1.03 Littleton's original phrase does not stop where Lord Denning left it.[4] Coke renders it in full as "the husband is stopped from saying that which is against his owne feoffment and taking back of the estate for term of life to him and to his wife".[5] This is a material part both of the citation and the underlying principle. It determines *why* someone is stopped and *what* it is that stops him. It shows that estoppel is raised by the estopped party's own act which she is not allowed to contradict, and that the bar is personal to that party.[6] That is reflected in classic formulations of the principle, by Coke himself:

> it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth[7]

and by Blackstone:

> [estoppel] happens where a man hath done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary.[8]

1.04 At law, the underlying principle used to be checked (or even suppressed) by formality. An instrument under seal was needed to raise an estoppel "by matter in writing".[9] Failing that, an estoppel might be raised "by matter *in pais*".[10] This was confined to a few ceremonial acts of notoriety involving the exercise of land property rights.[11] Perceived taint of "odium"[12] further restricted the use of estoppel. It took the intervention of equity to reveal (or perhaps remake) the foundation of estoppel *in pais* as a general principle

4 From "pur ceo que le baron est estoppe a dire ceo" it goes on to say "que est encontre son feoffement et son reprisel demesne del estate pur terme de vie a luy et sa feme," Littleton, *Treatise of Tenures* (first published 1482, S Sweet, 1841) book 3, ch 12, s 667.

5 Co Litt 352a. A feoffment was a grant of land in fee simple.

6 The best illustration is the very case postulated by Littleton (n 4) ss 666–668 which gave Coke occasion to make his own observations on estoppel. A woman owns land. She marries, her husband transfers ownership in the land to a purchaser and the purchaser leases the land back to the husband and wife for life. When the wife takes, together with the husband, possession of the land under the lease, the ancient doctrine of remitter operates to vest full title to the land back in her, so that she becomes the full owner and the lessor has no interest in reversion. If the lessor then brings an action for breach of the lease against the husband, it is no answer for the husband to rely on the remitter. He is estopped from taking that position by his own sale and leaseback of the land. However, if the wife is joined or intervenes in the action, she can set up her superior title against the lessor's interest to defeat the action, and she is not estopped. Notably, Coke's very first rule on application of estoppels at Co Litt 325a is concerned with defining precisely the extent to which privies of immediate parties to an estoppel are bound by or may take advantage of it.

7 Co Litt 352a.

8 3 Bl Comm 308.

9 Also called estoppel by deed, see 7.29ff.

10 Or "matter in the countrey", as Coke calls it, Co Litt 352a. "In pais" is the law French for "the country", a concept that later morphed into the jury. To give it its full name, "estoppel by matter *in pais*" means estoppel by a matter decided by a jury – ie by a matter of fact. Littleton (n 4) s 667 calls it exactly that: "estoppe per un matere en fait", translated as "estopped by matter in fact". A matter of fact could be proved by parol evidence, that is oral testimony or simple writing. This distinguished it from a matter of record, provable either by an Act of Parliament or judgment of the King's Court, in each case under a public seal, and from a matter in writing, provable by a deed under a private seal (originally adopted by the nobility in emulation of the Great Seal of the Realm that carried the image of the King).

11 Though not recorded in writing, by virtue of their public and notorious character these acts were supposed to be known to "the country", ie people residing in the location of the land in question from whom the jury would have been drawn to decide a dispute concerning that land. Their notoriety and solemnity could not be disputed by parol evidence but could be disputed by a higher solemnity of the sealed writing of a deed, Gilbert, *The Law of Evidence* (3rd edn, W Owen, 1749) 86–87.

12 See 1.06ff.

that one becomes personally bound by her own act and is in consequence prohibited from behaving in contradiction to it or an expectation engendered by it, even though such behaviour might be within her strict legal rights.[13] As a matter of jurisdiction, equity could only act in conscience.[14] For estoppel *in pais*, the jurisdictional gateway was opened by detrimental reliance on the act of the party sought to be estopped. In the end, the jurisdictional test became a substantive requirement for entitlement to relief.

1.05 Cases of innocent misrepresentation provide a vivid illustration of how estoppel came to be employed both in equity and at law to give relief where it would not otherwise be available. After *Derry v Peek*[15] settled the test of deceit, neither equity nor law could any longer get away with stretching the concept of fraud to give relief in cases of mere (forgetful or stupid) innocence of the representor. Absent fraud, no action for damages lay at common law[16] and equity had no jurisdiction. The solution was found in estoppel by which the representation would be "made good" and the party who had the benefit of estoppel would be put in the position as if the representation had been true.[17] For instance, in equity, where a trustee represented to an assignee of a trust fund that the fund was not subject to prior encumbrance, an order would be made that the trustee must "make good" his representation by paying over the fund in full (ie effectively pay the encumbrancer out of his own pocket).[18] Where a company issued a certificate for shares stating they were paid up in full, its action at law against a purchaser of the shares for payment of a share call was dismissed.[19] These are applications of the same principle, which is to give relief that vindicates the expectation created by the estopped party.

Estoppel not odious

1.06 It is striking how much of a long life a throwaway remark in a work of authority may have. In a short note buried deep in the third book of the first part of his *Institutes*, Lord Coke said this: "Note, that the warranties are favoured in law, being part of a man's assurance; but estoppels are odious."[20] This was taken as a condemnation, or at least a warning. It became a celebrated, oft-repeated dictum, and appears to have gradually acquired the status of a general maxim of law by reason of little more than constant

13 Courts of law adopted this reformed estoppel, and the position was accepted that not only was it a principle common both to law and equity but that it had been the doctrine of law all along, *Jorden v Money* (1854) 5 HLC 185, 212–213; 10 ER 868, 881; *Keate v Phillips* (1878) 18 Ch D 560, 577 (Bacon V-C noting that the law courts used legal estoppel to "convert their own special pleading tactics" into an instrument of justice to emulate the Court of Chancery).

14 *Pilcher v Rawlins* (1871–72) LR 7 Ch App 259, 269.

15 (1889) 14 App Cas 337.

16 A statutory substitute is now supplied by Misrepresentation Act 1967, s 2(1); see Spencer Bower & Handley, *Actionable Misrepresentation* (5th edn, LexisNexis, 2014) ch 13.

17 "It shall be, as represented to be," *Montefiori v Montefiori* (1762) 1 Wm Bl 363, 96 ER 203 (Lord Mansfield CJ). This was a case of fraud but the decision relied on estoppel that was equally available in cases of innocent misrepresentation. On this, see illuminating discussion in *Low v Bouverie* [1891] 3 Ch 82, and note in particular Kay LJ's six points at 111–112 on availability and conditions of relief in equity and at law and the function of estoppel.

