord learned that his brother was the true owner and with his consent the tenant attorned to his brother. The former landlord later distrained for rent but was estopped from relying on the original estoppel); para 16–011.
[55] Nn 50, 61; *Cornish v Searell* (1828) 8 B & C 471, 475; *Jew v Wood* (1841) Cr & Ph 185, 194; *Pearce v Bolton* (1902) 21 NZLR 464, 482–3 CA.
[56] *Rodenhurst Estates Ltd v W H Barnes Ltd* [1936] 2 All ER 3 CA. The landlord may also be estopped: *Friary Holroyd and Healey's Breweries Ltd v Singleton* [1899] 2 Ch 261 CA, para 2–021.
[57] *Official Trustee of Charity Lands v Ferriman Trust Ltd* [1937] 3 All ER 85.
[58] *Partridge v McIntosh and Sons Ltd* (1933) 49 CLR 453, 462, 463, 466–8.
[59] *Duke v Ashby* (1862) 7 H & N 600; *Ward v Ryan* (1875) IR 10 CL 17, 21, para 7–005.
[60] *Walrond v Hawkins* (1875) LR 10 CP 342; *Blyth v Dennett* (1853) 13 CB 178, 181.
[61] *Tickner v Buzzacott* [1965] Ch 426.
[62] *Clarke v Grant* [1950] 1 KB 104 CA; *Lower v Sorrell* [1963] 1 QB 959 CA; paras 2–020, 8–006 n 60.
[63] *Doe d Cheny v Batten* (1775) 1 Cowp 243; *Evans v Wyatt* (1880) 43 LT 177.
[64] *Matthews v Smallwood* [1910] 1 Ch 777; Ch 14.

Parties entitled to and bound by the estoppel

9–016 The estoppel is binding on, and enforceable by, the landlord's legal personal representatives and any heir, devisee or assignee of the reversion.[65] It is also binding on and enforceable by the tenant's legal personal representatives and any legatee, assignee, or sub-tenant,[66] but not on someone who merely stores goods on part of the property with the consent of the tenant because he is not in possession.[67] Anyone let into occupation as licensee,[68] lodger, caretaker, servant or the like, acknowledges the grantor's title and is estopped from disputing it[69] while in occupation.[70]

Limits of estoppel

9–017 A tenant is estopped from disputing that at the date of the lease the landlord had an estate sufficient to support a grant.[71] Thus in *Colchester BC v Smith*[72] an adverse possessor who accepted a lease from the documentary owner was estopped from claiming that the landlord's title had been extinguished. A tenant is not estopped from disputing a wider claim including the estate claimed by the landlord provided he does not deny that the landlord had an estate which supported the grant.[73] A landlord or tenant may always show that the true tenancy is not that asserted by the other.[74] The estoppel applies in favour of a landlord with an incomplete possessory title to registered[75] or unregistered land.[76] The Hong Kong Court of Appeal has held that the estoppel does not prevent the tenant showing that he is the

[65] *Cuthbertson v Irving* (1859) 4 H & N 742, (1860) 6 H & N 135; *London & North Western Rail Co v West* (1867) LR 2 CP 553.
[66] *Doe d Johnson v Baytup* (1835) 3 A & E 188; *Mackley v Nutting* [1949] 2 KB 55 CA; *Whitmore v Lambert* [1955] 2 All ER 147 CA. An analogous estoppel binds those who enter into possession under trusts, para 9–034.
[67] *Tadman v Henman* [1893] 2 QB 168 (landlord without title let premises to the plaintiff's husband. He distrained on her goods to recover arrears of rent and was liable in conversion because he had no title and the wife was not bound by the estoppel).
[68] *Crofts v Middleton* (1855) 2 K & J 194, 204–5; *Terunnanse* [1968] AC 1086.
[69] *Hall v Butler* (1839) 10 Ad & El 204, 206–7 per Patteson J: "There is a distinction between disputing the title of one who has actually let the party into possession, and of one who afterwards claims to be entitled to it"; *Brook v Biggs* (1836) 2 Bing NC 572, 574; *Gaunt v Wainman* (1836) 3 Bing NC 69; *Doe d Marchant v Errington* (1839) 6 Bing NC 79.
[70] *Cutherbertson v Irving* (1859) 4 H & N 742, 758; (1860) 6 H & N 135; *Williams v Heales* (1874) LR 9 CP 177. The licence cases include *R v Swifte* [1913] 2 Ir R 113 (caretaker of football ground); and *Tadman v Henman* [1893] 2 QB 168, n 67.
[71] *Cuthbertson v Irving* (1860) 6 H & N 135.
[72] [1992] Ch 421 CA.
[73] *Weld v Baxter* (1856) 1 H & N 568; *Ford v Ager* (1863) 2 H & C 279.
[74] *Ward v Ryan* (1875) IR 10 CL 17, 21.
[75] *Spark v Whale Three Minute Car Wash (Cremorne Junction) Pty Ltd* (1970) 92 WN (NSW) 1087 which concerned land under the Torrens system. The principle applies to land under the Land Registration Act 2002. Although s 96 provides that no period of limitation runs against any person, other than a chargee, in relation to an estate that is registered, s 97 and Sch 6 enable a person who has been in adverse possession for 10 years to apply to be registered as proprietor.
[76] *Perry v Clissold* [1907] AC 73.

true owner,[77] but the tenant may first have to determine the lease or go out of possession.

The estoppel may be extended by later events. A tenant took possession of space outside his lease, and remained in possession despite the landlord's protests. When the lease expired the landlord claimed damages for breach of the covenant to repair buildings on the additional space and the tenant was estopped from denying that they were within his lease.[78] A change in the relationship changes the estoppel. In *Harnam Singh v Jamal Pirbhai*[79] the landlord contended that the contractual tenancy had been determined by a notice to quit in 1943. He proved a letter from the tenant's solicitor at the time which said "our client will not vacate . . . in accordance with your notice, but will remain in occupation as statutory tenant". The tenant was estopped from disputing the statutory tenancy.

A tenant is not estopped from establishing that the landlord no longer has the title he had at the date of the grant and he need not show that a third party claims title.[80] The estoppel lapses for the future when the landlord's title is determined by his death if he had an estate for life, or by the death of another if his estate was *pur autre vie*, or on a transfer of the reversion, or on the expiration or determination of his head lease.[81] The estoppel prevails if his title expired before the commencement of the lease.[82] The tenant may free himself from any further effects of the estoppel by giving up possession, but remains estopped for the time he was in possession.[83] The estoppel based on the grant does not prevent the tenant disputing the territorial limits of the landlord's title[84] unless these are clearly set out in the lease.[85]

Eviction by title paramount

9–018 The estoppel lapses if the tenant's possession is disturbed by title paramount.[86] Dispossession is a breach of the landlord's implied representation that he had a title which would support the lease.[87] Ejectment proceedings by a third person to which the tenant reasonably submits are equivalent to dispossession. This also occurs when the tenant attorns or pays rent to a third party

