UNCONSCIONABILITY IN ESTOPPEL: TRIABLE ISSUE OR FOUNDATIONAL PRINCIPLE?

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This lecture reviews the role of unconscionability in estoppel by conduct. Estoppel by deed and by grant will not be considered as they are common law doctrines which owe nothing to the influence of equity. Unconscionability as a triable issue in estoppel by encouragement cases was unknown until the judgments of Scarman LJ in *Crabb v Arun DC*[1] in 1976 and Oliver J in *Taylors Fashions*[2] in 1977. Unconscionability as a triable issue in other estoppel cases was also unknown until the judgment of Robert Goff J in the *Texas Bank* case in 1980.[3]

Since then unconscionability has frequently been referred to in estoppel cases, and has been invoked in other cases to enlarge the grounds for equitable relief. Doubts have recently emerged about the utility and relevance of unconscionability in estoppel and other cases, and there has been a significant retreat, particularly in Australia, from the more extreme positions.

The Court of Chancery was a court of conscience and Selden said in the 17th century that equity varied with the length of the Chancellor's foot. Later that century Lord Nottingham LC began to establish general principles, and by the time of Lord Eldon LC most cases in the Court were decided in accordance with established principles and references to conscience and unconscionable were rare.

Until the developments referred to liability to an estoppel, other than an estoppel by standing by, depended on the conduct of the party sought to be estopped judged objectively and not on his subjective culpability. The orthodox principles were stated by Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*[4] in a passage that has frequently been approved here and in England.[5] He said:[6]

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1 [1976] Ch 179 CA (*Crabb*).

2 *Taylors Fashions Ltd v Liverpool Victoria Trustees Ltd* [1982] QB 133.

3 *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank* [1982] QB 84 CA.

4 (1937) 59 CLR 641 (*Grundt*).

5 The English authorities are collected in K R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2006) 4.

> The principle upon which estoppel [by conduct] is founded is that the law should not permit an unjust departure 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, of course, a very general statement. But it is the basis of the rules governing estoppel. 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 … The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he 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 … preclude the party if the other requirements for an estoppel are established (the Dixon principles).

This built on the principles established in *Freeman v Cooke* where Parke B, after referring to the judgment of Lord Denman CJ in *Pickard v Sears*,[7] said:[8]

> By the term 'wilfully' … in that rule 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 that it is acted upon accordingly; 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, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.

The party estopped is bound not by what he knew or intended when he acted, but by how his conduct was reasonably understood by the other party at the time. Reliance and 'a detrimental change of position' by that party[9] must also be established, but knowledge of these matters by the party estopped is not essential. The focus of estoppels by conduct, other than estoppel by standing by, is on the person who was induced to act and not on the party estopped.[10]

The Dixon principles applied to estoppel by representation and he also referred to estoppel by convention, an insight later adopted by the Court of Appeal in the *Texas Bank* case.[11] That decision established estoppel by convention as a separate form of estoppel by conduct, akin to estoppel by representation and estoppel by deed, with some special rules of its own. Dixon J did not refer to promissory estoppel but in *Legione v*

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6 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674-6. He also referred to the various situations in which the law will enforce an estoppel, and explained that the relevant detriment was not the representee's original change of position as such but the detriment that this would cause if the representor were free to repudiate the assumption which led to it.

7 (1837) 6 Ad & El 469, 474.

8 (1848) 2 Ex 654, 663.

9 (1937) 59 CLR 641, 674-5. Dixon J referred to this requirement more than once but did not elaborate.

10 *Sarat Chunder Dey v Gopal Chunder Lala* (1892) LR 19 Ind App 203, 215-6 (Lord Shand) (*Sarat Chunder*); *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305, 327 (Isaacs J) (*Craine*); *Super Chem Products Ltd v American Life & General Ins Co Ltd* [2004] 2 All ER 358 PC, 368 (Lord Steyn).

11 [1982] QB 84 CA.

Hateley Mason and Deane JJ applied his principles to promissory estoppel,[12] as did Deane, Dawson and McHugh JJ in *The Commonwealth v Verwayen*.[13] This had already been established in substance in *Hughes v Metropolitan Railway Co*.[14] In the Court of Appeal[15] Mellish LJ, Baggallay JA, and Mellor J[16] held that, although the landlord may not have intended the tenant to put off doing the repairs, this was immaterial if the tenant was reasonably entitled to act as he did. The House of Lords agreed, Lord Selborne saying,[17] 'now the question is, whether the conduct of the plaintiff in the correspondence justified and naturally led to that impression on the part of the company? In my opinion it clearly did.'

This is the objective test in *Freeman v Cooke*. Dixon J did not extend his principles to estoppel by encouragement but in *Waltons Stores*[18] Brennan J held that they did apply and in *The Commonwealth v Verwayen*[19] so did Deane J,[20] Dawson J,[21] and McHugh J.[22] In *Gillett v Holt*[23] the Court of Appeal followed an unreported judgment of Slade LJ who had adopted the Dixon principles. After quoting Dixon J in *Grundt* Robert Walker LJ continued,[24] 'this passage was not directed specifically to proprietary estoppel [by encouragement], but Slade LJ was right … to treat it as applicable to proprietary estoppel as well as to other forms of estoppel.'

The doctrine of estoppel by standing by was explained by Lord Cranworth LC in *Ramsden v Dyson*:[25]

> If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting him right … a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money … It considers that when I saw the mistake … it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wholly impassive … in order afterwards to profit by the mistake.