18 *Low v Bouverie* [1891] 3 Ch 82, 103 (see also *Burrowes v Lock*, reproduced within that report at 94–97).

19 *Burkinshaw v Nicolls* [1878] LR 3 App Cas 1004. For adaptation to modern conditions of trading in company shares, see *Blomqvist v Zavarco plc* [2016] EWHC (Ch) 1143.

20 Co Litt 365a, commenting on Littleton, *Treatise of Tenures* (first published 1482, S Sweet, 1841) book 3, ch 13, s 697.

repetition. In 1795 in *Skipworth v Green*[21] Pratt CJ included the dictum in his judgment as a general proposition after citation by counsel. Less than 30 years later, Holroyd J would repeat it without attribution and quite unprompted by argument of counsel, as a self-evident principle of universal application in *Lampon v Corke*[22].

1.07 On closer examination, Coke's original note was intended as nothing like the condemnation it was made out to be. The true intent of his remark is illuminated by what precedes it. Slightly simplified, Coke considers a case of husband and wife who take a grant of land to themselves with remainder to the husband's heirs. They have a son, and upon the husband's death the wife recovers the land and grants it away in fee simple. After she dies, her son brings an action by writ of formedon to recover land from his mother's grantee.[23] If brought by the mother, the action would be barred by her own grant, and if the son claims as her heir he is then heir to that estoppel and so barred himself. As a result, the son is denied his inheritance by estoppel raised against him by his mother's grant. This shows that the "odium" of estoppel arises because the son is estopped by something he never did, and supplies the much needed emphasis to Coke's remark that the law favours a man's *own* assurance. The right answer to the son's predicament, then, is that he should claim as heir to his father: in that case he is not barred by the mother's (not his own) grant, and the odium is avoided.[24]

1.08 Estoppel has had the particular misfortune of getting a bad name from harsh decisions in which it was used to enforce a policy or a technicality of rules that had

21 (1795) 8 Mod 311, 313; 88 ER 222, 224.

22 "Estoppels are odious in the law and, being so, they ought not to be allowed, unless they are very plainly and clearly made out," (1822) 5 B & Ald 606, 611; 106 ER 1312, 1314.

23 Formedon was an ancient form of action under Statute of Westminster II 1285, c 1. The statute protected future entitlements under a gift in tail ("to A and B and A's heirs") by allowing the heir to A to recover by action the entailed land from someone to whom A or B might have granted it in their lifetime; this protected the originally intended form of the gift (*forme de don*). See JH Baker, *An Introduction to English Legal History* (4th edn, OUP, 2002) 273–274.

24 This example, usefully, shows that the notion of "odium" (as indeed any other notion of morality) is historical. To the modern eye it is not immediately apparent that the loss of the son's inheritance should be any more odious than that the land acquired by express grant from the mother should be lost to the grantee by reason only that the son employs the technicality of claiming as heir to the father. Yet that outcome met the letter and the equity of the statute of 1285, and its "odium" is nothing more than the principle that estoppel must yield to statute, which remains very much alive, see n 66. Conversely, refusal to raise an estoppel can be perceived as no less odious. Take Littleton's example, discussed at n 6, of a wife who claims back title to land which had been sold and leased back by her husband, undeterred by estoppel raised by her husband's grant. Consider also the case of failed estoppel discussed in Nicholas Statham's *Abridgement* (1490) Estoppel 24, see *Statham's Abridgement of the Law* (Margaret Klinglesmith tr, New Jersey: The Lawbook Exchange Ltd 2007) 603–4. A defendant to an action of debt on a bond pleads that he is a layman and could not read the conditions of the bond. The claimant seeks to raise an estoppel by the fact that the defendant brought an action in detinue (action for the delivery of a specific article) against someone else in reliance on the condition to the same bond. The court says there is no estoppel because the action in detinue was on the condition and not on the bond. The case is reported, somewhat differently, at (1431) YB Hil 9 Hen VI, fo 59a-60a, pl 8 and (1432) YB Mich 11 Hen VI, fo 5b-6a, pl 10. It appears to be the case of a standard penal bond with conditional defeasance (see eponymous piece by Simpson (1966) 82 LQR 392) in the form of a promise to pay a sum of money unless a condition is satisfied as to the delivery of a certain article. The debtor brings an action on the condition for the delivery of that article, yet in response to the action against himself on the promise to pay he turns round and claims *non est factum* by reason of his laiety. Modern sensibilities cry out for an estoppel here, though old law sees nothing untoward in applying a technical distinction between the bond (sealed as a deed) and the condition (probably, as was usual, an unsealed writing). Yet in an action brought on the deed, a claimant was estopped from disclaiming his own unsealed endorsement of the condition to the bond as satisfied, (1367) YB Pasch 41 Edw III, fo 10-b, pl 7. For a stark modern example of a truly odious refusal to raise an estoppel, see *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] 1 WLR 1884 (and comment at n 57).

nothing to do with it. Coke's headline case is an example of "odium" arising from a rule of old property law. Rigours of old parol evidence rule provide other examples.[25] In modern times, a rule of patent law has cast an odious shadow over estoppel.[26] Cases of mistaken overpayment give a further example. In *Derby v Scottish Equitable plc*,[27] it would have been monstrous for the pensioner who received a sizeable payment into his bank account by mistake to have retained £162,000-odd by way of sheer windfall in reliance on estoppel by representation as against the hapless pension provider. However, before estoppel could be blamed for such an odious result, it would have first to be properly raised. Two points are called for. The first is whether it is correct to characterise as representation an apparently unsolicited print-out statement showing an overinflated amount of the pension policy value, which the pensioner in fact treated as a pleasant surprise. The second is the point (made by junior counsel and acknowledged by Robert Walker LJ as convincing)[28] that there was in reality no detriment to the pensioner who got to enjoy what he had spent on himself at another's expense and was only asked to return what was left of his windfall.

1.09 Attempts to capture the substance of supposed "odium" by definition or description do not quite work:

> Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying contrary to his former conduct in what he had said or done, or failed to say or do.[29]

This observation formulates the classic test for raising an estoppel in answer to an attempt to resile from the estopped party's earlier statement or conduct. If this test is not met, estoppel cannot be applied, yet if it is, estoppel must apply. The test is both the necessary and sufficient condition for estoppel; it is therefore exhaustive, and reference to odium is entirely superfluous. This is borne out by the actual decision in *Baxendale*. The defendant signed a blank acceptance on a bill of exchange, the bill was then stolen from him, the name of drawer was filled in and the bill transferred to the plaintiff as bona fide holder for value. The defendant was not estopped from denying his acceptance because there was nothing he had said or done to cause anyone to believe he had accepted the bill. An estoppel would have arisen if he had voluntarily given the signed instrument away for filling out and presentation, but not if it had been stolen from him. *Baxendale* was not a case where an otherwise applicable estoppel was disapplied because it would

25 n 129 to 3.33.