[77] *Tai Fat Development (Holding) Co Ltd v Incorporated Owners of Gold King Industrial Building* [2007] 4 HKLRD 440 CA.
[78] *J Perritt & Co v Cohen* [1951] 1 KB 705 CA; explained *Secretary for Justice v Chau* (2011) 14 HKCFAR 889. There was also an estoppel by representation based on the exercise or assertion of rights, para 2–017.
[79] [1951] AC 688; *Metcalfe v Boyce* [1927] 1 KB 758, n 123.
[80] *Industrial Properties* [1977] QB 580 CA; *Hart* [1983] QB 773 CA (tenant under protected tenancy not bound to pay rent after landlord's long leasehold expired).
[81] *Gibbins v Buckland* (1863) 1 H & C 736; *London & North Western Rail Co v West* (1867) LR 2 CP 553, 555; *Hart* (above).
[82] *Wogan v Doyle* (1883) 12 LR Ir 69, 74 per Palles CB.
[83] *Industrial Properties* [1977] QB 580 CA (the estoppel bound the tenant in an action for dilapidations brought by the landlord after the expiration of the lease and tenant could not avoid estoppel by vacating).
[84] *Cf Clark v Adie (No 2)* (1877) 2 App Cas 423, 435–6 (scope of patent); and *Doe d Butcher v Musgrave* (1840) 1 M & G 625, para 7–007 (scope of mortgage by demise).
[85] Conduct by the tenant after grant may expand the estoppel: n 78.
[86] *Cuthbertson v Irving* (1859) 4 H & N 742, 757–8.
[87] *Biddle v Bond* (1865) 6 B & S 225, 232–3.

with a title paramount.[88] The right of the third party will defeat ejectment by the original landlord or a person claiming through him if the third party has a better title[89] and the tenant defends with his authority.[90]

Feeding the estoppel

Under a technical common law rule, linked with the estoppel which prevents 9–019
a grantor disputing the validity of his grant,[91] if the landlord had any legal interest,[92] even though it did not fully support his grant, this passed, the grant took effect as a grant, and there was no estoppel.[93] If the landlord later acquired a title paramount, the title of the tenant was not fed.[94] Where at the date of grant the landlord had no title at law, and later acquired a legal interest[95] both titles would be fed and, as between himself and his tenant, the landlord's title would no longer depend on the estoppel alone.[96]

However a landlord who can deliver possession must at least have a possessory title even if it was obtained under a contractual licence from the true owner.[97] Possession in one's own right, for however short a time, is a good legal title against those who do not have a better one, although this was not settled until 1907.[98] If so there will be few cases in which the estoppel against disputing the titles of the landlord and tenant will apply. It will still apply to an attornment by a mortgagor in possession to a mortgagee without the legal estate[99] and to attornments by an occupier to a landlord without a possessory or other title.[100] The position seems anomalous but is not. The landlord's possessory title supports the lease until the tenant is evicted by title paramount,[101] and until then the landlord cannot evict the tenant and the tenant cannot repudiate the lease.

A landlord with a limited interest at law may acquire a further legal interest which, as we have seen, will not feed the title of the tenant. This will be a title paramount and when his limited interest expires or determines he will be entitled, as the new holder of the title paramount, to evict his tenant. Coke

[88] *Hill v Saunders* (1825) 4 B & C 529; *Mountnoy v Collier* (1853) 1 E & B 630; *Watson v Lane* (1856) 11 Ex 769.
[89] *Hindle v Hick Brothers Manufacturing Co Ltd* [1947] 2 All ER 825 CA.
[90] *Biddle v Bond* (1865) 6 B & S 225, 233–4.
[91] Paras 1–025, 7–004–7.
[92] *Cooke* [1952] Ch 95, 102 CA; n 116. An equitable interest would not pass under this principle.
[93] *Doe d Strode v Seaton* (1835) 2 Cr M & R 728, 730–1; *Cuthbertson v Irving* (1859) 4 H & N 742, 757 per Martin B: "if any estate or interest passes from the lessor . . . there is no estoppel at all"; *Langford v Selmes* (1857) 3 K & J 220, 226; *Cooke* [1952] Ch 95, 102 CA; *Lee v Ferno Holdings Pty Ltd* (1993) 33 NSWLR 404, 411–2 CA. This occurs for example if a sublessor grants a sublease for a term longer than his own, n 102.
[94] *First National* [1996] Ch 231 CA, paras 7–004–7.
[95] *Cooke* [1952] Ch 95 CA, 102; n 116.
[96] *Rajapakse v Fernando* [1920] AC 892, 897; *First National* [1996] Ch 231 CA, paras 1–025, 7–004–7.
[97] *Bruton* [2000] 1 AC 406, 414–6.
[98] *Perry v Clissold* [1907] AC 73.
[99] *Bruton* [2000] 1 AC 406, 416, n 58.
[100] *Colchester BC v Smith* [1992] Ch 421 CA.
[101] Para 9–018.

gave an example[102]: "A lessee for the life of B, makes a lease for years . . . and after purchases the reversion in fee; B dieth; A shall avoid his own lease, for he may confess and avoid the lease which took effect in point of interest, and determined by the death of B". The tenant faced eviction by the owner of the reversion on the death of B in any event and the common law considered that the landlord who acquired the title paramount was in the same position as any other owner. The tenant could also acquire the reversion and repudiate the lease on the death of B by showing that the landlord's title had come to an end.[103]

The rule in equity

9–020 Equity treated a grant without a title to fully support it as a contract which automatically attached to any after acquired interest of the grantor.[104] Thus an acquisition by the grantor causes a corresponding equitable interest to accrue to the grantee. Although this could be defeated by a grant to a bona fide purchaser of a legal interest without notice[105] a tenant in possession was not at risk because a purchaser would have constructive notice of his equitable rights.[106]

Other applications of feeding the estoppel

9–021 While most feeding the estoppel cases have arisen from leases the principle is of general application. A vendor who purports to convey an unencumbered title, and later pays off a legal or equitable mortgage is estopped from setting it up against his purchaser,[107] and the estoppel in favour of the latter will be fed.[108] A mortgagor is estopped by grant and convention from denying his own and his mortgagee's title[109] and this principle can still be of practical importance. In *First National*[110] borrowers executed a charge over registered land which was ineffective because they were neither registered nor entitled to be registered. Millett LJ held that they were estopped from denying their legal title,[111] and when their transfer was registered the estoppel was fed, the charge was validated and the bank was entitled to have it registered.[112] A

[102] Coke Lit 47b. Later cases have applied this statement, n 93.
[103] Nn 83–4.
[104] *Lee v Ferno Holdings Pty Ltd* (1993) 33 NSWLR 404, 412 CA; citing inter alia *Jones v Kearney* (1842) 1 Dr & War 134, 158–60 (Sir Edward Sugden LC Ir); and *Smith v Osborne* (1857) 6 HLC 375, 390. A contract to assign future property operated in equity to bind that property when it comes into existence: *Tailby v Official Receiver* (1888) 13 App Cas 523.
[105] *General Finance* (1878) 10 ChD 15; *First National* [1996] Ch 231 CA.
[106] *Hunt v Luck* [1902] 1 Ch 428.
[107] The vendor cannot keep the mortgage alive for his own benefit: *Ghana Commercial Bank v Chandiram* [1960] AC 732, para 1–025.
[108] The legal estate would not necessarily pass: paras 7–002, 7–004.
[109] Para 7–007. The principle depended on the refusal of the common law to permit the grantor of a legal estate to deny that he had a legal title, paras 7–005–6. It has given rise to a convention of general application which is a legal incident of relevant transactions.
[110] [1996] Ch 231 CA.
[111] *Ibid* at 237; *Doe d Butcher v Musgrave* (1840) 1 M & G 625, 638, para 7–007.
[112] A title by estoppel cannot be registered until it is fed: *Rajapakse v Fernando* [1920] AC 892,

solicitor, who had an equity of redemption in a freehold property, acted for an underlessee on a mortgage of the latter's forged underlease, and represented that his client had a good title. He was not a grantor and his collateral fraudulent misrepresentation did not bind his equity of redemption, or create any estoppel for the benefit of the mortgagee.[113]