In such a case the owner does not intend to make any representation and the stranger does not know that one is being made to him. However Dixon J referred to such an estoppel in *Grundt*[26] when he referred to situations where,[27] 'knowing the mistake the other laboured under he refrained from correcting him when it was his duty to do so.'

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12 (1983) 152 CLR 406, 437.
13 (1990) 170 CLR 394, 444, 453, 500.
14 (1877) 2 App Cas 439; (1876) 1 CPD 120 CA (*Hughes)*.
15 (1876) 1 CPD 120 CA.
16 Ibid 135-6.
17 (1877) 2 App Cas 439, 451.
18 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 427. He referred to Dixon J's analysis in *Thompson v Palmer* (1933) 49 CLR 507, 547 to the same effect.
19 (1990) 170 CLR 394 (*Verwayen*).
20 Ibid 431, 444-5.
21 Ibid 453.
22 Ibid 501.
23 [2001] Ch 210 CA.
24 Ibid 233.
25 (1866) LR 1 HL 129, 140-1.
26 *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641.
27 Ibid 676.

The test is subjective, because the focus is on the inactive party, and his knowledge at the time. However the requirements of good conscience which have been subsumed in the principles stated by Lord Cranworth LC in *Ramsden v Dyson* leave no room for a wider inquiry into the unconscionability of the party estopped.

Estoppel by representation originated in the Court of Chancery in the late 17th century,[28] and was borrowed, without acknowledgment, by Courts of common law in *Pickard v Sears*[29] and *Freeman v Cooke*.[30] Their definition of the constituent elements of the estoppel did not include unconscionable conduct by the representor, and this remained the position until 1980.[31] During this long interval there were many notable estoppel cases in the House of Lords, Privy Council and Court of Appeal but unconscionability was never mentioned. It was not mentioned in *Jorden v Money*.[32] The position was the same in Australia, as can be seen from the judgments of Isaacs J in *Craine*[33] and of Dixon J in *Thompson v Palmer*[34] and *Grundt*.[35] It was not mentioned in the promissory estoppel[36] cases of *Hughes*;[37] *Birmingham and District Land Co v London and North Western Rail Co*[38] and *Central London Property Trust Ltd v High Trees House Ltd*,[39] or in the important later cases of *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd*[40] and *Ajayi v R T Briscoe (Nigeria) Ltd*.[41]

Thus before the decision of Robert Goff J in *Texas Bank*[42] in 1980 unconscionability was not a triable issue in cases of estoppel by representation, promissory estoppel, or estoppel by standing by although at a high level of abstraction it was undoubtedly the underlying principle of each.

The principles governing both forms of proprietary estoppel were referred to in *Ramsden v Dyson*,[43] those governing estoppel by standing by[44] in the speeches of the majority,[45] those governing estoppel by encouragement in the dissenting speech of Lord

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28 Handley, above n 5, 2-3.
29 (1837) 6 Ad & El 469.
30 (1848) 3 Ex 654.
31 *Texas Bank* [1982] QB 84 (Robert Goff J).
32 (1854) 5 HLC 185.
33 (1920) 28 CLR 305.
34 (1933) 49 CLR 507.
35 (1937) 59 CLR 641.
36 This is another form of equitable estoppel: Handley, above n 5, 201-2.
37 (1877) 2 App Cas 439. In the Court of Appeal (1876) 1 CPD 120, 134 James LJ, alone of the five Judges, held that the lessor had intentionally lulled the defendants to sleep, and therefore it was against equity and good conscience for him to take advantage of the forfeiture. This view of the facts was rejected on appeal: (1877) 2 App Cas 444, 448, but it would have attracted a different equitable principle.
38 (1888) 40 Ch D 268 CA.
39 [1947] KB 130.
40 [1955] 1 WLR 761 HL.
41 [1964] 1 WLR 1326 PC.
42 [1982] QB 84.
43 (1866) LR 1 HL 129.
44 The principle dates back to *East India Co v Vincent* (1740) 2 Atk 82, but Lord Hardwicke's statement of principle did not include any requirement for the defendant's conduct to be characterised as unconscionable.
45 Ibid 140-1 (Lord Cranworth LC); 162 (Lord Brougham); 168-9 (Lord Wensleydale); and 174 (Lord Westbury).

Kingsdown[46] who took a different view of the facts. The majority said that equity intervened in estoppel by standing by cases because the defendant's conduct was fraudulent or dishonest. Lord Kingsdown did not find it necessary to characterise the conduct of the defendant in an estoppel by encouragement case. In *Plimmer v Mayor of Wellington*[47] the Privy Council applied Lord Kingsdown's principle and held that the estoppel by encouragement entitled the appellant to compensation from a resuming authority although the Crown, as the legal owner, had never repudiated his interest. Thus the estoppel was complete without any unconscionable conduct. Unconscionability was not mentioned in later proprietary estoppel cases until *Chalmers v Pardoe*, a Privy Council appeal from Fiji. In that case, where an estoppel by encouragement was barred by statute, the Board said:[48]

> The claim is based on the general equitable principle that, on the facts of the case, it would be against conscience that Pardoe should retain the benefit of the building erected by Chalmers on Pardoe's land … without repaying to Chalmers the sums expended by him in their erection.

They had referred to *Plimmer* and in this passage were identifying the underlying rationale of the estoppel. In *Dann v Spurrier*,[49] an estoppel by standing by case, Lord Eldon LC said[50] that 'these cases depend on conscience' and the plaintiff had to prove[51] 'a case of bad faith and bad conscience against the defendant'. He continued,[52] 'I am not satisfied that the Defendant up to the fourth of September knew of these repairs. His conscience is not affected by that knowledge that is necessary to authorise the court to apply the principle.'