26 *Coflexip SA v Stolt Offshore MS Ltd* [2003] EWHC 1892 (Pat), affd [2004] EWCA Civ 213, [2004] FSR 34. In a patent infringement action, an inquiry was ordered into damages for infringement. By a later judgment in an unrelated action, the patent was revoked, yet the revocation could not be relied on to stay the inquiry into damages by reason of cause of action estoppel. As counsel for the (once) patent holder stated, at [2003] EWHC 1892 (Pat) [10], the defendants to the inquiry "are bound by the rule of cause of action estoppel. They, unlike anyone else, cannot be heard to say 'There never was a patent.' The estoppel might sound odious to some, but estoppel it is." The result only sounds odious because of the rule of patent law that revocation of a patent takes effect retrospectively from the original grant. On appeal, in a minority judgment, Neuberger LJ sought to arrive at a more just result both by an interpretation of the revocation rule and by allowing an exception from the application of estoppel.

27 [2001] EWCA Civ 369, [2001] 3 All ER 818; see n 115.

28 ibid [45]–[47].

29 *Baxendale v Bennett* [1878] 3 QBD 525, 529.

be odious for a man to be found liable on a stolen bill (although it might indeed be so). Estoppel could not apply at all because the man had done nothing that could give rise to it in the first place.[30]

1.10 It has now been seven decades since high authority observed that the time had passed when estoppels were viewed with suspicion and applied with reluctance, and stated that estoppel "has become recognised as a beneficial branch of the law".[31] Yet the maxim about "odium" continues to be repeated, although more now in rebuttal than assertion. The courts keep directing themselves that "all estoppels are not odious but must be applied so as to work justice and not injustice".[32] The old ghost will haunt the courtroom as long as counsel acknowledge it[33] or judges feel compelled to say that they are not influenced by it.[34]

Whether estoppel bars the truth

1.11 There was really never any odium in Coke's own view of estoppel as barring a litigant by *her own* assurance (or an act equivalent to it). On the contrary, that proposition is the foundation for the "excellent and curious kinde of learning"[35] on estoppels. It will be recalled that the foundation of that learning is that "a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth".[36] This suggests that estoppel may lead the court to give judgment on the basis of a half-truth or even a complete untruth, when compared to reality outside the courtroom. It is here that later generations have found more "odium" to feed back into Coke's original, misunderstood, dictum.

Jeremy Bentham's editor John Bowring criticised estoppel as forcing upon the courts the "sort of logic which passes for irrefragable under the dominium of technical rules" and sought to show how "under the influence of technical rules, what is known to be false is taken for true, in order that what is evidently unjust may be done."[37] Probably the most strongly worded judicial expression of similar moral outrage is found in the judgment of Sir George Jessel MR in *General Finance Mortgage and Discount Co v Liberator Permanent Benefit Building Society*.[38] He scathed estoppel by deed as a "doctrine by which falsehood is made to have the effect of truth", scorned it as one that "might

30 Brett LJ's reasoning was based on absence of defendant's intention to accept the bill but he also agreed there was no estoppel, ibid 534.

31 *Canada and Dominion Sugar Company Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46, 56.

32 In line with the guidance in *Carl Zeiss Stiftung v Rayner C Keeler Ltd (No 2)* [1967] 1 AC 853, 947. The case concerned issue estoppel, but the guidance is of general application.

33 *Coflexip SA v Stolt Offshore MS Ltd* [2003] EWHC 1892 (Pat) [10].

34 *Cadbury Schweppes Plc v Halifax Share Dealing Ltd* [2006] EWHC 1184 (Ch) [50].

35 Co Litt 352a.

36 ibid.

37 Jeremy Bentham, *Rationale of Judicial Evidence*, Book IX, Pt VI, Ch IV, §3, in *The Works of Jeremy Bentham* (W Tait 1843) vol 7, 553 (editor's note at p 551 explains that the chapter was left unfinished by the author and was completed by the editor). Bowring referred to *Bauerman v Radenius* (1798) 7 TR 663, 101 ER 1186 which held a principal to be estopped by an admission made by his agent as nominal plaintiff. His criticism was directed at Lawrence J for allowing an admission by someone with no interest in the case to prejudice the party with a real interest, but the other judgments in the report make it clear that the matter was not decided quite in the manner which so incensed Bowring. Even if the action by the principal had proceeded, the agent's admission would have been received as witness evidence against the principal (Lord Kenyon CJ), and in substance the principal was bound by it (Ashurst J).

38 [1878] LR 10 Ch D 15.

have been founded in reason, but I am not sure that it was" and proceeded with evident distaste to apply the authorities in which he saw no more reason than "there they are".[39]

1.12 Truth and justice are not always coterminous or coextensive. By its very nature, justice dispensed by courts is the product of selection between competing accounts, and it is a rare (and blessed) occurrence when the choice lies between an outright lie and the only possible truth. More often, and sometimes tragically, the selection is between competing truths. That judicial proceedings are not designed for the discovery of any sort of absolute truth was made the foundation of the law of evidence in the very first dedicated book on the subject in English law:

> Now what is to be done in all Trials of Right, is to range all Matters in the Scale of Probability, so as to lay most Weight where the Cause ought to preponderate, and thereby to make the most exact Discernment that can be, in Relation to the Right.[40]

It was explained that the business of civil life depends on transient acts of men, for which higher degrees of philosophical certainty often cannot be attained.[41] It is inevitable that rights of men have to be determined to a lesser degree of certainty, which is probability on the evidence.[42]

The consequences of a view that requires a higher degree of certainty have been sufficiently demonstrated both in theory and practice. Bentham's founding proposition is that to attain justice, rules of evidence must have as their end the discovery of absolute and

39 ibid 20, 21, 25. The Master of the Rolls did remark that estoppel by representation, in contrast, was founded upon reason but did not indicate what it was. It appears that his indignation was a reaction to what in essence was an argument on construction, and was fuelled by the unfortunate facts of the case. It was a case of mortgage fraud. A fraudster obtained title deeds to a property and borrowed money from the first mortgagee on the faith of those. Then the fraudster borrowed more money from the second mortgagee, ostensibly to purchase that very property. The legal estate was conveyed to the fraudster and through him to the second mortgagee. In an action between the first and second mortgagees, the first claimed the legal estate on the basis that the first mortgage deed executed by the fraudster raised an estoppel which had been "fed" by his subsequent acquisition of the legal estate. The estoppel was sought to be raised by the fraudster's covenant of a power to convey the legal estate, and Sir Jessel refused to treat that covenant as a positive statement that the fraudster had the legal estate and apply the "doctrine of estoppel of this kind which is a fictitious statement treated as true" (at 20). He was clearly concerned to avoid the result where the estoppel between the fraudster and the first mortgagee would bear hard on the second mortgagee by taking away from him the interest which the fraudster only acquired at his expense. Yet the second mortgagee was himself imprudent in allowing the legal estate to pass through the fraudster (acknowledged at 20) and there was no escape from the fact that any result would be hard, as is inevitably the case where courts have to decide which of the two innocent victims of fraud is to bear the loss.

