

# THE LAW OF PROPRIETARY ESTOPPEL

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# 1

## INTRODUCTION

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### A. The Modern Law of Proprietary Estoppel

Fifty years ago, the term ‘proprietary estoppel’ was essentially unknown.<sup>1</sup> Today, the significance of the law of proprietary estoppel is evident to any attentive visitor to the United Kingdom’s Supreme Court. The role of that court is surveyed in a permanent exhibition, housed in the basement of its relatively new accommodation without, but within shouting distance of, the Houses of Parliament. One of the displays is entitled: ‘The relevance of the Supreme Court to everyday life.’ It asserts, with good grounds, if questionable syntax, that: ‘our highest judges make decisions that affect not only those involved in a particular case, but also set the guiding principles of how we live our everyday lives’. To support this claim, three cases are described. The most recent of these is *Thorner v Major*.<sup>2</sup> **1.01**

Peter Thorner, a taciturn farmer from Somerset, had indicated to David, his cousin, that David would inherit Peter’s farm.<sup>3</sup> As a result, David had continued to work on that farm, for very low pay, for a further fifteen years. When Peter died without having made a valid will, the statutory intestacy rules imposed a duty on Peter’s **1.02**

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<sup>1</sup> The term seems to have been introduced into general use by R Megarry and P Baker (eds), *Snell’s Equity* (26th edn, London, Sweet & Maxwell, 1966) 629–33, where the applicable principles are covered in four pages. There have been a number of important developments since then. The appearance of the term there was influenced by the reference to ‘equitable estoppel’ made by Danckwerts LJ in *Inwards v Baker* [1965] 2 QB 29, 38. In turn, in *ER Ives Investment Ltd v High* [1967] 2 QB 379, 399, his Lordship referred to the term ‘proprietary estoppel’ as used in *Snell’s Equity*.

<sup>2</sup> [2009] UKHL 18, [2009] 1 WLR 776.

<sup>3</sup> The facts of the case are set out in more detail at 2.82.

administrators to hold the farm for the benefit not of David but of other relatives of Peter, closer to him in blood if not in life. The House of Lords confirmed, however, that proprietary estoppel operated to impose a duty on Peter (and now on his administrators) to transfer to David the farm and associated assets. The decision meant not only that David was around £2.1 million better off than he would have been had no estoppel claim been possible<sup>4</sup> but also that, in the words of the Supreme Court's exhibition's display: 'if a verbal promise is made to someone who subsequently relies on that promise to their own detriment, that promise can be enforced under the principles of fairness and equity'.

- 1.03** In setting out the law of proprietary estoppel, one of the principal aims of this book is to provide a more precise account of the principle applied in *Thorner v Major*. In order to do so, it is necessary to identify, and distinguish between, three distinct strands of proprietary estoppel, each of which has different requirements. The first of these is based on A's acquiescence in B's mistaken belief as to B's current rights; the second on a representation of an existing state of affairs made by A to B; the third, applied in *Thorner*, is based on A's promise to B.
- 1.04** At an abstract level, it can be said that these three distinct strands have a common aim: each operates to ensure that A does not act in such a way as to leave B to suffer a detriment as a result of B's reasonable reliance on A. It is therefore possible to provide a general formulation of the modern law of proprietary estoppel that is broad enough to encompass all three strands of the doctrine. In *Thorner*, for example, Lord Walker noted the scholarly consensus that proprietary estoppel:<sup>5</sup>
- is based on three main elements... a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.
- 1.05** This general formulation, however, cannot be, nor was intended to serve as, a test that can be applied to determine the practical operation of proprietary estoppel

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<sup>4</sup> The Court of Appeal had been 'told that the effect of [the order of the first instance judge, later restored by the House of Lords], in broad terms, would be that David would inherit assets with a net value of some £2.1 million'; that estimate was premised on the farm's bearing 'the appropriate proportion referable to it of the overall inheritance tax, with the benefit of its share of the nil rate band' [2008] EWCA Civ 732, [2008] WTLR 1289 [27]. In fact, there is a strong argument that David's estoppel claim reduced the value of the chargeable transfer made by Peter on his death: see 10.11–10.17. That argument does not depend on the availability of agricultural property relief: such relief is limited to value attributable to 'the agricultural value of agricultural property' (Inheritance Act 1984, s 39A) and it seems that a large part of the value of the farm acquired by David derived from its development potential. Indeed, the coda to *Thorner* (it is for others to judge whether happy or not) is that in February 2013 the planning committee of Sedgemoor District Council, by a 7–5 vote, approved an application for the construction on the farm site of a Sainsbury's store with a sales area of 23,000 square feet.

<sup>5</sup> [2009] UKHL 18, [2009] 1 WLR 776 [29].

to a particular set of facts.<sup>6</sup> The main point made in this book is that the specific principles established in the cases can be understood only if the three separate, irreducibly dissimilar, strands of the doctrine are carefully distinguished. In particular, principles developed in relation to each of the longer-established acquiescence- and representation-based strands may well be ill-suited to the more recently developed, but more practically important, promise-based strand applied in cases such as *Thorner v Major*.<sup>7</sup>

## 1. The Acquiescence-Based Strand

In another recent decision of the House of Lords, *Fisher v Brooker*, Lord Neuberger stated that: ‘The classic example of proprietary estoppel, standing by whilst one’s neighbour builds on one’s land believing it to be his property, can be characterised as acquiescence.’<sup>8</sup> The principle on which the acquiescence-based strand of proprietary estoppel is based is certainly long-established:<sup>9</sup> its operation can be seen, for example, in *The Earl of Oxford’s Case*.<sup>10</sup> It applies where B adopts a particular course of conduct in reliance on a mistaken belief as to B’s current rights and A, knowing both of B’s belief and of the existence of A’s own, inconsistent right, fails to assert that right against B.<sup>11</sup> A then comes under a liability to B if B would suffer a detriment, as a result of B’s reasonable reliance on that mistaken belief, were A wholly free to enforce A’s right against B.

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<sup>6</sup> See eg *Macdonald v Frost* [2009] EWHC 2276 (Ch) [2010] 1 P & CR DG14 per Geraldine Andrews QC at [9], where the three-part test is prefaced by the observation that: ‘there is still no comprehensive and uncontroversial definition of proprietary estoppel’.

<sup>7</sup> The distinction between the acquiescence-, representation-, and promise-based strands of proprietary estoppel is made by J Mee, ‘Proprietary Estoppel, Promises and Mistaken Belief’ in S Bright (ed), *Modern Studies in Property Law: Volume VI* (Oxford, Hart Publishing, 2011) 175, 181–3. K Low, ‘Nonfeasance in Equity’ (2012) 128 LQR 63, 72–3 also identifies the point that the law of proprietary estoppel may be based on distinct principles that should not be confused. See too B McFarlane, ‘Understanding Equitable Estoppel: From Metaphors to Better Laws’ (2013) Current Legal Problems 267, which additionally considers the distinct principles applied through the broad doctrine of promissory estoppel.