Lord Eldon explained why the defendant's knowledge at the relevant time was crucial. He was not identifying a separate element or triable issue in the estoppel.

Chalmers v Pardoe brought proprietary estoppels to notice in England after a long period of inactivity, although they had been relied on elsewhere.[53] It was not long before proprietary estoppel cases were being reported in England with some regularity and this has continued. In *Ward v Kirkland*[54] Ungoed-Thomas J said that they were based on unconscionability but he did not treat this as a triable issue. Other cases reported at this time did not mention it.[55] In *Holiday Inns Inc v Broadhead*[56] Reginald Goff J upheld a proprietary estoppel on findings[57] of expenditure by the plaintiff,

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46 Ibid 170.
47 (1884) 9 App Cas 699, 712-3 (*Plimmer*).
48 [1963] 1 WLR 677 PC, 681.
49 (1802) 7 Ves 231, 235-6.
50 Ibid 234.
51 Ibid 235.
52 Ibid.
53 *Australia: NSW Trotting Club Ltd v Glebe Municipality* (1937) 37 SR (NSW) 288; *Svenson v Payne* (1945) 71 CLR 531; *Canada: Canadian Pacific Railway Co v The King* [1931] AC 414; *India: Ariff v Jadunath Majundar* (1931) LR 58 Ind App 91; and *New Zealand: Re Whitehead* [1948] NZLR 1066 CA; *Thomas v Thomas* [1956] NZLR 785.
54 [1967] Ch 194, 235, 239.
55 *Inwards v Baker* [1965] 2 QB 29 CA; *E R Ives Investment Ltd v High* [1967] 2 QB 379 CA; and *Pascoe v Turner* [1979] 1 WLR 431 CA.
56 (1974) 232 EG 951.
57 Ibid 1089 (left hand column).

benefit to the owner and acquiescence in and/or encouragement of that expenditure by him. However he referred[58] to equity giving relief against an owner taking unconscionable advantage of another, and to the requirements of good conscience, but did not treat these as triable issues. His finding of unconscionability followed when the elements of the estoppel were established, and added nothing.

Then came the judgment of Scarman LJ in *Crabb*,[59] an estoppel by encouragement case, where he said:

> whether one uses the word 'fraud' or not, the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable, or unjust … The court … cannot find any equity established unless it is prepared … to say that it would be unconscionable and unjust to allow the defendant to set up their undoubted rights against the claim being made by the plaintiff (emphasis supplied).

This was the first time, to my knowledge, that any English Judge had said that unconscionability was a triable issue in an estoppel by encouragement case. The other Judges, including Lord Denning MR, did not mention it at all. Scarman LJ substituted an ad hoc judgment on unconscionability for Lord Kingsdown's statement of principle in *Ramsden v Dyson*. However in the end he applied an objective test[60] because, as Oliver J said in *Taylors Fashions*,[61] Mr Crabb 'had been encouraged to alter his position irrevocably to his detriment on the faith of a belief, which was known to and encouraged by the defendants, that he was going to be given a particular right of access'. In *Taylors Fashions*, another encouragement case,[62] Oliver J said:[63]

> the more recent authorities … support a much wider equitable jurisdiction … where the assertion of strict legal rights is found by the court to be unconscionable … I'm not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstances, the situations which will persuade the court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a court of equity will interfere … the more recent cases indicate that the application of the *Ramsden v Dyson* principle[64] … requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour' (emphasis supplied).

He said the court should apply,[65] 'the broad test of whether … the conduct complained of is unconscionable … the inquiry … is simply whether, in all the circumstances … it

58 Ibid 1087.
59 [1976] Ch 179 CA, 195.
60 Ibid 198.
61 [1982] QB 153.
62 Ibid 133. The case was decided in 1977.
63 Ibid 147-52.
64 That of Lord Kingsdown.
65 Ibid 154-5.

was unconscionable for the defendants to seek to take advantage of the mistake which everyone shared (emphasis supplied).'

He acknowledged[66] that the elements of an estoppel by standing by identified in *Ramsden v Dyson* and *Willmott v Barber*[67] may be necessary in a case of 'mere passivity'. Despite his many references to unconscionability he too adopted an objective test. Peter Millett QC, for the defendant, argued that the test for estoppel by encouragement was subjective and the knowledge was the same as that required for an estoppel by standing by and the owner must be aware of his rights at the time.[68] Counsel for the plaintiffs argued that the Court had to look at the conduct of the party alleged to be estopped and its results, not his state of mind,[69] and Oliver J agreed.[70]

He dismissed Taylors' case because detrimental reliance, an essential element of an estoppel by encouragement, had not been established.[71] He found in favour of the other plaintiff[72] because it had been induced to incur expenditure and alter its position irrevocably on the faith of an expectation encouraged by the defendant. Thus the requirements of good conscience were subsumed in the elements of the estoppel. Describing its repudiation as unconscionable does not identify an element of the estoppel, it only tells us that equity will enforce it. A finding of unconscionability adds nothing.