40 Gilbert, *The Law of Evidence* (W Owen 1749) 2.

41 Gilbert was following and interpreting the ideas of John Locke, *An Essay Concerning Human Understanding*, Book IV, Ch II (first published 1689, P H Nidditch ed, Clarendon Press 1975) 530–538. Intuitive knowledge, that which Locke postulates to be the most certain, is not very useful in practice since each man has his own ideas and his intuitive knowledge is of necessity limited to himself only. The second degree of knowledge is "demonstration", attainable by application of reasoning to the consideration of proofs. Where this produces a necessary inference of a relation of which everyone has the same intuitive knowledge, there arises a shared knowledge and the matter is demonstrated to be true by that necessary inference. This, however, is limited to permanent things that are constantly present to the senses of the individual. Transient things, of which the business of civil life is composed, depend on memory and recollection and therefore are not capable of demonstration.

42 Gilbert (n 40) 2–3. The only thing that is capable of giving the "highest and clearest Knowledge" by demonstration is a record, which is an Act of Parliament or a judgment of a King's court. It is curious to observe that in the case of that latter, the process of trial by probability seems to bring about a judgment which is a demonstration, an embodiment of certainty. That is not quite as ironic as may at first seem. Probability applies, after all, to acts and recollections and other evidence, whereas a record is concerned with a legal right. A record is on that account self-fulfilling, as it not merely evidences a legal right but creates it, and therefore itself is a Lockian "demonstration" of it.

complete truth. This inevitably (and quite regardless of the undeniable inefficiencies and abuses by which the process of gathering evidence was ridden in his time) leads him to argue that the most efficient and indispensable instrument for that purpose is interrogation, "as a means of extracting self-disserving evidence".[43] Old Chancery practice is testament to the application in practice of the idea that the fullest justice requires the fullest possible evidence of facts. The aspiration at a perfect ideal resulted in grave denial of practical justice, vociferously lamented and finally redressed by the overhaul of procedure in the fused courts after the Judicature Acts 1873–75 were passed.[44]

1.13 Coke and Blackstone did not question the propriety of holding someone to an (objective) untruth where the conditions were right for that untruth to work real justice. They took meticulous care to formulate those conditions as rules for the correct pleading of estoppel: mutuality, certainty, precision and materiality, all of which remain relevant.[45] Originally rules of pleading, they ultimately became substantive rules for the application of the doctrine. They work to reduce or remove altogether any inherent "odium" by ensuring that estoppel is raised only where the "truth" excluded by it would contradict substantive justice of the case as between litigating parties.[46] Estoppel is the outcome of a balancing exercise between objective truth and the truth as stated by the estopped party.[47] That the outcome is intended to represent what is just and fair, was recognised by high authority when Lord Blackburn said in *Burkinshaw v Nicolls*:

> Now sometimes there is a degree of odium thrown upon the doctrine of estoppel . . . But the moment the doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered.[48]

43 Jeremy Bentham, *Rationale of Judicial Evidence*, Book V, Ch 7, §1, in *The Works of Jeremy Bentham* (Edinburgh: W Tait 1843) vol 7, 39. Chapter 7 as a whole is an engaging read. Of interrogation, Bentham says: "All suspected persons who are not guilty, court it; none but the guilty shrink from it." He confidently predicts that under interrogation a suspect who really is a delinquent will soon enough show his guilt by silence, or evasion, or confession, or fear, or confusion, all of which will provide the "self-inculpative, or self-criminative" evidence contributing to conviction. He recommends oral face-to-face interrogation in preference to written interrogatories which are not intimidating enough to extract the necessary evidence. He concludes by saying that it is an unnatural proposition that "if discovery of truth, and consequent rendering of justice, had been the object, the use of an operation so necessary to the discovery, so obviously and indispensably subservient to the purposes of justice, would ever have been rejected." Mercifully, Bentham stops short of recommending torture because the error of it produces "a not very satisfactory confession", and sometimes, unforgivably, enables the guilty by patience under torment to escape the punishment of death (Book IX, Pt VI, Ch 1, §1), ibid 523.

44 See detailed account by Sir William Serle Holdsworth, *A History of English Law* (London: Methuen & Co 1926) vol 9, 335–379.

45 Co Litt 352b (listing also a number of lesser rules of varying degrees of technicality, most of which are now obsolete), 3 Bl Comm 308. To like effect, see Sir Matthew Hale, *An Analysis of the Civil Part of the Law*, s XLIX "Of pleading" in Sir Matthew Hale, *The History of the Common Law of England and An Analysis of the Civil Part of the Law* (6th edn, H Butterworth 1820) [96].

46 "Estoppel is where one is concluded and forbidden in law to speak against his own act and deed, yea, though it be to speak the truth", *Les Terms de la Ley* (Estoppel), cited in *Ashpitel v Bryan* (1864) 3 B & S 474, 489; 122 ER 179, 184; "[estopped party] cannot give evidence of the truth, because the truth is inconsistent with the representation or conduct by which he induced a third party to alter his position", *Re Sugden's Trusts* [1917] 1 Ch 511, 516.

47 "The doctrine of estoppel has been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal; but because the estoppel may exclude the truth," *Bowman v Taylor* (1834) 2 Ad & E 278, 289–290; 111 ER 108, 112.

48 [1878] LR 3 App Cas 1004, 1026 (this was said contemporaneously with Sir George Jessel MR's invectives cited at 1.11 but, it would seem, not in direct response to them). For the philosophical foundation of the justice of that outcome, see 1.32.

These words were, and still are being, amply borne out. The application of estoppel in the course of fused administration of law and equity in the late 19th and especially the 20th century saw much more excellent and curious, and to that equitable and beneficial, learning added to the relatively modest beginnings catalogued by Coke. The start of the 21st century supplied a new such addition in the form of contractual estoppel.

Categories of estoppel

1.14 From Coke's methodical exposition to this day estoppel is classified into categories. Coke's original catalogue is still routinely consulted as a starting point. His estoppel by record is now a body of law concerned with res judicata.[49] His estoppel by deed continues to rest on pure formality.[50] His estoppel *in pais* has seen the most explosive growth as it developed into estoppel by representation and, when taken over by equity, spawned a whole family of equitable estoppels.