<sup>8</sup> [2009] UKHL 41, [2009] 1 WLR 1764 [62], referring to *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch) 151 per Oliver J. It is a curious feature of proprietary estoppel that Oliver J’s influential decision is often (as in *Fisher*) cited as *Taylor Fashions*, whereas the missing ‘s’ is often added to the end of *Thorner v Major*. That singular problem has also affected an important Australian decision, *Waltons Stores (Interstate Ltd) v Maher* (1988) 14 CLR 387 (High Court of Australia) from which the ‘s’ of the first word often disappears.

<sup>9</sup> See too *Lester v Woodgate* [2010] EWCA Civ 199 per Patten LJ at [27]: ‘Many of the earliest cases [of proprietary estoppel] arose out of circumstances in which no express encouragement in the form of words was given by the landowner but where the other party built on or made improvements to the former’s land in the mistaken belief that he owned or had rights over it.’

<sup>10</sup> (1615) Chan Rep 1, 21 ER 485. See D Ibbetson, ‘The Earl of Oxford’s Case (1615)’ in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Oxford, Hart, 2012) 1, 26–7.

<sup>11</sup> See further 2.04–2.50.

- 1.07** It should be noted that the acquiescence principle, as formulated, is not confined to cases where the right that A fails to assert is a right to particular land or other property. For example, in an earlier House of Lords' decision, *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*,<sup>12</sup> Lord Diplock considered that the principle was capable of applying where the right that A failed to assert was the power to object to a statutory application made by B outside the prescribed timetable.<sup>13</sup> There is no good reason why the wider principle should operate in a special way when applied to land or other property. The acquiescence-based strand of proprietary estoppel therefore consists of the application of a wider acquiescence principle to the particular context where A fails to assert a property right.<sup>14</sup> That wider principle has been said to depend on the need to prevent fraudulent or dishonest action by A.<sup>15</sup> Certainly, as will be discussed at 2.04–2.50 and 5.33–5.43, its operation is carefully limited.
- 1.08** When the term 'proprietary estoppel' first came to be widely used, it was essentially equated with the application of the acquiescence principle to cases involving A's assertion of a property right.<sup>16</sup> Indeed, judicial support for this view of proprietary estoppel can be found as late as 1986.<sup>17</sup> As exemplified by *Thorne v Major*,<sup>18</sup> however, it would be a mistake to assume that all cases of proprietary estoppel must meet the demanding criteria applied to the acquiescence principle.

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<sup>12</sup> [1971] AC 850 (HL).

<sup>13</sup> The principle did not in fact apply, as A, when failing to assert that power, had been unaware of its existence: see further 2.30.

<sup>14</sup> It has been accepted that the acquiescence principle may apply to cases involving A's failure to assert an intellectual property right (see eg *Proctor v Bennis* (1887) LR 36 Ch D 740 (CA); *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764; *Godfrey v Lees* [1995] EMLR 307) or to inform B of A's right to be paid under an insurance policy (see eg *Leslie v French* (1883) LR 23 Ch D 552 *per* Fry J at 504–5; *Falcke v Scottish Imperial Insurance Co* (1887) LR 34 Ch D 234 (CA); *re Foster, Hudson v Foster (No 2)* [1938] 3 All ER 610 (Ch)). On the view taken here, whether or not such an application of the principle would fall within proprietary estoppel makes no difference to the result of the case, and depends simply on whether or not A's right is to be regarded as a property right.

<sup>15</sup> See eg *Willmott v Barber* (1880) 15 Ch D 96 *per* Fry J at 105; *Electrolux Ltd v Electrix Ltd* (1954) 71 RPC 23 (CA) *per* Sir Raymond Evershed MR at 33; *Shaw v Applegate* [1977] 1 WLR 970 (CA) *per* Buckley LJ at 978.

<sup>16</sup> See R Megarry and P Baker (eds), *Snell's Equity* (26th edn, London, Sweet & Maxwell, 1966) 629–33. See too *Crabb v Arun District Council* [1976] Ch 179 (CA) *per* Scarman LJ at 194–5; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch) 145 where it is noted that the submissions of counsel for the defendants employ 'proprietary estoppel' and 'estoppel by acquiescence' as different terms for the same principle.

<sup>17</sup> See *Coombes v Smith* [1986] 1 WLR 808 (Ch) 817–18. In *Matharu v Matharu* (1994) 69 P & CR 93 (CA), Roch LJ at 102 accepted an equation of proprietary estoppel with the acquiescence principle, but in that case it seems that only the acquiescence-based strand of the doctrine could apply, as A had not dealt directly with B (but had dealt only with B's husband) and so could not, on the facts of the case, be seen as having made a promise or representation to B.

<sup>18</sup> [2009] UKHL 18, [2009] 1 WLR 776.

## 2. The Representation-Based Strand

The three-part formulation set out by Lord Walker in *Thorner v Major*<sup>19</sup> seems to be modelled on the operation of the general doctrine of estoppel by representation.<sup>20</sup> That doctrine, like the acquiescence principle, is long-established and also operates outside the proprietary context. It applies where A makes a representation to B as to a matter of fact, or mixed fact and law, and B reasonably believes that A intends B to adopt a particular course of conduct in reliance on the truth of that representation. If B then does adopt that course of conduct and, as a result, would suffer a detriment if A were free to deny the truth of the representation, A will be precluded from doing so.<sup>21</sup> **1.09**

The representation-based strand of proprietary estoppel consists of the application of this general principle to representations relating to A's property. For example, in *Hopgood v Brown*,<sup>22</sup> following discussions with A, his neighbour, as to the position of the boundary between their plots, B built a garage. It transpired that the parties were mistaken as to the true location of the boundary and B's garage in fact encroached onto A's land. It was held that an estoppel by representation had arisen and that as a result A would have been precluded from asserting the true location of the boundary as against B.<sup>23</sup> **1.10**

In *Hopgood*, it had been argued that no estoppel arose as A, when making the representation as to the boundary, had been unaware of its true location. Lord Evershed MR rejected that contention, stating that the requirement that A be aware of the true state of affairs between the parties is 'addressed to and limited to cases where the party is alleged to be estopped by acquiescence' and so does not apply to 'any case of estoppel by representation'.<sup>24</sup> The drawing of a distinction between the acquiescence- and representation-based principles was thus crucial to his Lordship's reasoning. **1.11**

It has been suggested that the acquiescence- and representation-based strands of proprietary estoppel are not distinct, but depend on the same basic principle.<sup>25</sup> For **1.12**

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<sup>19</sup> [2009] UKHL 18, [2009] 1 WLR 776 [29].