In *Texas Bank*[73] the company arranged a loan to its subsidiary in the Bahamas to be secured by the latter's property and the parent's guarantee. For exchange control reasons the loan was made by the bank's subsidiary in the Bahamas but the guarantee was not amended. Later dealings with the company were conducted on the basis that the guarantee applied. Its liquidator disputed its liability and Robert Goff J held that the guarantee did not cover the loan, and there was no estoppel by convention.[74] He applied[75] the statements of Oliver J in *Taylors Fashions* quoted above[76] and found that the reliance on the company's strict legal rights was unconscionable. He identified a wider equitable doctrine, which he said was surely one of its most flexible,[77] based on the prevention of unconscionable conduct that was not limited to the recognised categories of proprietary and promissory estoppel.[78]

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66 Ibid 147.
67 (1880) 15 Ch D 96.
68 [1982] QB 144.
69 Ibid.
70 Ibid 150, 152.
71 Ibid 157.
72 Ibid 157-8.
73 [1982] QB 84.
74 This does not appear from the report although the submission was referred to (at 102) but in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 40 Lord Goff said: 'I remember the doctrine of estoppel by convention being urged upon me, but the case was concerned with the scope of a guarantee, which was a matter of law … and I hesitated to adopt the doctrine.'
75 Ibid 105-6.
76 *Taylors Fashions Ltd v Liverpool Victoria Trustees Ltd* [1982] QB 133, 147-52. Ibid 65.
77 *Johnson v Gore Wood & Co* [2002] 2 AC 1, 103.
78 Ibid 106. However, like Oliver J (*Taylors Fashions Ltd v Liverpool Victoria Trustees Ltd* [1982] QB 133, 147), he considered (at 104) that the requirements in *Willmott v Barber* (1880) 15 Ch D 96 may be necessary where the party estopped has simply stood by without protest.

He referred to statements of principle in the leading cases on proprietary and promissory estoppel and said:[79] 'all these have been statements of aspects of a wider doctrine; none has sought to be exclusive'. This generalisation was supported only by the dicta of Scarman LJ and Oliver J. The view that there is a single overarching doctrine of estoppel has not prospered. In *The Indian Grace (No 2)*[80] Lord Steyn said that any overarching doctrine would be at such a high level of abstraction that it would serve no useful purpose, and in *Johnson v Gore Wood & Co*[81] Lord Goff himself said that 'the many circumstances capable of giving rise to an estoppel cannot be accommodated within a single formula, and … unconscionability … provides the link'. In *Texas Bank*, after a lengthy review[82] of cases on both forms of proprietary estoppel, promissory estoppel, and estoppel by representation he said,[83] 'the basis of all these groups of cases appears to be the same – that it would … be unconscionable in all the circumstances for the encourager or representor not to give effect to his encouragement or representation.'

This is remarkable when one recalls that unconscionability was not mentioned in *Ramsden v Dyson*, *Hughes*, or *Sarat Chunder* or in any of the other cases he referred to except *Taylors Fashions*.[84] If this only means that unconscionability is the underlying principle it is a truism that tells us nothing useful. If it means that it is a triable issue it is wrong. He said:[85]

> Where estoppel is alleged to be founded upon encouragement or representation, it can only be unconscionable for the encourager or the representor to enforce his strict legal rights if the other party's conduct has been influenced by the encouragement or representation.

This is an objective test because the party bound may not know what effect his conduct has had on the actions of the other party. The company's representations that its guarantee covered the loan were representations of fact, and Robert Goff J followed *Taylors Fashions*[86] and earlier cases[87] and held[88] 'that a representation by a party as to the legal effect of an agreement can give rise to an estoppel'. Although there was an orthodox estoppel by representation[89] he found there was an equitable estoppel based on unconscionability but then applied an objective test. He made two ultimate findings,[90] 'first … there were numerous representations … to the Bank that the guarantee … [was] binding and effective … covering the Nassau loan … Second … the representations did … influence the Bank [and] contributed to lulling [it] into a state of false security.'

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79 *Johnson v Gore Wood & Co* [2002] 2 AC 1, 103.
80 [1998] AC 878, 914.
81 [2002] 2 AC 1, 41.
82 Ibid 103-6.
83 Ibid 106.
84 He did not refer to the judgment of Scarman LJ in *Crabb*.
85 *Johnson v Gore Wood & Co* [2002] 2 AC 1, 104.
86 Ibid 105.
87 *Sarat Chunder* (1892) LR 19 Ind App 203; *Calgary Milling Co Ltd v American Surety Co of New York* (1919) 3 WWR 98 PC; and *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330.
88 [1982] QB 105.
89 Ibid 100 'by their whole course of conduct the plaintiffs … represented to the Bank … that [their] guarantee … covered the Nassau loan'.
90 Ibid 107.

He then stated[91] the legal principles he would apply, none of which concerned unconscionability, and held there was a binding estoppel.

The Court of Appeal adopted the Dixon principles, ignored the Judge's decision on equitable estoppel, and reversed his decisions on the construction of the guarantee and the estoppel by convention.[92] Lord Denning MR said[93] that departure from the convention would not permitted because 'it would be altogether unjust', 'inequitable', 'unfair or unjust', and 'unfair and unjust'. He quoted Robert Goff J's statement that it would be 'unconscionable' for the plaintiff to take advantage of the bank's error, and said,[94] 'the Judge is applying the general principle of estoppel which I have stated'. Thus unconscionable was a synonym for unjust and added nothing to the Dixon principles,[95] which prevent 'an unjust departure' from an assumption protected by an estoppel. The other Judges did not mention unconscionability.