The mortgage cases

The doctrine of feeding the estoppel was applied for some decades to give 9–022 tenants of mortgagors priority over their mortgagees. The mortgages prohibited the grant of leases by the mortgagor without the prior consent of the mortgagee and if a lease post-dated the mortgage the mortgagee had priority. In *Church of England Building Society v Piskor*[114] a purchaser in possession before completion granted leases. The mortgagee claimed that the purchaser took the legal title subject to its mortgage which had priority. The tenants said their grants created tenancies by estoppel and when the mortgagor acquired the legal estate on completion the estoppels were fed before the mortgage over the legal estate took effect, giving them priority. The decision in favour of the tenants was overruled in *Abbey National Building Society v Cann*[115] where the House held that the conveyance and mortgage were parts of a composite transaction. Accordingly the purchaser only acquired an equity of redemption, and the mortgagee's legal title prevailed.[116]

Surrender by operation of law

A tenant may surrender his lease by deed[117] but an executory agreement, even 9–023 if enforceable by specific performance, does not effect a surrender. A surrender by operation of law occurs as a result of conduct from which the law infers a surrender even if this was not intended. As Parke B said[118]:

> "The law . . . says that the act itself amounts to a surrender . . . The surrender is not the result of intention. It takes place independently, and even in spite of intention. Thus in the cases which we have adverted to . . . it would not at all alter the case to show that there was no intention to surrender the particular estate, or even that there was an express intention to keep it unsurrendered. In all these cases the surrender would be the act of the law, and would prevail in spite of the intention of the parties."

897; *Woolwich Equitable Building Society v Marshall* [1952] Ch 1; *First National Bank* [1996] Ch 231, 236 CA.
[113] *Keate v Phillips* (1881) 18 ChD 560, 577–8.
[114] [1954] Ch 553 CA.
[115] [1991] 1 AC 56.
[116] In *Cooke* [1952] Ch 95 CA the mortgage was granted a day after completion, and the tenant succeeded. It is still good law: *First National* [1996] Ch 231, 238–9 CA; *Mortgage Business* [2015] AC 385, 424–5, 426, 429; cf 415.
[117] Law of Property Act 1925 ss 52, 205. An agreement for surrender must be evidenced by writing which complies with s 2 of the 1989 Act.
[118] *Lyon v Reed* (1844) 13 M & W 285, 306–7, n 126.

breaches but not for unknown or future breaches.[5] If breaches continue the claimant may acquire fresh rights to terminate or forfeit. Thus a vendor who obtains a decree for specific performance that proves ineffective can have it set aside and obtain orders for termination of the contract and payment of damages.[6]

Election where claimant has alternative and inconsistent rights against different defendants

15–003 The principles which govern election between inconsistent rights against the same defendant by commencing legal proceedings do not apply where the claimant has alternative and inconsistent rights against different defendants. The claimant may sue both in the same proceedings and defer his election until judgment.[7] The commencement of proceedings against one is not, as a matter of law, an election terminating his rights against the other because for example he may have issued writs against both or may sue one after informing the other that the claim against him is not abandoned.[8]

Proceedings against one may be discontinued and proceedings brought against the other or he may be joined as an additional defendant.[9] The inadvertent lodgement of a proof of debt in the insolvent administration of the agent was not an election against resort to the principal.[10] An election on final judgment will be displaced if it is set aside on appeal[11] or otherwise.[12] A default judgment against the apparent principal was set aside on the plaintiff's application following his discovery of the undisclosed principal.[13] Whether the claimant has made an election before final judgment is a question of fact.[14]

15–004 Delay, even long delay, will not prevent the creditor suing the principal unless he has estopped himself by a representation which induced the latter to settle with his agent in the belief that the latter had paid the creditor.[15]

Election at trial subject to appeal

15–005 In *Petersen v Maloney*[16] the purchaser sued the vendor and the estate agent to recover his deposit paid to the latter and sought judgment against the

[5] *Matthews v Smallwood* [1910] 1 Ch 777, 786; para 14–035 n 187.
[6] *Johnson v Agnew* [1980] AC 367.
[7] Obtaining an order for the winding up of the agent was held not to be an election to treat it as the debtor: *Con-Stan* (1986) 160 CLR 226, 243–4. Quaere. In that case the debt was not disputed but that is the position where judgment is signed by default.
[8] *Clarkson Booker* [1964] 2 QB 775, 795–6 CA.
[9] *Priestly v Fernie* (1863) 3 H & C 977, 983; *Kendall v Hamilton* (1879) 4 App Cas 504, 514; *Petersen v Moloney* (1951) 84 CLR 91, 102; *Clarkson Booker* [1964] 2 QB 775 CA.
[10] *Curtis v Williamson* (1874) LR 10 QB 57.
[11] *Petersen v Moloney* (above).
[12] A default judgment may be set aside on the application of the claimant: *Cameron v Reynolds* (1855) 5 E & B 301; *S Kaprow & Co Ltd v Maclelland & Co Ltd* [1948] 1 KB 618 CA; *Meng Leong* [1985] AC 511, 524.
[13] *Sunray Irrigation Services Pty Ltd v Hortulan Pty Ltd* [1993] 2 VR 40.
[14] *Scarf v Jardine* (1882) 7 App Cas 345; *Clarkson Booker* (above) at 795; *L C Fowler & Sons Ltd v St Stephens College* [1991] 3 NZLR 304, 307–310.
[15] *Davison v Donaldson* (1882) 9 QBD 623 CA.
[16] (1951) 84 CLR 91.

vendor. The trial judge gave judgment against the agent, and on the purchaser's appeal seeking judgment against the vendor, the latter argued that the judgment entered by the trial judge was an election which extinguished the alternative right. The High Court of Australia disagreed, and judgment was given against the vendor. Inconsistent remedies can be claimed with or without amendment until final judgment[17] when the claimant must elect.[18] If the trial Court does not put the claimant to his election, an appellate Court must do so.[19]

Service

Although the Rules relating to service in the Rules of the Supreme Court (RSC) were a code[20] they did not prohibit consensual service in some other way. When service was effected by arrangement on an agent of a partner which was not authorised by the Rules an estoppel by convention made this good service on the firm. Lord Bridge said[21]: 15–006

> "If one party, knowing that another wishes to serve process upon him, requests or authorises the other to do so in a particular way which is outside the Rules and the other does so, then, unless the Rules themselves prohibit consensual service the party so served cannot be heard to say that the service was not valid."

Solicitors for a plaintiff sent a copy of the statement of claim to the defendant's insurer stating that because the prognosis was unclear they did not intend to serve it for the time being. The insurer invited settlement negotiations but nothing happened. Seven months later the insurer asked the solicitors to effect service. This did not occur until three months after the statement of claim had expired. The plaintiff contended that a promissory estoppel arose and the time for service had been extended by the period of consensual delay. The Court disagreed because, when the insurer asked the solicitors to effect service, there was no difficulty and the remaining five months was more than sufficient[22]:

> "Those principles only require that the respondent be given enough time to undo the harm which would accrue without the estoppel. Had the revocation come after the statement of claim expired, or only three days before it expired, doubtless the time to serve would have to be extended by estoppel...not so here."