<sup>20</sup> For the application of a similar three-part test to estoppel by representation see *Canada and Dominion Sugar Company Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 47 (PC) per Lord Wright at 56; *Tai Hing Cotton Mill Ltd v Liu Chong Bank Ltd* [1986] AC 80 (PC) per Lord Templeman at 110; *Steria Ltd v Hutchison* [2006] EWCA Civ 1551, [2007] ICR 445 per Neuberger LJ at [93].

<sup>21</sup> See eg *Pickard v Sears* (1837) 6 A & E 469, 112 ER 179.

<sup>22</sup> [1955] 1 WLR 213 (CA).

<sup>23</sup> It was also held that the estoppel bound the claimant in the case, a successor in title to A. This aspect of the case is discussed at 8.48–8.61.

<sup>24</sup> [1955] 1 WLR 213 (CA) 223.

<sup>25</sup> This suggestion can also be made by seeing those two strands as depending on an underlying need to prevent A's unconscionable assertion of a legal right. That analysis will be considered at 1.28–1.31.

example, attempts have been made to assimilate the acquiescence principle to the preclusive doctrine of estoppel by representation.<sup>26</sup> Those attempts should, however, be rejected. First, an acquiescence-based claim can arise even in the absence of a positive representation or assurance by A and, it seems, even if B is unaware of A's failure to assert A's right.<sup>27</sup> To find a representation in such a case would be to indulge in a fiction.<sup>28</sup> Secondly, the acquiescence principle imposes a liability on A which may, but need not, be satisfied by precluding A from asserting a right against B; in contrast, the general doctrine of estoppel by representation does not operate as a cause of action but instead operates only to prevent A's denying the truth of a particular state of affairs.<sup>29</sup> It is therefore possible to justify the position, adopted in *Hopgood v Brown*, that these two strands of proprietary estoppel have different requirements.

- 1.13** The representation-based strand has, somewhat surprisingly, been assumed to comprise the whole of proprietary estoppel. In *Cobbe v Yeoman's Row Management Ltd*, Lord Scott stated that:<sup>30</sup>

An 'estoppel' bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a 'proprietary estoppel'—a sub-species of a 'promissory' estoppel—if the right claimed is a proprietary right, usually a right to or over land, but, in principle, equally available in relation to chattels or choses in action. So what is the fact or facts, or the matter of mixed fact and law, that, in the present case, [A] is said to be barred from asserting?

- 1.14** As an analysis of the representation-based strand of proprietary estoppel, Lord Scott's analysis is impeccable;<sup>31</sup> yet that is precisely why it cannot explain the whole

<sup>26</sup> An influential attempt was made by G Spencer Bower, *Estoppel by Representation* (1st edn, London, Butterworths, 1923) 351ff. See too *De Busche v Alt* (1878) 8 Ch D 286 (CA) *per* Thesiger LJ at 314; *Proctor v Bennett* (1887) 36 Ch D 740 (CA) *per* Fry LJ at 766; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch) 151–2.

<sup>27</sup> See 2.45–2.48.

<sup>28</sup> See 2.06. This point is also made by J Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in S Bright (ed), *Modern Studies in Property Law: Volume VI* (Oxford, Hart Publishing, 2011) 175, 182.

<sup>29</sup> See eg *Low v Bouverie* [1891] 3 Ch 82 (CA) *per* Lindley LJ at 101: 'But 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'; *per* Bowen LJ at 105: 'Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said'; and *per* Kay LJ at 111–12.

<sup>30</sup> [2008] UKHL 55, [2008] 1 WLR 1752 [14]. Lord Scott's view was adopted by the Privy Council in *Capron v Government of the Turks & Caicos Islands* [2010] UKPC 2 [34]. It is, however, inconsistent with the decision of the House of Lords in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776.

<sup>31</sup> It is essentially identical to the analysis adopted in *Low v Bouverie* [1891] 3 Ch 82 (CA). See eg *per* Kay LJ at 112: 'Estoppel is effective where an action must succeed or fail if the defendant or plaintiff is prevented from disputing a particular fact alleged.'



of proprietary estoppel.<sup>32</sup> First, it cannot comfortably explain the operation of the acquiescence principle, which was applied in a proprietary context long before it came to be seen as part of the law of proprietary estoppel and which, as discussed at 1.12, cannot be assimilated within estoppel by representation. Secondly, Lord Scott's passing reference to promissory estoppel notwithstanding, his Lordship's formulation cannot encompass the most practically significant part of the modern law of proprietary estoppel: the promise-based strand.<sup>33</sup>

### 3. The Promise-Based Strand

The House of Lords' decision in *Thorner v Major*,<sup>34</sup> discussed at 1.02, confirmed the existence, and helped to explain the operation, of the promise-based strand of proprietary estoppel. It is the most practically important of the three strands of the doctrine and the majority of the text in this book is devoted to it. It will be submitted that it applies where A makes a promise that B has or will acquire a right in relation to A's property and B, reasonably believing that A's promise was seriously intended as a promise on which B could rely, adopts a particular course of conduct in reasonable reliance on A's promise. If, as a result of that course of conduct, B would then suffer a detriment were A to be wholly free to renege on that promise, A comes under a liability to ensure that B suffers no such detriment. 1.15

The promise-based strand applied in *Thorner v Major* has operated so as to determine rights not only to a farm in Somerset, but also, for example, to farms in Lincolnshire,<sup>35</sup> in North Yorkshire,<sup>36</sup> and in St Lucia;<sup>37</sup> to a houseboat in Chelsea and a flat in Jamaica;<sup>38</sup> to a hotel in North West Wales<sup>39</sup> and houses in New South Wales;<sup>40</sup> to walk on a stairway in London's East End<sup>41</sup> and through a school in 1.16

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<sup>32</sup> As noted by J Getzler, 'Quantum Meruit, Estoppel, and the Primacy of Contract' (2009) 125 LQR 196, 199, the effect of Lord Scott's analysis is to submerge proprietary estoppel into promissory estoppel and then to 'collapse promissory estoppel into estoppel by representation'.

<sup>33</sup> See further B McFarlane and A Robertson, 'The Death of Proprietary Estoppel' [2008] Lloyds Maritime and Commercial Law Quarterly 449. T Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' (Lecture at Chancery Bar Association's 2009 Conference) also noted at [27] that Lord Scott's analysis, taken at face value, 'spells a severe restriction on the operation of the doctrine'. Lord Walker referred, eschatologically, to these discussions of *Cobbe* in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [31].

<sup>34</sup> [2009] UKHL 18, [2009] 1 WLR 776.

<sup>35</sup> *Gillett v Holt* [2001] Ch 210 (CA).

<sup>36</sup> *Suggitt v Suggitt* [2012] EWCA Civ 1140, [2012] WTLR 1607.

<sup>37</sup> *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988 (PC).

<sup>38</sup> *Ottey v Grundy* [2003] EWCA Civ 1176, [2003] WTLR 1253.

<sup>39</sup> *Wayling v Jones* (1993) 69 P & CR 170 (CA).