Although the Court of Appeal ignored the wider doctrine of equitable estoppel identified by Robert Goff J references to unconscionability began to appear in almost every English estoppel case. The concept then entered Australian law in *Waltons Stores*.[96] The writer has criticised much of the reasoning in this case and suggested that it was unnecessary because an orthodox estoppel by encouragement was established.[97] Mason CJ and Wilson J purported to apply an expanded doctrine of promissory estoppel based on unconscionability:[98]

> The foregoing review of the doctrine [of promissory estoppel] demonstrates that it extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction … must be unconscionable … The appellant's inaction … constituted clear encouragement or inducement to the respondents to continue to act on the basis of the assumption … It was unconscionable for it … to adopt a course of inaction which encouraged them in the course they had adopted. To express the point in the language of promissory estoppel the appellant is estopped … from retreating from its implied promise to complete the contract.

Their so called 'review' of the doctrine of promissory estoppel was limited to dicta of Scarman LJ in *Crabb*,[99] of Oliver J in *Taylors Fashions*,[100] and of Robert Goff J in *Texas Bank*,[101] which were not promissory estoppel cases. The earlier cases from *Hughes* onwards were ignored. Mason CJ and Wilson J proposed an expanded doctrine of promissory estoppel which would specifically enforce positive promises as if they were contracts. They confused proprietary and promissory estoppel which are based on different principles and operate differently. Brennan J, who also referred to unconscionability, said:[102]

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91 Ibid 107-8.
92 [1982] QB 84 CA.
93 Ibid 121-2.
94 Ibid 122.
95 *Grundt* (1937) 59 CLR 641, 674-6.
96 (1988) 164 CLR 387.
97 (2006) 80 ALJ 724.
98 (1988) 164 CLR 406-8.
99 [1976] Ch 179 CA.
100 [1982] QB 133.
101 [1982] QB 84.
102 Ibid 426.

> [U]nless the cases of proprietary estoppel are attributed to a different equity from that which explains … promissory estoppel the enforcement of promises to create new proprietary rights cannot be reconciled with a limitation on the enforcement of other promises. If it be unconscionable for an owner of property … to fail to fulfil a non-contractual promise that he will convey an interest … to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another?

An estoppel by encouragement prevents a property owner enforcing his proprietary rights and confers proprietary rights on the other party. The creation of freestanding positive rights in personam is an altogether different matter. Brennan J's reliance on unconscionability encouraged and concealed the radical extension that this involved. However when he actually came to decide the case he applied an objective test without reference to unconscionability. He said:[103]

> to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them … (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant … failed … to avoid that detriment … by fulfilling the assumption or expectation or otherwise.

Since the first five findings would establish a binding estoppel there is no need to stigmatise its repudiation. *Plimmer* established that the estoppel exists before it is repudiated and thus the sixth element is not necessary. Deane J referred[104] to 'the general notions of good conscience and fair dealing which underlay common law, as well as equitable doctrines of estoppel by conduct', but did not treat them as triable issues. Gaudron J did not refer to unconscionability.

The judgments in *Verwayen*[105] contain many references to unconscionability. Mason CJ, Brennan J, Deane J and McHugh J referred to it[106] as the underlying principle or purpose of equitable estoppel. Mason CJ, Brennan J, Deane J and McHugh J referred[107] to the Court granting relief to prevent unconscionable conduct, and relief being limited by the requirements of good conscience. However despite this Deane J, Dawson J and McHugh J applied[108] the Dixon principles to estoppel by encouragement and promissory estoppel.

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103 Ibid 428-9.
104 Ibid 449, and also 450, 453.
105 (1990) 170 CLR 394.
106 Ibid 411, 428-9, 440-1, 443, 501.
107 Ibid 411-2, 428-9, 436-7, 441, 442, 445-6, 501.
108 Ibid 444, 453, 500.

Although Deane J held that unconscionability was the underlying foundation or purpose of equitable estoppel,[109] he alone held that it was a triable issue akin to that in an unconscionable bargain case. He examined that question at some length, and said that:[110]

> conduct which is unconscionable will commonly involve … insistence upon legal entitlement … that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing … the question … involves a real process of consideration and judgment [which will include] an element of value judgment in a borderline case.

As we shall see the focus in an unconscionable bargain case is on the stronger party. Deane J returned to this topic and said:[111]

> an issue of estoppel by conduct will involve an examination of the relevant belief, actions and position of [the] party [relying on the estoppel] … The question whether such a departure would be unconscionable relates to the conduct of the allegedly estopped party … That party must have played such a part in the adoption of … the assumption that he would be guilty of unjust and oppressive conduct if he were now to depart from it.

At this point the focus is on the party estopped, and the test of unconscionability is objective, based on the effect of his conduct on the other party, in other words the Dixon principles. Deane J continued:[112]

> the question whether departure from the assumption would be unconscionable must be resolved … by reference to all the circumstances of the case, including the reasonableness of the conduct of the other party in acting upon the assumption and the nature and extent of the detriment which he would sustain … if departure from the assumed state of affairs were permitted.

The focus is now on the party claiming the benefit of the estoppel but there is no requirement that these matters be known to the party estopped when he attempts to repudiate the estoppel. McHugh J also considered the issue for the trial judge. He said:[113]

> It will be unconscionable for a party to insist on his or her strict legal rights if that party has induced the other party to assume that a different legal relationship exists or will exist between them, if he or she knew that the other party would act or refrain from acting on that assumption and if, as a result, the other party will suffer detriment unless the assumption is maintained.