It is a natural to strive for a unified theory of apparently related phenomena, be that in physics, cosmology or law. At some point development of estoppel and the ever more precise refinement of its old and newly discovered categories prompted the view that those might in truth be instances of a single overarching principle. This raised an intriguing possibility that such principle may, once found, remove division of estoppel into categories, obviate the subtle but important differences in the rules that controlled their operation and unify them in a single category of estoppel; the principle put forward was that of detrimental reliance, and the estoppel was that by representation.[51] The welcome result would be harmony and simplicity.[52] That notion, however, was judicially criticised[53] and was disposed of as a matter of precedent when the House of Lords refused to formulate a single principle and insisted on maintaining the "necessarily separate requirements, and distinct terrain of application" of estoppel by convention and estoppel by representation (in its acquiescence variant).[54]

49 A "portmanteau term" that includes cause of action estoppel and issue estoppel, *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 [17].

50 7.29ff.

51 Spencer Bower, *The Law Relating to Estoppel by Representation* (Butterworths 1923), Preface and para 3.

52 cf Lord Denning, cited at 1.02. Sir Frederick Pollock sought to present estoppel as "a simple and wholly untechnical conception" grounded in reason, "perhaps the most powerful and flexible instrument to be found in any system of civil jurisprudence", F Pollock, *The Expansion of the Common Law* (Stevens & Sons 1904) 108, and was endorsed in this by Lord Wright in *Canada and Dominion Sugar Company Ltd v Canadian National (West Indies) Steamships Limited* [1947] AC 46, 56.

53 As historically unsound, repudiated by academia and unsupported by authority, *First National Bank v Thompson* [1996] Ch 231, 236F.

54 *Republic of India v India Steamship Co (No 2)* [1998] AC 878, 914 (the suggestion that there is no distinction between estoppel by representation and convention was also made, and rejected, in *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm) [495]). Consistently with that attitude, in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 39 Lord Goff rejected the idea of "one general principle shorn of limitations" into which Lord Denning MR would have seen diverse categories of estoppel merged in *Amalgamated Investment & Property Co Ltd v Texas Commerce Bank Ltd* [1982] QB 84, 122C. Note that as the judge at first instance in *Amalgamated*, the future Lord Goff (then Robert Goff J) did not accept counsel's attempt to limit equitable estoppel to specific categories and considered it helpful to establish broad criteria, at 103C; his remarks were recently cited with approval in *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737 [50], [83]. The perennial debate, therefore, is about just how broad the criteria of estoppel may be made before the necessary distinctions between accepted categories of estoppel begin to be lost. The notion of a uniform principle stirs from time to time but continues to be suppressed, eg *Coflexip SA v Stolt Offshore MS Ltd* [2003] EWHC 1892 (Pat)

1.15 Analytically, it is convenient to adopt the principle of detrimental reliance as one that underlies a certain genus of estoppels, in contrast to estoppels founded on formality or, as argued in this book, contract. Estoppel by representation (including its sub-species) and by convention will be referred to in this work as reliance-based estoppels.[55] This designation ensures that analytical convenience does not offend against precedent: the underlying principle is only a linchpin for holding together separate categories of estoppel within a genus without mixing them all into a blend.

1.16 Calling estoppel an instrument,[56] however flexible, harks back to the original attempt at unification. Rather, it is a versatile technique for doing practical justice, hardened into set modes of application. Or, if the metaphor is to be put in terms of hardware, estoppel is not a single instrument with however many applications; it is rather a label for a certain compartment in the courts' justice and fairness kit. That compartment is made up of separate holders; each contains a nicely calibrated precision instrument that is a specific category of estoppel. Great care is required to select just the right one to fit the "distinct terrain" in which it is to be applied, and it takes a dexterous hand to operate it in precise conformity with strict instructions for use.[57] The most recent addition to that kit is contractual estoppel. It is an excellent novel instrument which makes hitherto forbidden terrain accessible.[58] This book aims to give an account of its emergence, development and present condition. Introductory observations in this chapter are intended to set the scene for that exploration.

Estoppel outcomes

1.17 Where a party is estopped from making a case in contradiction to her own prior act, that act itself becomes conclusive. Practical outcomes that follow from this are determined by the character of that act.

Where the act is to make a statement asserting or denying a fact, the outcome is that the court makes a conclusive finding of the fact as stated. Applied to issues of pure fact, then, estoppel has evidential effect and determines facts on which an order for substantive relief might be founded.

[23]–[26], [34] (affd [2004] EWCA Civ 213, [2004] FSR 34 [149]) rejected the argument that in *Gore Wood* the House of Lords had completely re-written the law of res judicata and made all types of estoppel grouped under that head subject only to general public policy considerations.

55 The plural is in contrast to "reliance-based estoppel", put in the singular to denote "a unity" of which categories treated by precedent as separate are merely variations that "do not by themselves involve any special considerations", Elizabeth Cooke, *The Modern Law of Estoppel* (OUP 2000) 69. That "compendious term" is adopted in the eponymously titled fifth edition of Spencer Bower's original work, *Spencer Bower: The Law of Reliance-Based Estoppel* (Bloomsbury 2017) 1.8; the fifth edition resumes Spencer Bower's original unification project in reliance on recent judicial citation of classic authority, ibid 1.5–1.8.

56 Pollock, n 52.

57 An example of failure to follow those instructions is supplied by *Newport City Council v Charles* [2008] EWCA Civ 1541, [2009] 1 WLR 1884. The claimant chose to plead proprietary estoppel by reason of its ability, unique to estoppel in general, to found a complete cause of action. The court decided that the case was one of estoppel by representation, and the action failed because of the inability of that category of estoppel to found a cause of action. Seeing how the case was pleaded, there was no discussion of the principle that estoppel may complete an otherwise incomplete cause of action, see 1.20ff. That principle would appear to be directly applicable to the position in *Charles* where estoppel was available to supply the want of one constituent element in the cause of action, see [27], [31].

58 Novel by rediscovery, if not by invention, see 7.13. Note also applications of the underlying idea that may be recognised in decisions made and reasoning employed long before the concept was formulated in its present form, see Chapter 3.

Where the act is to create by conduct or statement (short of contract) an expectation of future action or inaction and thereby to induce the other party to act on the expectation, the outcome is that the expectation itself is given effect. The court makes an order for substantive relief in terms of the expectation and by that order substantive rights may be suspended, varied or enlarged and, in extreme, new personal and possibly proprietary rights and interests created.[59] Though modeled as a procedural bar, the effect of estoppel on an issue of law or mixed fact and law is a substantive resolution of the issue.[60] This is so even though the expectation does not in itself amount to a legal entitlement and could not on its own be enforced by action.[61]

Fact-finding outcomes are purely evidential and are perceived as the hallmark of a true estoppel.[62] Expectation-enforcing outcomes are fraught with difficulties of characterisation given their potential to straddle the divide between the evidential or procedural, and the substantive.[63] Those difficulties have been explored in the course of debates whether estoppel is a rule of evidence and whether it may found a cause of action.