<sup>40</sup> See eg *Sullivan v Sullivan* [2006] NSWCA 312, (2006) 13 BPR 24, 755; *Delaforce v Simpson-Cook* [2010] NSWCA 84, (2010) 78 NSWLR 483.

<sup>41</sup> *Chaudhary v Yavuz* [2011] EWCA Civ 1314, [2011] 2 All ER 418.

Ireland's Westmeath.<sup>42</sup> It can apply in the commercial<sup>43</sup> as well as the domestic context, and provides B with an independent cause of action: if the conditions of a promise-based proprietary estoppel claim are met, the promisor (A) comes under a liability to the promisee (B). To meet that liability, A may be required, for example, to transfer property to B,<sup>44</sup> to grant B a particular right in property,<sup>45</sup> to hold a right on trust for B,<sup>46</sup> to allow B to make particular use of A's property,<sup>47</sup> or to pay a sum of money to B.<sup>48</sup>

- 1.17** The promise-based strand of proprietary estoppel has developed with remarkable speed: like the term 'proprietary estoppel' itself, it was not known to lawyers practising fifty years ago.<sup>49</sup> Indeed, its relative novelty means that, prior to *Thorner v Major*, B's ability to base a proprietary estoppel claim on A's promise had, on occasion, been overlooked<sup>50</sup> or even, as exemplified by Lord Scott's analysis in *Cobbe v Yeoman's Row Management Ltd*, denied.<sup>51</sup> It is therefore significant that, on the facts of *Cobbe* itself, it seems clear that the requirements of the promise-based strand were not met,<sup>52</sup> so that its recognition by the House of Lords would have made no difference to the decision reached. In contrast, in *Thorner*, where its application might have determined the case against David Thorner, Lord Scott's analysis in *Cobbe* was supported by only one member of the panel: Lord Scott.

<sup>42</sup> *Board of Management of All Saints Church of Ireland National School v Courts Service* [2011] IEHC 274 (Irish High Court).

<sup>43</sup> See eg *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699 (PC); *Holiday Inns v Broadhead* (1974) 232 EG 951, 1087 (Ch); *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] WTLR 345; *Sutcliffe v Lloyd* [2007] EWCA Civ 153, [2007] 2 EGLR 13; *Herbert v Doyle* [2010] EWCA Civ 1095.

<sup>44</sup> See eg *Pascoe v Turner* [1979] 1 WLR 431 (CA); *Gillett v Holt* [2001] Ch 210 (CA); *Thorner v Major* [2009] UKHL 48, [2009] 1 WLR 776.

<sup>45</sup> See eg *Crabb v Arun District Council* [1976] Ch 179 (CA); *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [2005] WTLR 345; *Herbert v Doyle* [2010] EWCA Civ 1095.

<sup>46</sup> See eg *Holiday Inns v Broadhead* (1974) 232 EG 951, 1087 (Ch); *Esther Chan Pui Chun v Gilbert Leung Kam Ho* [2002] EWCA Civ 1075; *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988.

<sup>47</sup> See eg *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699 (PC); *Parker v Parker* [2003] EWHC 1846 (Ch).

<sup>48</sup> See eg *Campbell v Griffin* [2001] EWCA Civ 990, [2001] WTLR 981 (where the duty to pay the sum was secured by an equitable charge on A's property); *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8 and *Powell v Benney* [2007] EWCA Civ 1283, [2008] 1 P & CR DG12 (where the duty was not so secured).

<sup>49</sup> It has been suggested that the decision of the Privy Council in *Chalmers v Pardoe* [1963] 1 WLR 677 (PC) played an important role in the modern evolution of the proprietary estoppel (see K Handley, *Estoppel by Conduct and Election* (London, Sweet & Maxwell, 2006) 11-004) and that decision can be seen as recognizing the general possibility of a promise-based proprietary estoppel claim. The reasons for which B's claim failed are discussed at 3.53–3.63 and 6.173–6.179.

<sup>50</sup> See eg *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* (1979) [1982] QB 133 (Ch), where Oliver J's analysis focuses on the acquiescence- and representation-based strands of the doctrine and also *Coombes v Smith* [1986] 1 WLR 808 (Ch) 817 where proprietary estoppel is equated solely with the acquiescence-based strand.

<sup>51</sup> [2008] UKHL 55, [2008] 1 WLR 1752 [14]–[20]; see 1.13.

<sup>52</sup> See 2.137–2.138.

Whilst the authoritative recognition of the promise-based strand of proprietary estoppel has thus occurred only recently, precursors of the modern principle can be found.<sup>53</sup> In *Loffus v Maw*,<sup>54</sup> for example, A persuaded B to continue as his live-in carer by promising to leave her, in his will, the right to take, for her life, the rents and profits on two of A's properties. B continued to care for A until A's death, three years later. A's will did not provide the promised benefits to B, but the court found that, as A's representation was made for the purpose of influencing B's conduct, and was acted on by B, an equitable claim arose in B's favour, with the effect that A, at his death, was obliged to perform his promise to B. That decision was one of the very last to be based on the now defunct equitable doctrine of 'making representations good'. 1.18

The chief cause of the demise of the doctrine of making representations good was the judicial perception that it was incompatible with the law of contract, the classical shape of which came to be settled as the equitable doctrine was rejected.<sup>55</sup> It is therefore important to consider whether the promise-based strand of proprietary estoppel is vulnerable to the same objection. 1.19

The essential point, as explained by Hoffmann LJ (as he then was) in his influential but unreported judgment in *Walton v Walton*,<sup>56</sup> is that the promise-based strand differs from contract law in both its requirements and its effects. The conclusion of a contract, for example, requires evidence of the parties' intention to make a legally binding agreement and results in the promisor's being under an immediately binding duty which, 'subject to the narrow doctrine of frustration, must be performed come what may'.<sup>57</sup> In contrast, no such requirement applies to the promise-based strand of proprietary estoppel, which imposes no such immediate duty and instead 'looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be 1.20

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<sup>53</sup> The equitable doctrine of part performance, as applied to contracts for the sale of land rendered unenforceable by s 4 of the Statute of Frauds 1677 (see eg *Gregory v Mighell* (1811) 18 Ves Jun 328, 34 ER 341) as well as the limited equitable jurisdiction to perfect a failed gift (see eg *Dillwyn v Llewelyn* (1862) 4 De G, F & J 517, 45 ER 1285), also operated, in some cases, to produce results that could now be reached through the promise-based strand. In *Jennings v Rice* [2002] EWCA 159, [2003] 1 P & CR 8, Robert Walker at [49] referred to the 'faint parallel' between the promise-based principle and 'the old equitable doctrine of part performance'. For a very helpful discussion of the relevant history, see P Matthews 'The Words Which Are Not There: A Partial History of the Constructive Trust' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart, 2009) 3, 25–44.