He too would apply an objective test in accordance with the Dixon principles which only require the Court to consider the knowledge of the party estopped in the limited way explained in *Freeman v Cooke*. Despite copious references in the four judgments to unconscionability, in three the concept added nothing of substance to the Dixon principles. In one part of the judgment of Deane J the concept added nothing, but in the

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109 He held that there was a single unified doctrine of estoppel based on the prevention of unconscionable conduct.

110 *The Commonwealth v Verwayen* (1990) 170 CLR 394, 441.

111 Ibid 444.

112 Ibid 445.

113 Ibid 500.

other the issue for trial was said to be akin to that in an unconscionable bargain case, something no other judge has said before or since.

Meanwhile in England unconscionability had become the flavour of the month. In *Keen v Holland*[114] one reason given for the failure of the estoppel by convention was that it was not unconscionable for the tenant to rely on the *Agricultural Holdings Act 1948*, but one wonders how unconscionability could ever trump such a statute. In *The Vistafjord*,[115] Bingham LJ adopted a statement of Peter Gibson J that 'the parties [are not] held to an assumed and incorrect statement of fact or law where there is no injustice in allowing a party to resile therefrom'. Peter Gibson J had said that one of the requirements for an estoppel by convention[116] was that 'it would be unjust or unconscionable if one of the parties resiled from' it. Neither held that a finding of unconscionability was necessary, and in *The Vistafjord* an estoppel was upheld without such a finding.[117] However in *Hiscox v Outhwaite* Lord Donaldson MR said that *The Vistafjord* was authority for the proposition that[118] 'the Court will give effect to the agreed assumption only if it will be unconscionable not to do so'. He said later 'it would be unconscionable now to allow Mr Outhwaite to renege from the common assumption'. *The Vistafjord* did not decide this, and Lord Donaldson seems to require the court to apply the test of unconscionability to itself.

In *Allison Ltd v Limehouse & Co*,[119] where an estoppel by convention validated service of originating process in a manner not authorised by the rules, Lord Goff referred to unconscionability but Lord Bridge, who gave the principal speech, did not. This form of estoppel was again considered in *The Indian Grace (No 2)*[120] without any reference to unconscionability. In *Johnson v Gore Wood & Co* the majority upheld an estoppel by convention.[121] Lord Bingham adopted a statement of Lord Denning MR in *Texas Bank*, which did not mention unconscionability, and held[122] that the convention prevented further proceedings being an abuse of process and it would be 'unjust' to permit the defendant to resile from it.[123] In *Actionstrength Ltd v International Glass Engineering SpA*,[124] the House of Lords held that an estoppel based on nothing more than an oral guarantee could not displace the Statute of Frauds which made such guarantees unenforceable. Unconscionability was referred to in several of the speeches,[125] but the House did not have to decide whether it would have been a triable issue.

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114 [1984] 1 WLR 251 CA.
115 [1988] 2 Lloyds Rep 345 CA, 352.
116 Ibid.
117 Ibid 353.
118 [1992] 1 AC 562, 575.
119 [1992] 2 AC 105, 127.
120 [1998] AC 878, 913.
121 [2002] 2 AC 1, 33-4 (Lord Bingham), 42 (Lord Cooke), and 50 (Lord Hutton).
122 Ibid 33.
123 Ibid 34.
124 [2003] 2 AC 541.
125 Ibid 547 (Lord Bingham). At 552 Lord Clyde said 'some recognisable structural framework must be established before recourse is had to the underlying idea of unconscionable conduct in the particular circumstances'. Lord Walker of Gestingthorpe at 556 referred to the need for 'some sort of representation by the guarantor, together with unconscionability; not just unconscionability on its own'.

Despite many references to unconscionability there is, as yet, no decision of the Court of Appeal, House of Lords or Privy Council that it is a triable issue in an estoppel by conduct case.[126] In *John v George*[127] Simon Brown LJ expressed the unconscionability principle as the 'unfairness or injustice in allowing the party … to go back on that assumption' but this is covered by the Dixon principles. In *P W & Co v Milton Gate Investments Ltd*[128] Neuberger J accepted the requirement for unconscionability but problems emerged when he applied it to the facts. He said:[129]

> unconscionability must be based on the prejudice which would be caused to the claimant if the strict legal position applied … the claimant must also establish that the prejudice arises from its reliance on the convention … when considering the question of unconscionability in connection with an estoppel by convention the court must ultimately carry out its assessment by reference to facts and matters known to it at the date of the hearing … it seems scarcely consistent with doing justice to ignore facts which have occurred since the date upon which an action was taken in reliance upon the estoppel, and which may well impinge significantly, or even determinatively, on the issue of unconscionability.

This means that unconscionability does not depend, as one would think, on the knowledge of the party estopped when he repudiates the convention, but on the court's assessment of the claimant's prejudice at the date of trial, if departure from the convention were permitted. This deprives unconscionability of all meaning. An estoppel will certainly fail if departure from the assumption by the party bound will no longer cause any substantial detriment to the other party, but this is within the Dixon principles, and does not depend on unconscionability.