A defendant, who was not properly served or was served out of the jurisdiction, who enters an unconditional appearance, will waive any objection to service or to the territorial jurisdiction of the Court. Such a defendant is confronted with a choice between accepting or rejecting the jurisdiction and

[17] *United Australia* [1941] AC 1.
[18] A successful plaintiff who does not have the information to make an informed election can obtain it by post trial discovery or other interlocutory relief: *Island Records Ltd v Tring International plc* [1996] 1 WLR 1256.
[19] *Tang Man* [1996] AC 514; *Mahesan* [1979] AC 374.
[20] *Allison* [1992] 2 AC 105, 126.
[21] *Ibid* at 116–7.
[22] *Martinez v Hogeweide* (1998) 156 DLR (4th) 757, 761 Alta CA.

must elect. He will be bound by his election and frequently by an estoppel because the claimant will generally be prejudiced if the defendant were later permitted to withdraw his appearance. A defendant who ignores irregular service and allows the proceedings to continue in his absence may be unable to rely on the point to invalidate the proceedings.[23] A defendant served out of the jurisdiction who entered a conditional appearance, but failed to have the writ and service set aside, was not allowed to withdraw its appearance because the plaintiff had changed its position.[24]

Arbitration

15–007 The parties to a contract may have included an alternative dispute resolution clause providing for the mediation or arbitration of their disputes. If legal proceedings are commenced in breach of a term requiring disputes to be mediated or arbitrated, the breach is not a defence unless there is a *Scott v Avery* clause. The breach may be made the subject of a cross-action but in most cases the damages are likely to be nominal.[25] Parliament intervened[26] to give the Courts power to stay proceedings brought in breach of an ordinary arbitration clause.[27] The Court will also enforce, by stay, adjournment or injunction, a contractual reference to other forms of alternative dispute resolution.[28]

Proceedings in breach of an arbitration clause present the defendant with an election. He can enforce the clause by seeking a stay or allow the dispute to be resolved by the Court. A defendant can only obtain a stay if he has always been ready and willing to go to arbitration and applies for the stay before taking any step in the proceedings other than the entry of an appearance.[29]

[23] *Sutherland v Thomson* [1906] AC 51.
[24] *Somptorex Ltd v Philadelphia Chewing Gum Corporation* [1968] 3 All ER 26, 29 CA.
[25] *Anderson v G H Michell & Sons Ltd* (1941) 65 CLR 543, 548–9 per Rich ACJ, Dixon and McTiernan JJ.
[26] Common Law Procedure Act 1854 s 11. Now Arbitration Act 1996 s 9, s 86.
[27] The Court of Chancery had jurisdiction to grant an injunction to restrain breach of an express or implied negative stipulation: *Doherty v Allman* (1878) 3 App Cas 709. Mustill & Boyd, "Commercial Arbitration" 2nd ed, 1989 p 460 state that this remedy does not appear to have been invoked; Companion 2001 pp 215–6. An application for a stay under the Supreme Court Act 1981 s 49(3) based on this equity is the only effective remedy for breach of a mediation clause. In *London Chatham and Dover Railway Co v South Eastern Railway Co* (1888) 40 ChD 100, 107 CA Bowen LJ said that an arbitration clause could not be enforced by injunction but Cotton and Lindley LJJ did not mention the point. Story "Equity Jurisprudence" 11th ed 1873 Vol 1 para 670 states that courts of equity will not enforce such an agreement, and cites English authority, but the attitude to arbitration has changed, and these early decisions would not be followed. The Courts grant injunctions to restrain proceedings commenced abroad in breach of an arbitration clause: *The Angelic Grace* [1995] 1 Lloyd's Rep 87 CA; *Toepfer International GmbH v Societe Cargill France* [1998] 1 Lloyd's Rep 379 CA; *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67, 84 CA. There is no reason why a stay cannot be granted under s 49(3) of the Supreme Court Act to stop domestic proceedings in breach of such a clause.
[28] *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; *Cable & Wireless plc v IBM United Kingdom Ltd* [2002] 2 All ER (Comm) 1041; *Emirates Trading Agency LLC v Prime Mineral Exports Pte Ltd* [2015] 1 WLR 1145, 1164.
[29] Arbitration Act 1996 s 9(3), s 86.

Any other step is an election against arbitration. A defendant was not permitted on appeal to rely on an arbitration clause for the first time.[30]

Scott v Avery clause

The position under a *Scott v Avery*[31] clause is different because arbitration is 15–008
then a condition precedent to litigation and a claimant does not have a complete cause of action until an award is made in his favour. Breach of such a clause is a defence,[32] which a defendant will waive if he does not apply for a stay or plead the breach.[33] An arbitration clause is a collateral contract which normally survives the frustration, termination or rescission of the principal contract.[34] A challenge to an arbitration clause must be based on grounds specific to that clause.[35] The commencement of proceedings in breach of a *Scott v Avery* clause is a repudiation of this contract which the defendant can accept or reject. A defendant who allows the action to proceed elects to terminate the collateral contract and cannot subsequently rely on its primary obligation.[36]

Judge as arbitrator

Where parties ask a Judge to act outside "the ordinary and regular course of 15–009
judicial procedure",[37] the validity of the proceedings depends on their consensus and not on an exercise of judicial power.[38] The position is the same where the Court has no jurisdiction or is irregularly constituted. In such cases the parties make the Judge an arbitrator, and are bound by his decision on the merits,[39] with no right of appeal.[40] Not every departure from ordinary practice has this result. The principles were stated in *Pisani v A-G for Gibraltar*[41]:

[30] *London, Chatham & Dover Rly Co v South-Eastern Rly Co* (1888) 40 ChD 100 CA.
[31] Named after the clause upheld in *Scott v Avery* (1856) 5 HLC 811.
[32] *Anderson v G H Michell & Sons Ltd* (1941) 65 CLR 543, 549–50 per Rich ACJ, Dixon and McTiernan JJ where the English cases are reviewed; Mustill & Boyd, op cit, pp 161–3.
[33] Mustill & Boyd, op cit, p 164; Companion 2001 p 156. *Downing v Al Tameer Establishment* [2002] 2 All ER (Comm) 545 CA. The converse situation arose in *The Amazonia* [1990] 1 Lloyd's Rep 236, 246–7 CA where the defendant's objection to the jurisdiction of the arbitrators failed when the point was taken long after the arbitration commenced. The Court enforced an estopped by convention.
[34] *Heyman v Darwins Ltd* [1942] AC 356; *Mackender v Feldia AG* [1967] 2 QB 590, 598 CA; *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation* [1981] AC 909, 980–1 *(Bremer Vulkan)*.
[35] *Fiona Trust* [2008] 1 Lloyd's Rep 254, 257 HL.
[36] *Bremer Vulkan* (above) at 980–1, 982.
[37] *White v Duke of Buccleuch* (1866) LR 1 Sc & Div 70, 81 where a public right of way having been found the Court, by consent, directed that a footpath be laid equally convenient with that to which the public were entitled.
[38] *Ibid* at 82; In *re Durham County Permanent Benefit Building Society* (1871) LR 7 Ch App 45 *(Durham)* (parties agreed to Judge deciding case in a summary way). This principle does not apply to statutory tribunals with limited jurisdiction which cannot be enlarged by consent, or by estoppel: *Essex Incorporated Congregational Church Union v Essex CC* [1963] AC 808, 820–1.
[39] *Ledgard v Bull* (1886) LR 13 Ind App 134, 145.
[40] *Durham* (above); *Bustros v White* (1876) 1 QBD 423, 427 CA; *Wyndham v Jackson* [1938] 2 All ER 109 CA.
[41] (1874) LR 5 PC 516, 522.

> "It is true that there was a deviation from the cursus curiae, but the Court had jurisdiction over the subject, and the assumption of the duty of another tribunal is not involved...Departures from ordinary practice by consent are of everyday occurrence; but unless there is an attempt to give the Court a jurisdiction which it does not possess, or something occurs which...puts it entirely out of its course...such departures have never been held to deprive either of the parties of the right to appeal."

In *Burgess v Morton*[42] the parties stated a case on questions of fact, a procedure only available for questions of law.[43] The Divisional Court therefore sat as arbitrators and there was no right to appeal to the Court of Appeal. In *Scott* Viscount Haldane LC said[44]:

> "[W]here all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. The right to invoke the assistance of a Court of Appeal may be thereby affected, but the parties are at liberty to do what they please with their private rights."