<sup>54</sup> (1862) 3 Giff 592, 66 ER 544.

<sup>55</sup> For full discussion of the doctrine of making representations good, and its demise, see F Dawson, 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329; P Finn, 'Equitable Estoppel' in P Finn (ed), *Essays in Equity* (Sydney, Law Book Company Ltd, 1985) 59, 62–71; P Matthews, 'The Words Which Are Not There: A Partial History of the Constructive Trust' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart, 2009) 3, 25–44.

<sup>56</sup> CA, 14 April 1994, cited with approval in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 by Lord Walker (at [56]–[57]) and [62]) and by Lord Neuberger (at [101]).

<sup>57</sup> CA, 14 April 1994 *per* Hoffmann LJ.

unconscionable for the promise not to be kept'.<sup>58</sup> A useful way of explaining this point is to see the promise-based strand as imposing a liability on A, one which may (as in *Thorner v Major*) lead to A's being under a duty to perform A's promise to B, but which need not have that result.<sup>59</sup> The relatively recent recognition that the promise-based strand does not always lead to A's being under a duty to perform A's promise is, therefore, important in showing how the principle can prosper alongside, without undermining,<sup>60</sup> the law of contract.<sup>61</sup>

- 1.21** It was noted above that each of the acquiescence- and representation-based strands of proprietary estoppel consists of the application of a broader principle to the specific context of dealings with property. In contrast, in English law at least,<sup>62</sup> the principle on which the promise-based strand of proprietary estoppel is based has yet to be recognized as capable of applying to promises that do not relate to any specific property of A.<sup>63</sup> Indeed, it is not clear that the principle can apply if A's promise relates purely to property other than land.<sup>64</sup> The potential for the wider application of the principle in English law will be discussed at 10.59–10.78. It will be submitted there that, in principle, there is a strong argument for such

<sup>58</sup> CA, 14 April 1994 *per* Hoffmann LJ.

<sup>59</sup> See *eg* *Campbell v Griffin* [2001] EWCA Civ 953, [2001] WTLR 981; *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8; *Powell v Brimer* [2007] EWCA Civ 1283, [2008] 1 P & CR DG12; *Henry v Henry* [2010] UKPC 3, [2010] 1 All ER 988 (PC). For a general discussion of the model by which an initial liability of A may be concretized into a particular duty by a court order in B's favour, see *eg* S Smith, 'Duties, Liabilities and Damages' (2012) 125 *Harvard Law Review* 1727.

<sup>60</sup> Indeed, it may be said that the task of justifying the classical requirements of contract law (such as the need for consideration or, in particular contexts, for formality) is easier if other claims, such as promise-based proprietary estoppel, are available to protect B in a case where those requirements are not met.

<sup>61</sup> It is worth noting that the judgments of Mason CJ and Wilson J, and of Brennan J, in *Waltons Stores (Interstate) Ltd v Maher* (1988) 14 CLR 387 (High Court of Australia), when supporting an extension of promise-based estoppel as a cause of action, also emphasized that its focus was on preventing detriment rather than enforcing promises (see *eg per* Mason CJ and Wilson J at 401 and *per* Brennan J at 427) thus attempting to meet the criticism that the extension would undermine the law of contract; see M Bryan, 'Almost 25 Years On: Some Reflections on *Waltons v Maher*' (2012) 6 *Journal of Equity* 131.

<sup>62</sup> The position is different in the United States (see Restatement (Second) of Contracts, §90) and, it seems, in Australia (see *eg* *Waltons Stores (Interstate) Ltd v Maher* (1988) 14 CLR 387 (High Court of Australia)); see further 10.59–10.78.

<sup>63</sup> See *eg* *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 *per* Lord Walker at [61]: '[Proprietary estoppel] need not be based on an existing legal relationship, but it must relate to *identified property* (usually land) owned (or, perhaps, about to be owned) by the defendant. It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in *Crabb v Arun District Council* [1976] Ch 179 (CA) 187' (emphasis in original).

<sup>64</sup> See Lord Walker in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [61]. In *eg* *re Basham* [1986] 1 WLR 1498 (Ch) and *Otley v Grundy* [2003] EWCA Civ 1176, [2003] WTLR 1253, the promise-based principle was applied to property other than land, but in each case A's promise related to land as well as that other property. In *Sutcliffe v Lloyd* [2007] EWCA Civ 153, [2007] 2 EGLR 13, the principle was applied where A's promise related to shares in a company established in order to hold title to particular land.

wider application although, in practice, there may be only a limited need for that extension.

Currently, however, one important reason for restricting the principle's application is that, even in the proprietary context, there are a number of outstanding questions as to its requirements and effect. For example, as to its requirements, there is doubt as to whether B's reliance must be on a belief not merely that A will give B a right in relation to A's property, but rather on a belief that A is under an existing legal duty to B to do so.<sup>65</sup> As to its effect, there is a lack of clarity as to how a court should determine the extent of the liability imposed on A if a promise-based claim is established. **1.22**

One of the main aims of this book is to provide answers to such questions. It will be shown that much of the current uncertainty can be attributed to a failure properly to distinguish between the three distinct strands of proprietary estoppel.<sup>66</sup> For example, a failure to separate the promise- and acquiescence-based strands lies behind the erroneous idea that, where B relies on a belief that A will give B a right in relation to A's property, B must also show that he or she believed that A was under an existing legal duty to B to give B that right.<sup>67</sup> Similarly, a failure to separate the promise- and representation-based strands leads to the false assumption that, where a promise-based claim is established, it must at least be the prima facie position that A is precluded from acting contrary to the terms of A's promise.<sup>68</sup> **1.23**

## B. The Benefits of Identifying and Separating the Three Strands

General formulations of proprietary estoppel, such as the three-part analysis adopted by Lord Walker in *Thorner v Major*,<sup>69</sup> serve a useful purpose in outlining **1.24**

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<sup>65</sup> The position adopted in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 by Lord Scott (at [14]) and by Lord Walker (at [66]) is that such an additional belief is necessary; yet that requirement is inconsistent with the result reached by the House of Lords in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 and by the Court of Appeal, in a commercial context, in *Sutcliffe v Lloyd* [2007] EWCA Civ 153, [2007] 2 EGLR 13.

<sup>66</sup> The confusion of the acquiescence- and promise-based strands has been facilitated in part by the fact that in *Ramsden v Dyson* (1866) LR 1 HL 129, each of Lord Cranworth (at 141–2) and Lord Wensleydale (at 168) clearly identified the acquiescence-based strand, whereas, in a dissenting speech, Lord Kingsdown (at 170) set out a version of the promise-based strand. The appearance of two distinct principles in different speeches in the same case should not cause confusion, least of all where one of the principles is set out in a dissent, but it has done so: see J Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in S Bright (ed), *Modern Studies in Property Law: Volume VI* (Oxford, Hart Publishing, 2011) 175 and K Low, 'Nonfeasance in Equity' (2012) 128 LQR 63, 71–3. This mistaken analysis depends on the popular, but incorrect, view that Lord Kingsdown dissented only on the facts.