Estoppel is more than a rule of evidence

1.18 It has been gradually acknowledged that effect of estoppel may go way beyond a purely evidential determination of a fact in issue.[64] Still, there is no uniform position on whether "pure" estoppel by representation should be treated as a rule of substantive law rather than merely a rule of evidence. The answer depends on the context in which the issue is raised. Estoppel by representation is naturally characterised as a rule of evidence

59 See, in particular, the conclusion that proprietary estoppel creates proprietary rights made in Megarry & Wade, *The Law of Real Property* (8th edn, Sweet & Maxwell 2012) 16–028. *Walden v Atkins* [2013] EWHC 1387 (Ch) considered (and gave an affirmative answer to) the issue whether an interest created by a finding of proprietary estoppel is property for the purposes of Insolvency Act 1986.

60 *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, 4 All ER 713 [14]. cf *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1016 where Viscount Radcliffe referred to estoppels as "rules of evidence *as between themselves* that the parties may have created by their conduct or otherwise." (emphasis supplied). Any rule "as between" the parties necessarily has effect on the substantive relationship that exists between them. See further 1.18.

61 Save in case of proprietary estoppel, *Cobbe* (n 60) [14].

62 *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) 12–001. It might be convenient to call that type of estoppel "narrow" (rather than "true"), to recognise the entrenched (and by now legitimate, if for no better reason than long and widespread usage) wider sense of the term that includes expectation-based outcomes, attained through a procedural model of preclusion or bar on denying the expectation.

63 See *Chitty On Contracts* (32nd edn, Sweet & Maxwell 2015) vol I, 4–103 for the distinction between estoppel by representation that concerns evidence of facts and equitable doctrine that determines legal effect of promises. *Snell's Equity* (n 62) 12–007 makes a similar point to the effect that expectation-enforcing outcomes are not produced by true estoppel.

64 St German observed that estoppel had a purely neutral effect, neither giving nor taking away a substantive entitlement: "For though the law in such cases giveth no remedy to him that is estopped, yet the law judgeth not that the other hath right unto the thing that is in variance betwixt them," *Doctor and Student*, Dialogue I, Chapter XIX (18th edn, Dublin: James Moore 1792) 56. Later it was recognised that estoppel was not quite so neutral: "The rule is not a rule of substantive law, in the sense that it does not declare any immediate right or claim. It is a rule of evidence, but capable of having the gravest effect on the substantive rights of parties", F Pollock, *Principles of Contract* (7th edn, Stevens & Sons 1902) 524, repeated almost verbatim (though without attribution) in *London Joint Stock Bank Limited v MacMillan* [1918] AC 777, 818. Modern authorities have adopted a definition of estoppel as something that "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", *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, 4 All ER 713 [14], making estoppel into a device through which she who claims a substantive right may gain that right.

where it is relied on for its evidential effect to prevent a litigant from denying or averring a fact, and not as itself declaring an immediate right or claim.[65] Sometimes the characterisation is nothing more than a matter of taxonomy and is either not considered at all or is of small practical moment.[66] Sometimes, however, it can have a great impact on the outcome of a particular case and in that event an inconvenient characterisation is liable to be reasoned away.[67]

1.19 Characterisation of estoppel, in appropriate cases, as a concept of substantive law would to a large part reflect existing reality.[68] It would also follow the characteristic pattern of historical development of English law, where from very early stages, "rights and wrongs are not made in the first place"[69] but are considered to be there already, diffused as it were in the "primordial soup" of forms of trial and later, forms of action and rules of pleading. From thence there gradually emerge rules of positive substantive or procedural law, and sometimes a species of one genus may develop so as to fall into a different genus altogether. An endlessly fascinating example is the growth of substantive law of contract out of early forms of action for the relief of a civil wrong.[70] Another historical example is evolution of equitable relief in the form of personal injunctions into substantive equitable rights and interests. To avoid subverting the common law, early equity refrained from declaring immediate rights. It would only give an order (on pain of jail) that the holder of the right *at law* should exercise it in a certain manner so as to convey a right or interest

65 *London Joint Stock Bank Limited v MacMillan* [1918] AC 777, 818; *Low v Bouverie* [1891] 3 Ch 82, 105; *Evans v Bartram* [1937] AC 473, 484; *Avon County Council v Howlett* [1983] 1 WLR 605, 622.

66 That is so with the proposition that estoppel may not be used to overcome a statutory or common law prohibition or prescription, see *Horton v Westminster Improvement Commissioners* (1852) 7 Ex 780, 791; 155 ER 1165, 1170; *Maritime Electric Company Limited v General Dairies Limited* [1937] AC 610; *Keen v Holland* [1984] 1 All ER 75; *Bank of Scotland plc v Waugh* [2014] EWHC 2117 (Ch) and n 76. In reality it matters not whether in this context estoppel is treated as a rule of evidence or of substance: whatever characterisation is adopted, estoppel will yield to the mandatory rule. In *Actionstrength Ltd v International Glass Engineering SpA* [2003] UKHL 17, [2003] 2 AC 541 and *Briggs v Gleeds* [2014] EWHC 1178 (Ch), [2015] 1 Ch 212 no discussion of taxonomy was needed to reach the conclusion that estoppel could not overcome formality requirements of s 4 of the Statute of Frauds 1677. Estoppels were referred to in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1016 as "rules of evidence as between [the parties]" in the context of determination of a substantive issue whether a party was bound by a contract despite failure to comply with statutory requirements.

67 A rather stark example is provided by a trio of Court of Appeal cases on mistaken overpayments, considered at 1.25, where the court struggled with the consequences that flowed from characterisation of estoppel by representation as rule of evidence. The practical justice of those cases was attained by formulating an "exception" to estoppel which had nothing to do with the law of evidence but was in truth an application of substantive equitable rules on change of position. More recently, in *Marussia Communications Ireland Ltd v Manor Grand Prix Racing Ltd* [2016] EWHC 809 (Ch), [2016] Bus LR 808 [95] estoppel by acquiescence was characterised as a substantive defence and therefore was not caught by the "rule of procedure" exception in the Community Trade Mark Regulation. It will be recalled that estoppel by acquiescence is seen as a sub-species of estoppel by representation in equity, see *Halsbury's Laws* (5th edn, 2014) vol 47, para 252.