Judge–Arbitrator decisions depend on estoppel

15–010 These decisions depend on estoppels, although this is not explicit in the judgments. This was made clear in *Bickett v Morris*,[45] a Scots case, where the parties agreed to issues of fact being tried by a Judge without a jury.[46] The unsuccessful party appealed to the Court of Session which allowed his appeal. His objection to the competency of a further appeal to the House of Lords was overruled. Lord Chelmsford LC said[47]:

> "Having obtained from the Court of Session an interlocutor reversing the interlocutor of the Lord Ordinary, it would be opposed to every notion of propriety and justice if the Pursuers could successfully resist the Defender's right to question the interlocutor upon the ground of incompetency. By taking the step of appealing to the Inner House, the Pursuers...have precluded themselves from objecting that the interlocutor pronounced in their favour is not subject to all the consequences of other interlocutors, and therefore appealable to this House."

Conduct of arbitrations

15–011 Estoppels also apply to private tribunals.[48] A contract provided that disputes could be referred to arbitration under the rules of either of two trade

[42] [1896] AC 136, 137.
[43] *Ibid* at 141.
[44] [1913] AC 417, 436.
[45] (1866) LR 1 Sc & Div 47.
[46] Under the Scots procedure at the time this made the Judge an arbitrator. The decisions were reviewed in *Burgess v Morton* [1896] AC 136, 141.
[47] (1866) LR 1 Sc & Div at 53–4.
[48] *Dines v Wolfe* (1869) LR 2 PC 280, 288–9; *Meyers v Casey* (1913) 17 CLR 90, 117–20.

associations. An arbitration was commenced under the rules of one but the plaintiff nominated an arbitrator who was only qualified under the rules of the other. It was estopped from challenging the award on this ground.[49] A party who appeared without knowing that the arbitrator was disqualified[50] or who took up an award without knowing the facts which made it invalid, can have it set aside.[51] Where, unknown to the parties, the umpire was disqualified a plea of waiver failed.[52] Where unknown to the parties an arbitration clause appeared to be avoided by statute but the parties went to arbitration an estoppel by convention barred the defendant's objection to the arbitrators' jurisdiction.[53] As a general rule a party who appears before an arbitral tribunal without protest submits to its jurisdiction and will be bound by the award.[54]

Inordinate and prejudicial delay in arbitrations gave rise to much litigation. The House of Lords held by majority that such delay did not entitle the defendant to terminate the reference because both parties were bound by contract to progress the arbitration.[55] In a second decision the House held that such delay did not frustrate the reference, establish an implied abandonment, or rescind it by mutual consent.[56] Abandonment of a reference by estoppel based on such delay was then rejected in *The Leonidas D*[57] where Robert Goff LJ said[58]:

> "What has to be shown is that [one party] appeared to be offering to agree that the reference should be abandoned and that [the other party], having so understood [the] offer, by his conduct accepted [it]...We do not think that the charterers' conduct could possibly be read as an offer to agree to abandon the reference...all the owners can show is that the charterers did nothing at all for over five years. But silence and inaction are of their nature equivocal, for... there can be more than one reason why the person concerned has been silent and inactive."

Parliament intervened in 1990 to confer a power of dismissal on the tribunal where there has been inordinate and inexcusable delay.[59]

[49] *Oakland Metal Co Ltd v Benaim & Co* [1953] 2 QB 261.
[50] *Jungheim, Hopkins & Co v Foukelmann* [1909] 2 KB 948.
[51] *Earl of Darnley* (1867) LR 2 HL 43.
[52] *Rahcassi Shipping Co SA v Blue Star Line Ltd* [1969] 1 QB 173.
[53] *The Amazonia* [1990] 1 Lloyd's Rep 236 CA, paras 1–015, 8–019.
[54] *Westminster Chemicals & Produce Ltd v Eichholz* [1954] 1 Lloyd's Rep 99, 105; *Bintulu Development Authority v Pilecon Engineering Bhd* [2004] 2 MLJ 381, 398–9.
[55] *Bremer Vulkan* [1981] AC 905.
[56] *The Hannah Blumenthal* [1983] 1 AC 854.
[57] [1985] 1 WLR 925 CA. These cases do not prevent the parties abandoning other contracts by an implied contract or an estoppel: para 5–035. In *The Hannah Blumenthal* (above) the House approved the decision in *The Splendid Sun* [1981] QB 694 CA where the Court found that a reference had been abandoned.
[58] *Ibid* at 940–1; *Collin v Duke of Westminster* [1985] QB 581 CA (no contract to abandon leasehold enfranchisement claim based on mere silence).
[59] Now conferred by s 41(3) of the 1996 Act. The history is set out by Lord Mustill in *L'Office Cherifien des Phosphates v Yamashita Shinnihon Steamship Co Ltd* [1994] 1 AC 486.

but promissory estoppel could not be an appropriate basis for the decision. The position in carrier cases is dealt with below[81]. In Canada an admission of liability when the plaintiff is still in time can raise a promissory estoppel against a limitation defence if the following test is satisfied[82]:

> "There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum."

In Ireland the fact that a defendant has expressly conceded the issue of liability does not necessarily entitle the putative plaintiff to assume that he can safely defer proceedings beyond the limitation period if the subsequent negotiations become dormant. The plaintiff must show an unambiguous representation (promise) that liability would not be in issue from which it was reasonable for him to infer that proceedings were unnecessary.[83] The Supreme Court considered this question where an insurer wrote to the plaintiff's solicitor, well within time, stating that liability was not in issue, and inviting negotiations on quantum. Active negotiations followed which included the exchange of medical reports, until after the plaintiff was out of time when the point was taken. Geoghegan J, who gave the judgment of the court, construed the correspondence as evidencing a promise by the defendant not to plead the time bar. He said [84]:

> "It clearly could not be the law that merely because there was an admission of liability a plaintiff could ignore the Statute of Limitations with impunity."

He said that a bare admission of liability would not be sufficient, and something more was required. If negotiations lapsed a defendant may be able to raise a limitation defence.[85] In that case the negotiations established a forbearance contract or an estoppel by convention against raising the time bar.[86] The solicitor for a putative defendant has no general duty to warn the opposite number of an accruing limitation defence. Neuberger LJ said:[87]

> "In general...a solicitor acting for a proposed defendant when suggesting to an intending claimant's solicitor that the issue of proceedings be delayed for a genuine reason, is entitled to assume that the intending claimant and his solicitor are able to look after themselves as far as Limitation Act implications are

[81] Paras 15–017–9.
[82] *Travellers Indemnity Co of Canada v Maracle* [1991] 2 SCR 50, 59 per Sopinka J. As mentioned above, a promissory estoppel will not work in this situation, but the decision can be supported on the basis of a unilateral contract or an estoppel by convention.
[83] *Ryan v Connolly* [2001] 1 IR 627, 633, 634 SC per Keane CJ: "I can find nothing in the correspondence to indicate that they were...treating the case as one in which they would regard the institution of proceedings as superfluous and would not raise the Statute of Limitations as a defence."
[84] *Murphy v Grealish* [2009] 3 I R 366, 373 SC
[85] *Ibid*.
[86] *Ibid* at 375–6.
[87] *Law Society v Sephton* [2005] QB 1013, 1047 CA, aff on other grounds without comment on this point [2006] AC 543, paras 15–018–9.

> concerned...I do not rule out the possibility of a different conclusion if it could be shown that the proposed defendant's solicitors have been guilty of sharp practice."