<sup>67</sup> See 2.147–2.187.

<sup>68</sup> See 7.138–7.158.

<sup>69</sup> [2009] UKHL 18, [2009] 1 WLR 776 [29], set out at 1.04.

the basic form of the doctrine. But, as Lord Walker himself noted in an earlier proprietary estoppel case: ‘synthesis and unification, however desirable as objectives, have their dangers’.<sup>70</sup>

- 1.25** The principal danger in merging the three distinct strands of proprietary estoppel is that the particular requirements and effect of each will be obscured. In some cases, this will disadvantage B: as noted at 1.14, for example, a failure to differentiate the promise- and acquiescence-based strands may lead a court to conclude, incorrectly it is submitted, that a promise-based claim can arise only where B has relied on a mistaken belief as to B’s current rights.
- 1.26** More frequently, however, the confusion of the three strands will benefit B: it may be that B cannot meet the requirements of any of the three strands, but that his or her claim succeeds through a court’s ‘eclectic application of some of the ingredients of each’.<sup>71</sup> For example, as confirmed by the another recent decision of the House of Lords, *Cobbe v Yeoman’s Row Management Ltd*,<sup>72</sup> no proprietary estoppel should arise if, in the absence of a promise from A to that effect, B has simply relied on a belief that A will act in a particular way in the future. Yet in some cases, the courts have found to the contrary by, in effect, allowing the acquiescence-based strand to apply in a case where B, rather than acting on a mistaken belief as to B’s current rights, has instead relied on a belief as to A’s future action.<sup>73</sup> It will be submitted here that, if they cannot be justified on a different basis, such cases must now be regarded as wrongly decided.<sup>74</sup> One important source of confusion in these cases has been the concept of ‘encouragement’. In practice, in many cases where the acquiescence principle applies, A does not simply stand by, but also offers some positive encouragement to B.<sup>75</sup> In attempting a formulation that is capable of applying to both the acquiescence- and promise-based strands, it is therefore tempting to focus on the notion of encouragement.<sup>76</sup> Yet this overlooks the fact that, where an acquiescence-based claim arises, B has relied on a mistaken belief, known to A, as to B’s *current* rights. It does not follow from the fact that liability may arise in such a case that it must also arise where A encourages B to adopt a belief solely as to A’s future actions. After all, the distinction between B’s mistaking the current position

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<sup>70</sup> *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [48].

<sup>71</sup> This phrase was used by Peter Millett QC as counsel for A in *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch) 145. He was successful in resisting one of the proprietary estoppel claims put forward in that case but Oliver J (unfortunately, it is submitted) did not accept his basic point that the varieties of estoppel must be carefully distinguished.

<sup>72</sup> [2008] UKHL 55, [2008] 1 WLR 1752.

<sup>73</sup> See eg *Scottish & Newcastle plc v Lancashire Mortgage Corporation Ltd* [2007] EWCA Civ 684, discussed at 2.18–2.25.

<sup>74</sup> See further 2.14–2.28.

<sup>75</sup> See 2.45–2.47.

<sup>76</sup> See eg *Ramden v Dyson* [1866] LR 1 HL 129 per Lord Kingsdown at 170; *Taylor’s Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Ch) 144.

and B's mispredicting future events is viewed as significant in a number of areas of law.<sup>77</sup> As will be demonstrated at 2.80–2.113, both as a matter of principle and of authority, the mere fact that A has encouraged B to believe that A will act in a particular way in the future is not enough to justify A's being under a liability to ensure that B suffers no detriment as a result of B's reliance on that belief.

In practical terms, the chief benefit of separating the three strands is that the requirements and effect of each can be seen more clearly. In a number of cases concerning the promise-based strand of proprietary estoppel, for example, courts have expressed dismay at the parties' failure to reach a settlement and the consequent need for costly litigation.<sup>78</sup> Yet, if the rules remain unclear, it is no surprise that settlements are not made: each of the parties may genuinely believe that his or her case has a good chance of success.<sup>79</sup> The need for greater clarity is not confined to commercial cases: in domestic contexts, an exposure to increased costs is particularly unwelcome as the parties' resources may be quickly eroded. Moreover, if there is ill-feeling between the parties, this will further limit the chances of settlement: when combined with fractured family relationships, uncertain legal principles make for fierce litigation,<sup>80</sup> which can consume the value of the disputed property. 1.27

### 1. Unconscionability

As noted at 1.26, the confusion of the three strands of proprietary estoppel generally benefits B. As a result, their careful separation may address any perception that proprietary estoppel, in its modern form, provides a judge with an unjustified 1.28

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<sup>77</sup> eg if B makes a payment to A as a result of a unilateral mistake, this may itself provide a ground for restitution of the value of the payment; the same is not true of a payment made subject to a misprediction: see eg *Kleinwort Benson Ltd v Lincoln County Council* [1992] 2 AC 349 (HL) *per* Lord Hoffmann at 399 *para* 4 *per* Lord Hope at 409; *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193 (PC) [29].

<sup>78</sup> See eg *Orgee v Orgee* [1997] EGCS 152 (CA) *per* Hirst LJ: 'both throughout earlier negotiations when professional advisers were involved, and through the trial when the judge urged reconciliation, and in this court where we made a similar plea—but all to no avail'; *Macdonald v Frost* [2009] EWHC 2276 (Ch) *per* Geraldine Andrews QC at [7]: 'it is disappointing that the parties to this litigation have been unable to reach a compromise'; *Suggitt v Suggitt* [2011] EWHC 903 (Ch) *per* HHJ Kaye QC at [66]: '[o]ne of the unfortunate features of this case has been the inability of the parties to compromise an obviously compromisable case' (the costs there were increased by a subsequent, unsuccessful appeal: [2012] EWCA Civ 1140, [2012] WTLR 1607); *Joyce v Epsom and Ewell Borough Council* [2012] EWCA Civ 1398, [2013] 1 P & CR DG1 *per* Davis LJ at [1]: '[p]ragmatic compromise has eluded the parties'.

<sup>79</sup> As one commentator has forcefully put it: 'Perhaps the courts should look to their own decisions rather than marvelling at the inability of the parties to reach a sensible compromise': J Mee: 'Proprietary Estoppel: "Enough is Enough"' [2013] Conveyancer & Property Lawyer 280, 296.

<sup>80</sup> In *Gillett v Holt* [2001] Ch 210 (CA) 228 (a 'domestic' case), Robert Walker LJ described the litigation as 'bitterly fought and ruinously expensive'. In that case, the parties' falling out had been particularly traumatic as B had suffered the 'bitter humiliation of summary dismissal and a police investigation of alleged dishonesty' (235).

licence to adjust, at will, the parties' property rights. That perception owes much to the use of the concept of unconscionability in descriptions of proprietary estoppel.