68 It has been cautiously called for by some authorities, usually with support from academic opinion, see *Canada and Dominion Sugar Company Ltd v Canadian National (West Indies) Steamships Limited* [1947] AC 46, 56; *Derby v Scottish Equitable plc* [2001] EWCA Civ 369, [2001] 3 All ER 818 [48]; *National Westminster Bank plc v Somer International (UK) Limited* [2001] EWCA Civ 970, [2002] QB 1286 [54]. The intrepid Lord Denning did not need much (or any) support to refuse flatly to treat estoppel as a rule of evidence in *Moorgate Mercantile Co Limited v Twitchings* [1976] QB 225, 241H; the Court of Appeal fell back on his analysis of estoppel as a "principle of justice and equity" in *Somer* [43].

69 SFC Milsom, *Historical Foundations of the Common Law* (2nd edn, OUP 1981) 81. Part I "Institutional Background" offers an exhaustive and insightful general account of development of substantive law out of pleading and procedure.

70 ibid Ch 12.

at law unto the beneficiary to meet her beneficial entitlement in equity.[71] It was a process long in the making before this procedural power was recast in terms of creation of substantive rights and interests.[72] More recent examples may be found, including at common law. One such is recognition of abatement of price for breach of warranty as "no mere procedural rule designed to avoid circuity of action but a substantive defence at common law".[73] Another is the rethinking of parol evidence rule as not a rule of evidence at all, with the result that terms of a contract are established as a matter of objective contractual intention, determined by substantive rules on formation and interpretation of contracts.[74]

Estoppel is less than a cause of action

1.20 Perceived as a rule of evidence, estoppel by representation may not found a cause of action, but may supply the want of evidence needed to obtain substantive relief.[75] It may go so far as to repair what would otherwise be a defect in a cause of action[76] but is incapable of founding an action.[77] A metaphoric expression of that idea, that estoppel "is to be used as a shield and not as a sword",[78] has become an (inevitably, unreasoned) maxim of general application, prone to having an ossifying effect on the law in general and a distorting influence on decisions in individual cases.[79] However, it has come to be counterbalanced by another maxim, "there are estoppels and estoppels",[80] and in the context of estoppel by convention the principle was established that

71 Hanbury & Martin, *Modern Equity* (20th edn, Sweet & Maxwell 2015) 1–008.

72 By way of example, recognition that equitable assignment of a debt creates a substantive equitable interest grew out of concerted practices of equity and law courts which adopted procedures to allow recovery of the debt by the assignee using the name (and the formal right at law) of the assignor, see an outline by the author at [2010] LMCLQ 555–556.

73 *Modern Engineering Bristol Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC. Hoffmann LJ's judgment in *Aectra Refining Inc v Exmar NV* [1994] WLR 1634, 1650A–D views transaction set-off generally as substantive, and independent set-off as substantive result attained by procedural means.

74 Law Commission, *Law of Contract: The Parol Evidence Rule* (Law Com No 154, 1986) paras 2.7, 2.17.

75 *Low v Bouverie* [1891] 3 Ch 82, 105, discussing estoppel as "one step in the progress towards relief" that fills up "the gap in the evidence which when so filled up, would produce this right to relief".

76 For instance, allow an action to be brought upon a document as a deed despite the absence of requisite formality, *TCB Ltd v Gray* [1986] Ch 621, 634 (affd on other grounds [1987] Ch 458); *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35 [33], though this is not available as a method of overcoming statutory requirements, see *Briggs v Gleeds* [2014] EWHC 1178 (Ch), [2015] 1 Ch 212 [43]; *Bank of Scotland plc v Waugh* [2014] EWHC 2117 (Ch) [78].

77 eg for the recovery of a misrepresented balance of a trading account, see *Parabola Investments Ltd v Browallia CAL Ltd* [2009] EWHC 901 (Comm), [2009] 2 All ER (Comm) 589 [195], [198], affd on other grounds [2010] EWCA Civ 486 (a stockbroker fraudulently misrepresented an inflated balance of the trading account; a claim would lie for trading losses and loss of profit, but not for an account or recovery of the balance on the basis that the broker was estopped from denying that the balance was less than represented).

78 A "vivid description" adopted by Birkett LJ in *Combe v Combe* [1951] 2 KB 215, 224 on the suggestion of Mr Kee of counsel who himself cited earlier usage, at 218. It appears that the metaphor has been around for centuries, see Bracton's observation that "exceptions take the place of actions, since he who excepts assumes the place of a plaintiff with respect to the burden of proof. It is with respect to actions that they are called exceptions, for one impugns the other. And as *actores* are armed with actions and girt, so to speak, with swords, so conversely *rei* are armed with exceptions and defended, so to speak, with shields", Bracton, *On the Laws and Customs of England* (S Thorne tr, HUP 1977) vol 4, 245.

79 See observations on maxims in general by Lord Esher MR in *Yarmouth v France* (1887) 19 QBD 647, 653 and Lord Wright in *Lissenden v Bosch* [1940] AC 412, 435. cf an observation on labels by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 [17].

80 *Crabb v Arun DC* [1976] Ch 179, 187.

the level of the High Court and the Court of Appeal which treated the principle as settled law. If and when the Supreme Court has occasion to deliberate on the matter, one hopes that it shall refuse to overrule established case law and upset commercial practice that relies on it, and will recognise contractual estoppel as a legitimate, useful and welcome development of the principle of contractual freedom. Doing that will take the law forward, all the while with, and not against, the grain of established legal policy.[70] Doing otherwise will force the law "to stand still whilst the rest of the world goes on; and that will be bad for both".[71]

Estoppel raised by contract without more

2.18 Contractual estoppel precludes a party from disputing or denying a particular state of affairs stated by contract. Estoppel arises where the statement is intended to be contractually binding and is therefore a term of the contract. From the proposition that the court's proper role is to enforce terms on which the parties have chosen to contract,[72] it follows that contractual estoppel arises as a direct incident of binding character of contract, without more:

> the fact that the parties have willingly so bound themselves is itself sufficient reason for the contract to be enforced.[73]

A contract, once established, "must be performed come what may".[74] It is a matter of contractual right that where the parties contract to accept a particular state of affairs as true, each party will be estopped by the contract from proving that it is not true. In this, contractual estoppel implements the long recognised policy of contract law to promote certainty and protect reasonable expectations of honest and sensible business persons.[75] To raise contractual estoppel, nothing more need be shown than a subsisting contract by which, on its true construction, the parties agreed the state of affairs now sought to be disputed.