I said at the outset that doubts have emerged in Australia about the utility and relevance of unconscionability as a triable issue in estoppel and other cases. In *ABC v Lenah Game Meats Pty Ltd*,[130] the plaintiff invoked the power of equity to grant relief against unconscionable conduct in an attempt to restrain the ABC from broadcasting some films. These had been taken by video cameras surreptitiously installed at its abattoirs by one or more unidentified trespassers who were not servants or agents of the ABC. The plaintiff claimed that it would be unconscionable for the ABC to broadcast the films, but, apart from the trespass, its legal and equitable rights had not been and would not be infringed. Gleeson CJ said:[131]

> No doubt it is correct to say that, if equity will … restrain publication of the film, the ultimate ground upon which it will act will be that, in all the circumstances, it would be unconscientious of the appellant to publish. But that leaves for decision … the principles according to which equity will reach that conclusion … The real task is to decide what a

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126 *Con-Stan Industries of Australia Pty Ltd v Norridge Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 244. The Court's statement of the requirements for an estoppel by convention did not mention unconscionability; but it was referred to in *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 CA, 550. Estoppel by convention is applied in Singapore without any requirement for a finding of unconscionability: *Singapore Island Country Club v Hilbourne* [1997] 1 SLR 248 CA, 256.

127 (1995) 71 P & Cr 375 CA, 396.

128 [2004] Ch 142, 195-6, 197.

129 Ibid 197, 200-1.

130 (2001) 208 CLR 199.

131 Ibid 227.

> properly formed and instructed conscience has to say about publication in a case such as the present.

Gummow and Hayne JJ said:[132]

> Disapproval of unconscientious behaviour … finds expression in such principles as those respecting estoppel in equity; it is 'the driving force behind equitable estoppel'. But the notion of unconscionable behaviour does not operate wholly at large as Lenah would … have it.

In *ACCC v C G Berbatis Holdings Pty Ltd*,[133] Gummow and Hayne JJ, who were part of the majority, said that unconscionability in equity was found at two levels, a generic level which informs its fundamental principles and a specific level limited to particular categories of case. This was developed in the joint judgment in *Tanwar Enterprises Pty Ltd v Cauchi*:[134]

> the terms 'unconscientious' and 'unconscionable' are … used across a broad range of the equity jurisdiction. They describe in their various applications the formation and instruction of conscience by reference to well developed principles. Thus it may be said that breaches of trust and abuses of fiduciary position manifest unconscientious conduct; but whether a particular case amounts to a breach of trust or a breach of fiduciary duty is determined by reference to well developed principles … It is to those principles that the court has first regard rather than entering into the case at that higher level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large … The conscience of the vendor which equity seeks to relieve is … a properly formed and instructed conscience.

The joint judgment continued:[135]

> the phrase 'unconscionable conduct' tends to mislead in several respects. First it encourages the false notions that (i) there is a distinct cause of action, akin to an equitable tort, wherever a plaintiff points to conduct which merits the epithet 'unconscionable'; and (ii) there is an equitable defence to the assertion of any legal rights, whether by action to recover a debt or damages in tort or for breach of contract, where in the circumstances it has become unconscionable for the plaintiff to rely on that legal right.
>
> Secondly, and conversely, to speak of 'unconscionable conduct' as if it were all that need be shown may suggest that it is all that can be shown and so covers the field of equitable interest and concern …
>
> Thirdly, as a corollary to the first proposition, to speak of 'unconscionable conduct' may, wrongly, suggest that sufficient foundation for the existence of the necessary 'equity' to interfere in relationships established by, for example, the law of contract, is supplied by an element of hardship or unfairness in the terms of the transaction in question, or in the manner of its performance.

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132 Ibid 245.
133 (2003) 214 CLR 51, 71 (*Berbatis*).
134 (2003) 217 CLR 315, 324-5 (*Tanwar*).
135 Ibid 325.

Reservations about the overuse of unconscionability have also emerged in England.[136] McGhee, the current editor of 'Snell's Equity' said in his preface to the 30th edition in 2000 that: 'the frequent reference by the courts to "conscience" and "unconscionability" … may have masked rather than illuminated the underlying principles at stake', a statement quoted by Gummow and Hayne JJ in *Berbatis*.[137] In his preface to the 31st edition in 2005, McGhee said that, 'the understanding of equitable rules … has been hampered by … opaque concepts such as unconscionability', and dealing with equitable estoppel the book stated that,[138] 'a general principle of unconscionability is an inadequate basis to found a general doctrine because of its level of abstraction as a defining principle and its indefinable criteria'.

The general rule, recognised in *Tanwar*, that the established rules of equity make it unnecessary to consider unconscionability independently of those rules, is subject to limited exceptions, such as unconscionable bargains and rescissions where unconscionability enters directly into the Court's fact finding. In such cases questions of degree are involved, equitable relief depends on the precise facts, and the court has to make a value judgment. The nature of the principles on which courts of equity grant relief in such cases differ significantly from the orthodox principles which govern estoppel by conduct. Equity has never defined the circumstances in which relief can be granted against an unconscionable bargain. In *Blomley v Ryan*, Fullagar J said,[139] 'the circumstances adversely affecting a party, which may induce a court of equity … to set a transaction aside, are of great variety and can hardly be satisfactorily classified'.

In *Commercial Bank of Australia Ltd v Amadio* Mason J said,[140] 'it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct.'

Likewise in *Legione v Hateley* Mason and Deane JJ said,[141] 'it is impossible to define or describe exclusively all the situations which may give rise to unconscionable conduct on the part of a vendor in rescinding a contract of sale.'

Similarly in *National Westminster Bank plc v Morgan* Lord Scarman, who delivered the principal speech, said:[142]

> There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence … a court in the exercise of this equitable jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable. This … depends on the particular facts.

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136 *Criterion Properties plc v Stratford UK Properties LLC* [2004] 1 WLR 1846 HL, 1848, 1855-6. The Court of Appeal wrongly treated unconscionability as relevant to a company's responsibility for acts of its directors.