15–015

Seechurn[88] involved claims under disability policies that accrued in 1988. The claimant received a substantial payment but wanted more. Correspondence continued over many years but proceedings were not commenced until 1998 when the insurer pleaded the limitation defence and the claimant set up an estoppel. There was no admission of liability for the further claim and no clear promise not to plead the time bar and the estoppel failed.[89] The difficulties were noted by Lord Steyn in another case[90] where there had also been no admission of liability:

> "[T]he mere fact that a party has continued to negotiate...about a claim after the limitation period has expired, without anything being agreed about what happens if the negotiations break down, cannot give rise to a waiver or estoppel... [T]here is nothing to show that the insurers knew whether a protective writ had been issued or not. It is therefore impossible to say that their silence signified that they would not be relying on the time bar."

A case in the Privy Council illustrates the capacity of an estoppel by representation to trump a limitation defence. In 1912 a mortgagee with two mortgages sued on the second joining the mortgagors and the assignee of the equity of redemption. A decree was made for sale subject to the earlier (usufructuary) mortgage. The assignee, who was not personally liable for the debts, paid off the decree and sued to redeem the earlier mortgage when the mortgagee pleaded a limitation defence. The Privy Council held that the mortgagee was estopped from denying that the earlier mortgage could still be redeemed.

His exercise of rights as mortgagee was a representation that the assignee had the right of a mortgagor to redeem the first mortgage. Sir George Lowndes giving the judgment of the Board said[91]:

> "[T]he proceedings in the suit on the simple mortgage [were] based upon the right of redemption [under the earlier mortgage] being still alive...Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt, the appellant...cannot now turn around and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment."[92]

[88] [2002] 2 Lloyd's Rep 391, 396–7 CA, paras 8–014, 13–009.
[89] *Seechurn* and other estoppel cases involving defences to claims by the promisee are also considered paras 13–030–36. An estoppel based on promises not to enforce a contractual limitation period was enforced in *Re Cadboro Investments Ltd and Canada West Insurance Co* (1987) 45 DLR (4th) 470 BCCA.
[90] *Super Chem* [2004] 2 All ER 358, 368 PC; nn 96, 97.
[91] *Ambu Nair v Kelu Nair* (1933) LR 60 Ind App 266, 271. The Board included Lord Tomlin and Lord Thankerton; para 1–007 n 30.
[92] This case was cited by Dixon J in *Grundt* (1938) 59 CLR 641, 676 as authority for an estoppel where one party "has exercised against the other party rights which would exist only if the assumption were correct", paras 1–007, 2–017.

15–016 An attempt to use an estoppel by convention to answer a time bar failed in the Supreme Court of Canada. Lawyers representing an injured driver corresponded with insurance adjusters representing the insurer of the other driver in an attempt to negotiate a settlement.

The putative defendant died, and the 6 months time bar from grant expired without proceedings being commenced. Bastarache J, giving the leading judgment, said[93]:

> "The mere fact that communications occurred between the parties does not establish that they both assumed that Moore was alive. It is unlikely that the question of whether Moore was alive or dead crossed [their] minds...[T]he Court is in the presence of mutual ignorance, not mutual assumption."

Carrier cases

15–017 An ocean carrier may be estopped from raising the time bar under the Hague or Hague-Visby Rules. In *The Henrik Sif*[94] cargo interests made a claim against the time charterer which had issued the bills of lading but was not a party to the contract, and negotiated with the latter's agents. The cargo interests obtained extensions of time from the time charterer and did not seek them from the owners. When sued within the extended time the time charterer denied that it was the carrier or bailee, and the owners pleaded the time bar. Webster J upheld an estoppel by silence and a promissory estoppel against the time charterer. As to the former he said[95]:

> "[The agent for TL the time charterer] was...under a duty to alert [the agent for the cargo interests] to the true facts...a reasonable man would...have expected him, acting honestly and responsibly, to have informed [the agent for the cargo interests] in one way or another that he was seeking extensions of time from the wrong party. In my judgment...the plaintiffs have established the estoppel by silence...on which they rely."

The additional finding of a promissory estoppel is dubious for many reasons including the same conduct being held to convey both a representation of existing fact and a promise with the estoppels being inconsistent. The estoppel by silence prevented the time charterer denying that it was a party to the bills of lading but a promissory estoppel would prevent it from "enforcing" its "strict rights" as a stranger to the contracts evidenced by the bills of lading.

However a promissory estoppel was not available because the time charterer's rights were purely defensive and would not be affected by such an estoppel. Moreover a temporary restraint would not help the plaintiff. In *Baird Textiles*[96] Mance LJ supported the decision on the former basis.

[93] *Ryan v Moore* [2005] 2 SCR 53, 83–4.
[94] [1982] 1 Lloyd's Rep 456, para 4–005. The decision on promissory estoppel is criticised: para 13–032.
[95] *Ibid* at 465.
[96] [2002] 1 All ER (Comm) 737, 763 CA. The problems with extending promissory estoppel

15–018 In *The August Leonhardt*[97] a time bar was due to expire on January 26, 1982. On December 8 solicitors (A) representing cargo interests raised the time question and on December 18 the owners' P & I Club sent a telex to their solicitors (B) agreeing to an extension of three months "provided charterers agree likewise" and this was passed on to A. A genuine misunderstanding ensued because B assumed that A would obtain the charterers' consent, and A assumed that B would. The Court of Appeal held there was no estoppel. Kerr LJ said[98]:

> "[B] had no idea that [A] was acting under a mistake and...there was nothing unreasonable in [B's] conduct or state of mind in acting or thinking as he did... Colloquially speaking [A] and [B] were clearly under a mutual mistake...[A] relied on his assumption by not issuing a writ. But he did not do so in reliance on anything said or done by [B] which might have been capable of giving rise to an estoppel."

Settlement negotiations without more will not support a contract or an estoppel against a time bar. The point arose in the Court of Appeal of New South Wales in *The Zhi Jiang Kou* where Gleeson CJ said[99]:

> "I [am] unable to accept that the communications from the solicitors...contained any promise or representation...or manifested any common assumption...I am still not entirely clear as to the exact nature...of the representation or assumption said to have been relied upon. It was expressed...as...a representation that it would not be necessary for the respondent to commence proceedings until settlement had been fully explored. A representation of that kind is hardly unequivocal...for the solicitors [for the owners]...to inform the solicitors for the respondent that the former hoped that the latter would not find it necessary to commence proceedings until settlement negotiations had been fully explored neither states nor suggests, nor justifies the conclusion that nothing further need be said or done about the limitation period and...that the contractual provision will be treated as modified in some unspecified fashion."