- 1.29** In *Taylor's Fashions Ltd v Liverpool Victoria Trustees Company Ltd*, for example, Oliver J displayed some impatience towards an approach premised on distinguishing between different strands of proprietary estoppel, and applying their specific requirements, stating instead a preference for:<sup>81</sup>

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.

- 1.30** The essential difficulty with such an approach, however, is that the broad concept of unconscionability cannot, by itself, provide a sufficiently clear guide for parties, their lawyers, or the courts.<sup>82</sup> The statement that particular conduct of A is, or would be, unconscionable is simply the expression of a conclusion and, by itself, provides no detail as to the basis on which that conclusion was reached.<sup>83</sup> In reaching its decision, the court must have 'first regard' to the well developed principles, both specific and flexible in character' on which B's claim is based, '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'.<sup>84</sup>

- 1.31** The better view, it is submitted, is that each of the strands of proprietary estoppel deals with a specific form of unconscionable behaviour, and so applies only when its particular requirements are met. An unparticularized notion of unconscionability cannot provide a workable guide to the parties' rights. This conclusion can be supported by the decision in *Cobbe v Yeoman's Row Management Ltd*.<sup>85</sup> B worked on A's application for planning permission to develop A's land, in the belief that, if the application succeeded, A would sell that land to B. A, through its agent, knew that B was acting in reliance on that belief but failed to tell B that it no longer intended to sell the land to B on the terms previously planned between the parties. It could be said that, by thus acquiescing in B's mistaken belief as to A's intention, whilst aiming to take the benefit of B's work, A had acted unconscionably.<sup>86</sup> Nonetheless,

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<sup>81</sup> [1982] QB 133 (Ch) 151–2. See too eg *Lester v Woodgate* [2010] EWCA Civ 199 per Patten LJ at [39].

<sup>82</sup> For further criticism of an over reliance on the concept of unconscionability in this context, see K Handley, 'Unconscionability in Estoppel by Conduct: Triable Issue or Underlying Principle?' [2008] Conveyancer & Property Lawyer 382.

<sup>83</sup> As noted by L Smith, 'Fusion and Tradition' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Sydney, Lawbook Co, 2005) 19, 21.

<sup>84</sup> *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 (High Court of Australia) per Gleeson CJ, and McHugh, Gummow, Hayne, and Heydon JJ at 324–5.

<sup>85</sup> [2008] UKHL 55, [2008] 1 WLR 1752.

<sup>86</sup> See eg *Cobbe v Yeoman's Row Management Ltd* per Lord Scott at [28], stating that he did 'not in the least dissent' from the view that the conduct of A (through its agent) was unconscionable.



B's proprietary estoppel claim failed,<sup>87</sup> as it did not meet the specific requirements of any of the acquiescence-,<sup>88</sup> representation-,<sup>89</sup> or promise-based strands.<sup>90</sup> As Lord Scott stated:<sup>91</sup> 'unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present'.

## 2. Terminology

It is no surprise that the concept of unconscionability has had a prominent role in explanations of proprietary estoppel. Given the clear differences between the three strands of proprietary estoppel, their unification is possible only through the adoption of a potentially vague standard such as unconscionability. This gives rise to the question of whether there is any merit in the use of the term 'proprietary estoppel' as a means to tie the three strands together.<sup>92</sup> It may be that an analogy can be drawn with the term 'unjust enrichment'. It is not possible, it seems, to state a single principle that is both precise enough to be used to determine the outcome in a particular case and also general enough to cover all cases in which B's claim depends on A's enrichment at B's expense.<sup>93</sup> Nonetheless, the term usefully groups together a number of distinct principles which, if their individual requirements are met, may lead to A's coming under a liability to give B the benefit, or the value of a benefit, received at B's expense.<sup>94</sup> Whilst the law of proprietary estoppel cannot

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<sup>87</sup> It was recognized that B had a *quantum meruit* claim against A and that A was, as a result, under a duty to pay B a sum representing an appropriate fee for the services provided by B in connection with A's planning application and also compensating B for expenses incurred as a result of that work: *Cobbe v Yeoman's Row Management Ltd* [42] and see 10.51–10.54. The value of such a claim to B was estimated at £150,000 ([44] but note the reservation expressed as to that estimate by Lord Mance at [96]) whereas the proprietary estoppel claim recognized at first instance and by the Court of Appeal had led to A's being under a duty to pay B £2 million ([11]).

<sup>88</sup> B had not relied on a mistake as to B's current rights, but had instead mispredicted how A would behave in the future.

<sup>89</sup> Even if A were precluded from denying that it had, at the time of B's reliance, intended to enter the planned contract with B, B's ability to establish such an intention would not give B any claim against A.

<sup>90</sup> As important aspects of any eventual contract were not covered by the parties' previous discussions, it could not be said that A had made a promise that B could reasonably regard as seriously intended by A as capable of being relied upon by B: see 2.137–2.138.

<sup>91</sup> [2008] UKHL 55, [2008] 1 WLR 1752 [16].

<sup>92</sup> eg J Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in S Bright (ed), *Modern Studies in Property Law: Volume VI* (Oxford, Hart Publishing, 2011), 175, 182 suggests that: 'the overall category of "proprietary estoppel" is not a helpful one' and that it is questionable whether the three distinct principles in fact share 'essential characteristics'.

<sup>93</sup> In *Lumbers v W Cook Builders Pty Ltd* (2008) 232 CLR 635 [85], Gummow, Hayne, Crennan, and Kiefel JJ referred to unjust enrichment as a 'unifying concept' but not 'a principle which can be taken as a sufficient premise for direct application in particular cases'.

<sup>94</sup> In *Benedetti v Sawiris* [2013] UKSC 50, [2013] 3 WLR 351 Lord Neuberger noted at [175] that: 'The circumstances in which [a claim in unjust enrichment] can arise are multifarious, but they can all be said to involve the conferment of a benefit on a defendant at the expense of a claimant in circumstances where it would be unjust for the defendant not to pay the claimant.'

be reduced to a single general principle, capable of specific application to particular factual situations, it similarly covers distinct principles that have a common effect: each may ensure that A does not exercise a property right in such a way as to cause B to suffer a detriment as a result of B's reasonable reliance on a particular belief for which A bears some responsibility.