137 (2003) 214 CLR 51, 71.

138 J McGhee, *Snell's Equity* (Thomson/Sweet & Maxwell, 31st ed, 2005) 257.

139 (1956) 99 CLR 362, 405.

140 (1983) 151 CLR 447, 461, and 474 (Deane J).

141 (1983) 152 CLR 406, 449.

142 [1985] AC 686, 709.

In *Tanwar* the Court limited the circumstances in which equity would relieve against an unconscionable rescission and rejected wider statements in some of the judgments in *Stern v McArthur*.[143] The majority said:[144]

> the special heads of fraud, accident, mistake or surprise' identify in a broad sense the circumstances making it inequitable for the vendors to rely on their termination of Tanwar's contracts as an answer to its claim for specific performance. No doubt the decided cases in which the operation of these special heads is considered do not disclose exhaustively the circumstances which merit this equitable intervention. But, at least where accident and mistake are not involved, it will be necessary to point to the conduct of the vendor as having in some significant respect caused or contributed to the breach of the essential time stipulation.

The Dixon principles leave no scope for unconscionability as a triable issue because the justice of an estoppel is not determined by an ad hoc decision but by law. Those principles, derived from equity, make it unnecessary to consider unconscionability independently and a requirement for unconscionability adds nothing except a vituperative epithet. Since the responsibility of the party estopped, except in standing by cases, depends on his conduct, considered objectively, and not his knowledge, the unconscionability of his conduct is a false issue. It also suggests that the Court has a general discretion whereas in substance its discretion is confined to the relief to be granted in proprietary estoppel cases.

This will depend on the equity of the plaintiff. As the Privy Council said in *Plimmer*,[145] in a passage that has frequently been followed, 'the Court must look at the circumstances in each case to decide in what way the equity can be satisfied'. In *Giumelli*,[146] the High Court said that Courts consider the requirements of conscience when framing relief in a proprietary estoppel case[147] and[148] they should not go 'beyond what was required for conscientious conduct'. However it matters little whether the Court says it is granting relief to satisfy the plaintiff's equity, granting equitable relief, or granting relief to prevent unconscionable or unconscientious conduct. This is illustrated by *Gillett v Holt*,[149] a recent case on estoppel by encouragement. Walker LJ said,[150] that 'the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine'. Thus it is not itself one of those elements and not a triable issue. He applied an objective test when he said,[151] 'it is the other party's detrimental reliance on the promise which makes it irrevocable … there must be a sufficient link between the promises relied on and the conduct which constitutes the detriment.'

143 (1988) 165 CLR 489.
144 (2003) 217 CLR 315, 355.
145 (1884) 9 App Cas 699, 714.
146 (1999) 196 CLR 101.
147 Ibid 111, 122, 123.
148 Ibid 125.
149 [2001] Ch 210 CA.
150 Ibid 225.
151 Ibid 229-230.

The detriment must be 'something substantial',[152] and he added,[153] 'whether [it] is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test of unconscionability.'

It is suggested that this adds nothing to the Dixon principles which hold that the estoppel is binding if the representee's change of position would be a source of detriment or prejudice. When Walker LJ determined what relief would be granted he applied the statement in *Plimmer* and did not refer to unconscionability. On the other hand in *Jennings v Rice*,[154] soon afterwards he said that in a proprietary estoppel case the Court grants relief to prevent unconscionable conduct.

A comparison between the principles on which estoppels by conduct (except estoppels by standing by) are enforced and those which govern the grant of equitable relief against unconscionable bargains is instructive. The focus in the estoppel cases is on the party claiming the benefit of the estoppel and the conduct of the party sought to be estopped is judged objectively, in accordance with *Freeman v Cooke*. The estoppel binds once the other party acts in reliance on that conduct and would be materially disadvantaged if departure from the assumption were permitted, whether the party bound knew this or not. The law defines with more or less completeness the conduct that precludes if the other requirements are established.

On the other hand equity has never attempted to define the circumstances in which it will grant relief against an unconscionable bargain. This depends on proof that the victim was in a position of significant disadvantage because of some weakness or disability, that this was known to the stronger party at the time, and that he exploited his power over the victim. Equity's focus is on the stronger party and its relief depends on his knowledge when the contract was made.[155] An ad hoc judgment is required in every case based on the nature and extent of the disability, the knowledge of the stronger party, and the extent of any undervalue or other detriment to the victim.

In conclusion:

1. Estoppel by conduct cases including cases of proprietary estoppel have not been decided by an ad hoc assessment of the defendant's conduct, even when the Judge adopted the test of unconscionability.

2. An estoppel by encouragement binds the party who created the expectation as soon as there has been detrimental reliance by the party encouraged. This is judged objectively and the detriment must be material. Knowledge of this by the party who created the expectation is not necessary.

3. As *Plimmer* demonstrates, an estoppel by encouragement exists once the necessary conditions are satisfied even if the party bound does not repudiate the expectation. The estoppel is not just remedial.

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152 Ibid 232.
153 Ibid 232.
154 [2003] 1 P & CR 100 CA, 112.
155 *Hart v O'Connor* [1985] AC 1000, 1024, 1027.

4. The relief in an estoppel by encouragement case depends on the Court's assessment of what would be equitable in all the circumstances. This is what is required to cleanse the conscience of the defendant, or to prevent unconscionable conduct, but such references add nothing of substance.

5. The requirements of good conscience are subsumed in the elements of each form of estoppel by conduct and unconscionability has no further useful role.