15–019 The last of the decisions involving ocean carriers is *The Stolt Loyalty*.[100] A, a solicitor acting for cargo interests, who had forgotten about a demise charter, on one construction of her letter only sought an extension of time from the owners. On that construction solicitor B acting for both owner and charterer was "virtually certain" that A had made a mistake and the charterer decided to take advantage of it. B's reply was framed so as not to alert A to

to prevent reliance on a defence on the supposition that this involved the "enforcement" of a "right" are considered elsewhere: paras 13–035–6. In *Air Tahiti* (2009) 77 NSWLR 299, 307–8 CA a contract for carriage by air with the appellant was established by estoppel.
[97] [1985] 2 Lloyd's Rep 28 CA.
[98] *Ibid* at 34, and the further quote para 8–012.
[99] [1991] 1 Lloyd's Rep 493, 501; (sub nom *China Ocean Shipping Co Ltd v P S Chellaram & Co Ltd* (1990) 28 NSWLR 354, 367).
[100] [1993] 2 Lloyd's Rep 281, paras 3–009; 4–006.

the mistake. Clarke J having said[101] that a litigant or potential litigant had no general duty to point out mistakes to the other side continued[102]:

> "[I]f they were going to send a reply they owed a duty to send a full reply. Instead [they] deliberately allowed [A] to continue in the mistaken belief that [she] had asked for all relevant extensions of time. They encouraged [her] to continue to make the same mistake...The letter did produce or at least encourage an expectation in the mind of [A] that she need take no further action...Moreover that is precisely what it was intended to do. In these circumstances it would...be unconscionable to allow the demise charterers...to rely upon the one year time bar."[103]

Estoppel against other defences

15–020 An estoppel by acquiescence based on sharp practice may prevent a defendant relying on another defence.[104] In *Hiscox v Outhwaite*[105] the respondent objected to the Court's jurisdiction to hear an appeal from what was said to be a Convention award[106] but the Court of Appeal held by majority that the objection was barred by an estoppel by convention. Lord Donaldson MR said[107]:

> "Whilst...in general there is no obligation to disclose defences, this is not the case where there has been a common assumption that the defence is not available and one or both parties have acted on this assumption...it would be unconscionable now [for] Mr Outhwaite to renege from this common assumption...In relation to future awards the position will, of course be different."

An estoppel limiting the defences was upheld in *The Wise*.[108] After the tanker had been hit with a missile in the Gulf the parties agreed to delivery of its cargo and various payments without prejudice to their rights. Their agreement defined the issues for the Court. Mustill LJ said[109]:

> "[E]xplicit reliance on one contention and the absence of reliance on another, which could have been advanced on facts already known, is capable of being a tacit representation that the latter would not be relied upon."

[101] *Ibid* at 290.
[102] *Ibid* at 291.
[103] Clarke J upheld an estoppel by acquiescence, silence or inaction which he described as equitable (*ibid* 289). However an estoppel by silence where there was a duty to speak was recognised at law in *Freeman v Cooke* (1848) 2 Ex 654, 663, quoted para 5–004. *Spiro v Lintern* [1973] 1 WLR 1002, and *The Henrik Sif* [1982] 1 Lloyd's Rep 456 cited by Clarke J at 289 were cases where an estoppel by silence of the kind referred to in *Freeman v Cooke* was enforced. The finding of unconscionability was unnecessary because all the elements of a *Freeman v Cooke* estoppel were established: paras 1–023–32.
[104] *Kammins* [1971] AC 850, 884; para 11–012 n 69.
[105] [1992] 1 AC 562 CA.
[106] Arbitration Act 1975 s 7(1).
[107] *Ibid* at 576–7 and the further quote at para 8–011. The House of Lords held that it was not a Convention award and did not consider estoppel. The estoppel finding is questionable because s 7 limits the jurisdiction of the Court and could not be displaced by an estoppel, para 15–021.
[108] [1989] 2 Lloyd's Rep 451 CA.
[109] *Ibid* at 460. This is best understood as an estoppel by convention.

In *The Indian Grace*[110] the House of Lords held that s 34 of the 1982 Act[111] did not limit the jurisdiction of the Court, and thus a party could be prevented from relying on it by an estoppel. On the second appeal[112] Lord Steyn, who delivered the principal speech, held that the defendant was not estopped by convention or acquiescence from relying on the section. He said[113]: 15–021

> "Both sides were in ignorance of the potential consequences of a judgment in Cochin...The defendants...did nothing by conduct or silence which could have led the plaintiffs to think that [they] could safely take a judgment in Cochin without any risk of a plea or defence in further proceedings."

Representations in proceedings

A litigant may be faced with a choice between inconsistent steps in the litigation. If he represents to his opponent that he has adopted one and the latter changes his position and would be prejudiced if the election was reversed the representor may be estopped from doing this. However representations about the conduct of litigation are often provisional or only statements of intention. 15–022

Until the trial finishes a litigant may be able to change his election or seek the leave of the Court to do so if this is necessary. The freedom which a party ordinarily enjoys to do this is illustrated by *Australian Securities Commission v Marlborough Gold Mines Ltd.*[114] The Commission appeared on a summons to convene a meeting of the respondent's members to consider a scheme of arrangement and did not oppose the order. When it opposed confirmation of the scheme relying on an intervening appellate decision, the company argued that it was estopped from doing so. The High Court said[115]:

> "[T]he Commission's departure from the position it took up at the first hearing... was neither unjust nor unconscionable...On the contrary had the Company paused to consider...what the consequences would be of [such] a decision... coming to the attention of the Commission before the second hearing, it would have realised that [it] would necessarily induce the Commission to reconsider its

[110] [1993] AC 410.
[111] This abolished the rule that a cause of action did not merge in a foreign judgment which had enabled a plaintiff to sue in England on the original cause of action giving credit for any recovery under the foreign judgment. The section enabled a defendant who had been sued to judgment abroad and was sued again in England to plead the foreign judgment as a *res judicata*.
[112] *The Indian Grace (No 2)* [1998] AC 878.
[113] *Ibid* at 915–6, and the further quotes at paras 8–006, 8–014. In the Court of Appeal Staughton LJ said (893) that on two occasions the owners had pointed out that there was a duplication of claims and "the owners owed no duty to say more". The plaintiff took judgment in Cochin for a small amount for short delivery which barred recovery for a very much larger claim in England under the same cause of action for cargo damage.
[114] (1993) 177 CLR 485, para 15–037.
[115] *Ibid* at 506.

position. It would have been unreasonable for the Company to assume that the Commission would...maintain the same attitude."[116]

Pleadings

15–023 Statements of fact in unverified pleadings are not representations of their truth but a statement of the case the litigant intends to make. In *Boileau v Rutlin*[117] Parke B said:

> "[P]leadings...are not to be treated as positive allegations of the truth of the facts...for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite party, and if denied to be proved, and ultimately submitted for judicial decision."

In *Laws v Australian Broadcasting Tribunal*[118] Mason CJ and Brennan J said:

> "The suggestion that pleadings should be treated in the same way as any other form of admission fails...to take account of the function and object of pleadings, when they are not required to be verified, in outlining the party's case and defining the issues to be tried. Especially is this so in the case of...defences. A defendant is entitled to put a plaintiff to proof of his or her cause of action and to raise alternative matters of defence which may possibly answer the plaintiff's claim, without asserting in an absolute sense the truth or correctness of the particular matters pleaded."

A litigant will not ordinarily be estopped by unverified pleadings from seeking an amendment, or making an inconsistent assertion.[119] However the Civil Procedure Rules (CPR) require the particulars of claim, defence, and reply and the statement of case to be verified[120] by a statement of the party's belief that the asserted facts are true.[121] This is not a representation that they are in fact true, but it may be more difficult to obtain amendments based on assertions inconsistent with those originally verified.

[116] There were other objections to the estoppel. The point concerned the powers (jurisdiction) of the Court, the Commission as a public body could not estop it self from exercising its functions, and there was no unequivocal representation or promise.
[117] (1848) 2 Exch 665, 680–1; *Buckmaster v Meiklejohn* (1853) 8 Ex 634, 637 (Ex Ch); *Jamieson v R* (1993) 177 CLR 574, 579, 592.
[118] (1990) 170 CLR 70, 86.
[119] In *Verwayen* (1990) 170 CLR 394 at 414 Mason CJ, at 485 McHugh J, and at 503 Gaudron J said that pleadings without more are a poor basis for an estoppel. In the earlier proceedings referred to in *Cleary v Jeans* (2006) 65 NSWLR 355, 358 a late amendment had been refused because an admission in the pleadings had created an estoppel. In *Kaysen Constructions Sdn Bhd v Kong Wha Housing Development Sdn Bhd* [2013] 2 MLJ 41 CA an amendment to the statement of defence 12 years after suit to raise a new point was refused because the resulting prejudice to the plaintiff and third parties had created an estoppel.
[120] CPR Pt 22.1.
[121] Pt 22 Practice Direction cl 2.1.