- 1.33** Even if the three distinct strands are grouped together, a question remains as to the suitability of the name 'proprietary estoppel'. The main point is that, when considering the acquiescence- and promise-based strands, it is dangerous to place any weight on the notion of estoppel.<sup>95</sup> The essence of an estoppel is that a party is stopped from denying the truth of a particular state of affairs.<sup>96</sup> The representation-based strand of proprietary estoppel can be seen to operate in that way. In *Thorner v Major*, however, there was no such estoppel. If an estoppel had operated, the most that could be said is that Peter was prevented from denying that a promise had been made to David. Such an estoppel, however, would be both redundant and pointless: redundant, because David was in any case able to prove that such a promise had been made; pointless, because Peter's making of a promise would not, by itself, give David a right. In *Thorner*, the promise-based strand directly imposed a liability on Peter that would not otherwise have existed: it thus operated as a cause of action.
- 1.34** When *Snell's Equity* first introduced legal practitioners to the concept of proprietary estoppel,<sup>97</sup> it did so as part of a new chapter entitled 'Equitable Estoppel', which began with the statement that equity 'developed a system of estoppel which supplemented the rather narrower rules at common law'.<sup>98</sup> This is not, however, the best way to understand the principles of which proprietary estoppel is comprised.<sup>99</sup>
- 1.35** As discussed at 1.12, the acquiescence-based strand, which may impose a liability on A and thus provide a cause of action, operates differently from a genuine estoppel.

<sup>95</sup> When considering 'proprietary estoppel', there is a question as to the adjective as well as the noun. As noted at 1.07 and 1.10, each of the principles behind the acquiescence- and representation-based strands of the doctrine can apply beyond the proprietary context. As noted at 1.21, the conventional view is that the same is not true of the principle behind the promise-based strand; this point will be examined at 10.59–10.78.

<sup>96</sup> See eg *Pickard v Sears* (1837) 6 A & E 469, 112 ER 179 per Lord Denman CJ at 474, 181: an estoppel applies where A causes B 'to believe the existence of a certain state of things' and operates so as to prevent A's 'averring against [B] a different state of things as existing at the same time'. It is therefore no surprise that the doctrine of estoppel by representation can be seen as primarily evidential or procedural: see eg *Low v Bouverie* [1891] 3 Ch 82 (CA) per Bowen LJ at 105; *Greenwood v Martins Bank Ltd* [1932] 1 KB 371 (CA) per Scrutton LJ at 379, [1933] AC 51 (HL) per Lord Tomlin at 59; *Hopgood v Brown* [1955] 1 WLR 213 (CA) per Lord Evershed MR at 223.

<sup>97</sup> See n 1 above.

<sup>98</sup> R Megarry and P Baker (eds), *Snell's Equity* (26th edn, London, Sweet & Maxwell, 1966) 625.

<sup>99</sup> See further B McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) *Current Legal Problems* 267.

Whilst the representation-based strand is a form of estoppel, it is simply an application to the proprietary context of the general doctrine of estoppel by representation, which was recognized by each of common law and equity,<sup>100</sup> and operated in the same way in each.<sup>101</sup> As for the promise-based strand, it would be a mistake to see it as an extension, or modification, of a rule that prevents an estoppel from arising as a result of a statement as to the future. First, that rule was confirmed by the House of Lords in an appeal taken from a court of Chancery.<sup>102</sup> Secondly, the rule is in any case a product of the very logic of estoppel:<sup>103</sup> a preclusionary doctrine that prevents A's denying a state of affairs cannot determine the legal effect of a promise as to A's future conduct. Thirdly, since the promise-based strand may impose a liability on A, and thus operate as a cause of action, it has departed decisively from the preclusive domain of estoppel.

### C. The Structure of the Book

Each of Chapters 2, 3, and 4 corresponds to one of the three elements of proprietary estoppel identified by Lord Walker in *Thorner v Major*.<sup>104</sup> Chapter 2 is concerned with the conduct of A and each of the acquisition-, representation-, and promise-based strands is considered separately. Chapter 3 examines B's reliance and, again, a distinct section is devoted to each of the three strands. Chapter 4 deals with B's detriment; as this requirement is common to, and treated the same way in, each of the strands, a unified approach is taken. **1.36**

Lord Walker's dictum refers to the three *main* elements of proprietary estoppel and Chapter 5 considers whether B separately needs to show unconscionable conduct by A in order to establish a proprietary estoppel. It will be submitted that there is no such independent requirement, but that the concept of unconscionability, in each of two different senses, nonetheless has some role to play in the current law of proprietary estoppel. That role varies between each of the three strands and so they will again be considered separately. **1.37**

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<sup>100</sup> For the recognition of estoppel by representation in equity, see eg *Hunt v Carew* (1649) Nels 46, 21 ER 786; *Dyer v Dyer* (1682) 2 Ch Cas 108, 22 ER 869; *Hunsden v Cheney* (1690) 2 Vern 150, 23 ER 703. See further RP Meagher, JD Heydon, and MJ Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th edn, Chatswood, NSW, Butterworths Lexis Nexis, 2002) [17.015].

<sup>101</sup> This explains why, in the first edition of George Spencer Bower's *The Law Relating to Estoppel by Representation* (London, Butterworths, 1923), the index includes an entry reading: 'Equitable Estoppel: a meaningless expression': the point is not that estoppel by representation did not exist in equity, it is rather that the doctrine was no different from that applied at common law.

<sup>102</sup> *Jorden v Money* (1854) 5 HL Cas 185, 10 ER 868.

<sup>103</sup> This point was noted by Gaudron J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (High Court of Australia) 459.

<sup>104</sup> [2009] UKHL 18, [2009] 1 WLR 776 [29]: see 1.04.

- 1.38** If B has established all the elements of a claimed proprietary estoppel, A may attempt to resist that claim by pointing to a failure to comply with a formality requirement, or by invoking a different bar to B's claim. The effect of each of informality, incapacity, ultra vires, and illegality will be considered in Chapter 6. When considering each potential bar, a distinction will again be drawn between the three strands of proprietary estoppel.
- 1.39** Chapters 7, 8, and 9 then consider the effect of a successful claim of proprietary estoppel. Chapter 7 considers the impact of B's claim on A: in relation to each of the acquiescence- and promise-based strands, the nature and extent of A's liability to B is assessed; the effect of the representation-based strand, it will be submitted, is simply that A is precluded from denying the existence of a particular state of affairs. Chapter 8 then examines how B's ability to establish a proprietary estoppel as a result of A's conduct may affect third parties such as C, who later acquires a right from A, and B2, who later acquires a right from B. Chapter 9 deals with remedies and so looks at how a court will enforce B's rights, whether against A or any other party bound by those rights. The practical remedial question of how best to enforce B's rights arises irrespective of the means by which those rights have been acquired, and so Chapter 9 makes no distinction between the three strands of proprietary estoppel.
- 1.40** At relevant points throughout the first nine chapters, references will be made to related areas of law, such as unjust enrichment and (in particular) the law of constructive trusts. Chapter 10 will consider the wider legal context in which proprietary estoppel operates and will therefore consider some of the practical issues (for example in relation to taxation or the conflict of laws) that may arise when making or defending a proprietary estoppel claim. It will also consider the question of whether further strands of proprietary estoppel should be recognised, and will make a case for the extension of the promise-based strand to promises unrelated to A's property.