Amendment of pleadings

Pleadings can be amended by leave prior to and during the trial and even on appeal. The relaxed approach to amendments, and the perceived efficacy of orders for costs as an answer to any prejudice or injustice that would be suffered by the other party as a result of the amendment, adopted by Brett MR in *Clarapede & Co v Commercial Union Association*[122] and by Bowen LJ in *Cropper v Smith*[123] continue to apply to those sought at an early stage. Lord Phillips speaking for the Supreme Court has said[124]: 15–024

> "Where an application is made to amend a pleading the normal approach is to grant permission where to do so will cause no prejudice to the other party that cannot be dealt with by an order for costs. This accords with the overriding objective. Where all that a refusal of permission will achieve is additional cost and delay, the case for permitting the amendment is even stronger."

Those principles were modified in *Ketteman*,[125] before the introduction of the CPR, to make it more difficult to obtain a late amendment despite the power to impose terms, because as Lord Griffiths said "justice cannot always be measured in terms of money", and "a Judge is entitled to weigh in the balance the strain the litigation imposes on litigants...the anxieties occasioned by facing new issues, the raising of false hopes".[126] He added that it was also relevant to consider:

> "The pressure on the courts...and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age."

The approach to late amendments under the CPR was summarised by Lloyd LJ on behalf of the Court[127]:

> "[T]he court is and should be less ready to allow a very late amendment than it used to be in former times, and...a heavy onus lies on a party seeking to make a very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases before the court."

These principles were applied by the High Court of Australia in a case involving corporate litigants.[128] The principle that an amendment may be refused if the opponent would be prejudiced if it were allowed, has not been based, in terms, on estoppel, but this is the principle applied. Formal admissions can be

[122] (1884) 32 WR 262, 263 CA.
[123] (1884) 26 ChD 700, 711 CA.
[124] *N. M. L. Capital Ltd v Republic of Argentina* [2011] 2 AC 495, 522; 531, 543.
[125] [1987] AC 189.
[126] *Ibid* at 220.
[127] *Swain-Mason v Mills & Reeve* [2011] 1 WLR 2735, 2750 CA.
[128] *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 *(Aon)*.

amended or withdrawn on the same basis.[129] Lord Denning MR once said[130] that "an admission made by Counsel...can be withdrawn unless the circumstances are such as to give rise to an estoppel", a statement that an Australian Judge[131] said had been "uttered in another age and in other circumstances".

Amendments barred by prejudice

15–025 As Bowen LJ recognised[132], there will be cases where a party would suffer prejudice, if an amendment was allowed, which cannot be cured by the imposition of terms. *Steward v The North Metropolitan Tramways Co*[133] is a good example. When the company was sued for personal injuries caused by the defective state of its tramway it merely denied negligence. It later applied to amend to allege that the local authority had the obligation to maintain the tramway. Leave was refused because the six months during which notice of action could be given to the local authority had expired. Pollock B said[134]:

> "[T]he action would be wholly displaced by the proposed amendment, and I think it ought not to be allowed...If a defendant chooses to conduct his defence to a certain point on certain lines, and lead the plaintiff into a certain position, the defendant has no right to change his front. That is only acting on the well known doctrine of estoppel...[T]he defendants are estopped from saying that they are not the proper defendants."

The company's appeal to the Court of Appeal failed. Lord Esher MR said[135]:

> "If the defendants had in the first instance pleaded as they now ask to be allowed to plead, the plaintiff could have discontinued his action against the defendants and then have given notice of action and brought an action against the local authority]; but now, more than six months having elapsed, he can no longer sue [the local authority]. If therefore the amendment were allowed, the plaintiff could not be put in the same position, or compensated by costs or otherwise."

15–026 *Steward* was followed in *The Kyoan Maru*[136] where a cargo claim was brought against four defendants. The third defendant admitted in its defence that the goods had been shipped on its vessel and that it was a party to the bills of lading. Five years later it sought leave to withdraw these admissions and allege that the vessel had been demise chartered to the first defendant. In the

[129] CPR Pt 14.1(5).
[130] *H Clark (Doncaster) Ltd v Wilkinson* [1965] 1 Ch 694, 703 CA.
[131] *Coopers Brewery Ltd v Panfida Foods Ltd* (1992) 26 NSWLR 738, 746; *Ridolfi v Rigato Farms Pty Ltd* [2000] 2 Qd R 355, 459 CA per De Jersey CJ: "There is no principle that admissions... may always be withdrawn for the asking, subject to payment of costs".
[132] N 123.
[133] (1885) 16 QBD 178.
[134] *Ibid* at 180.
[135] (1886) 16 QBD 556, 558–9 CA; *Joint Coal Board v Adelaide Steamship Co Ltd* [1965] NSWR 143.
[136] [1980] 2 Lloyd's Rep 233.

meantime that defendant had gone into liquidation and the plaintiff had lost the opportunity of arresting one of its vessels. Sheen J refused leave to amend because the plaintiff's prejudice had created an estoppel.

Steward was distinguished in *Weait v Jayanbee Joinery Ltd*[137] where the 15–027 plaintiff sued his employer for injuries at work. The original defence was a denial, but the defendant applied to amend to allege that the plaintiff's injuries had been aggravated by the negligence of his treating surgeon. By then a claim against the surgeon was time barred, but the delay was not the defendant's fault. Pearce LJ said[138]:

> "[W]here a defendant has been guilty of no fault at all, and some fresh fact comes to light showing that he is not under a liability to the plaintiff, it seems to me an odd proposition that the plaintiff should rather have a right to which he is not entitled against the defendant than be without a remedy...That misfortune cannot be put on the defendant where he has been free from fault."

Rules of Court[139] have substantially modified the rule in *Weldon v Neal*[140] that 15–028 an amendment to add a time barred cause of action will not be allowed, but as Bowen LJ said in *Cropper v Smith*[141] the court must still consider whether "the other side [will be] in as good a position for the purpose of having the right determined as they were in" when the limitation period expired.

Elections during proceedings

Decisions as to the form of the pleadings and the relief to be sought are not an 15–029 election against reliance on other allegations of fact or law, or other claims, and a party may change his position subject to obtaining leave. In *United Australia* Viscount Simon LC said[142]:

> "There is nothing conclusive about the form in which the writ is issued, or about the claims made in the statement of claim. A plaintiff may at any time before judgment be permitted to amend."

Defendants are in the same position and a defence in one form is not an election against an amendment.[143] The claimant will have relied on the defence in various ways but the power of the Court to impose terms as to costs or otherwise displaces the general principle that an estoppel may not be bought out.[144] The exercise of this power enables the Court to override many estoppels which might otherwise have arisen from the form of the pleadings, or the conduct of

[137] [1963] 1 QB 239 CA; leave to appeal was refused [1962] 1 WLR 1083 HL.
[138] *Ibid* at 245–6; *Turner v Ford Motor Co Ltd* [1965] 1 WLR 948 CA where the defendant was given leave to plead contributory negligence after the expiration of the limitation period, the plaintiff not being relevantly prejudiced.
[139] Now CPR Pt 17.4.
[140] (1887) 19 QBD 294 CA.
[141] (1884) 26 ChD 700, 711 CA.
[142] [1941] AC 1, 18–9.
[143] *Verwayen* (1990) 170 CLR 394, 409.
[144] Para 1–023.