No requirement of inducement, reliance or detriment

2.19 Unlike reliance-based estoppels,[76] to raise contractual estoppel it is not necessary to show inducement, reliance or detriment.[77] A statement that is contractually binding raises an estoppel by contract alone. Such a statement may also happen to raise, in addition,

70 *Douglas v Hello! Ltd* [2007] UKHL 21, [2008] AC 1 [305].
71 *Packer v Packer* [1954] P 15, 22.
72 *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] 1 AC 436 [46], [47].
73 ibid [41].
74 Hoffmann J in *Walton v Walton* (14 April 1994, unreported), approved in *Thorner v Major* [2009] UKHL 18, [2009] WLR 776 [57].
75 See a recent reminder in *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] EWCA Civ 443, 166 Con LR 79 [42].
76 See 1.15.
77 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm) [557](ii)]; *Trident Turboprop (Dublin) Ltd v First Couriers Ltd* [2008] EWHC 1686, [2008] 2 Lloyd's Rep 581 [35]; *FoodCo UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) [170] (no need to show belief in the truth of the statement); *ACG Acquisition XX LLC v Olympic Airlines SA* [2012] EWHC 1070 (Comm) [140] (affd [2013] EWCA Civ 369, [2013] 1 Lloyd's Rep 658); *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) [302].

estoppel by representation (or indeed found a cause of action in misrepresentation) if on its true construction it is also intended as a representation of fact and the evidence shows inducement and detrimental reliance on it.[78] But where contractual estoppel is sought to be raised, no inquiry into evidence is necessary or permissible beyond what is normally needed to establish and construe a contract.

No requirement of unconscionability

2.20 Unlike reliance-based estoppels, contractual estoppel does not depend on considerations of unconscionability:

> once it is accepted that there is a separate doctrine of "contractual estoppel" then there is no room for a requirement that the party which wishes to rely on that estoppel must demonstrate that it would be unconscionable for the other party to resile from the conventional state of affairs that the parties have assumed.[79]

It is not necessary to show on the evidence that allowing a party to prevail on the basis of allegations which contradict a contractually agreed statement would be unjust, unfair or unconscionable. It is sufficient that on the true construction of that statement the allegations contradict what it says.[80]

Truth or falsity of agreed statement irrelevant

2.21 Where the parties agree to adopt a statement as true for the purposes of their contract, it does not matter whether or not what is stated is actually true:

> The point and effect of the [agreed provisions] is to require the parties to accept a particular state of affairs as true, even if the actual reality was different. One cannot, merely by referring to what is asserted to be the underlying reality, avoid the effect of those provisions.[81]

78 In *Springwell* (n 77) [569], Gloster J found that in addition to contractual estoppel the bank could rely on contractual statements to raise estoppel by representation to the extent that it actually believed in the truth of the statements; making the contract would constitute reliance on that belief. This shows that the same statement may raise both contractual and evidential estoppel. In *Shaftsbury House (Developments) Ltd v Lee* [2010] EWHC 1484 (Ch) [67] counsel unsuccessfully sought to take advantage of just such a coincidence by arguing that a contractual acknowledgement of non-reliance on representations took effect by way of estoppel by representation and not as a term of contract and was therefore was not subject to the Unfair Terms in Consumer Contracts Regulations 1999, see n 86 to 6.23. *Trident Turboprop* (n 77) [35] makes clear that if a party may rely on contractual estoppel she need not rely on evidential estoppel, though it may be also available. By contrast, contractual estoppel and estoppel by convention are mutually exclusive, see 7.27.
79 *Springwell* [2010] EWCA Civ 1221, [2010] 2 CLC 705 [177].
80 In *Bikam OOD v Adria Cable sarl* [2013] EWHC 1985 (Comm) [160] it was said that although it is not necessary to show unconscionability, it would in any event be unjust to allow a party to resile from a freely negotiated commercial compromise. In that case the contract was in the nature of a compromise of a dispute, but in fact any commercial agreement can be said to be the product of a negotiated commercial compromise, an exercise in give and take, a compromise of negotiating positions. Contracts are made to be kept; no more is needed to establish the injustice of resiling from a contract, see 7.08–7.09.
81 *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) [544(3)] (affd on other grounds [2012] EWCA Civ 1049). Also by Gloster LJ in *Shoreline Housing Partnership Ltd v Mears Ltd* [2013] EWCA Civ 639 [17]: "the doctrine of freedom of contract allows parties to agree that, at the time they enter into the contract, a representation-free state of affairs exists, even if, in reality, that is not the case and prior representations have been indeed been made that might ground an estoppel".

What the parties agree, becomes the truth *as between them*; contractual estoppel will prevent a party establishing facts in contradiction to the agreed position.[82]

Knowledge of falsity of agreed statement irrelevant

2.22 It does not matter that any or all of the parties know that the agreed statement is not in fact true,[83] except only where the agreement might *otherwise* violate English public policy or a statutory prohibition.[84] By reason of party autonomy, such agreement does not offend public policy in itself:

> . . . contractual estoppels are subject to the same limits as other contractual provisions, but there is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, although they know the facts to be otherwise.[85]

2.23 Subject to fraud, mistake or misrepresentation,[86] a party shall not be deprived of the benefit of contractual estoppel if it is shown that this party alone knew that the agreed statement did not represent the true position. An attempt to argue that an agreed statement should be construed restrictively to compel the conclusion that matters known only to one party were not agreed is liable to be rejected and the other party estopped even though she did not know what her opponent knew.[87] Distinction between agreement on what is to be deemed truth and assumption of liability for objective untruth is very significant here,[88] and characterisation of a statement as one or the other will determine whether the statement raises contractual estoppel against a party or, on the contrary, gives that same party a right of action in misrepresentation or breach of contract against the other.

Contractual estoppel outcomes

2.24 Contracting parties are free to determine by contract the factual basis on which they deal as between themselves, and their contract precludes them from making assertions

82 *Torre Asset Funding Ltd v RBS* [2013] EWHC 2670 (Ch) [192]; *Richards v Wood* [2014] EWCA Civ 327 [16]: "All parties are bound by that agreed statement, whether it represented the truth or not."

83 *Springwell* [2008] EWHC 1186 (Comm) [568], affd [2010] EWCA Civ 1221, [2010] 2 CLC 705 [143]-[144]; *CRSM v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 [505]; *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) [302]; *Thornbridge Ltd v Barclays Bank plc* [2015] EWHC 3430 (QB) [111].

84 See 5.44–5.47.

85 *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] 1 AC 436 [47], rejecting an impassioned plea by counsel that in the context of a publicly registered disposition of property an estoppel was an "unbelievable proposition" that felt "entirely wrong in law and equity, and indeed contrary to any moral principle" ([26]) and reversing the Gibraltar Court of Appeal which inferred that the parties had intended to conceal the truth on no more evidence than that the contract stated what the parties knew to be untrue ([22]). Citation from *Shoreline Housing* at n 81 is also apposite here, since the parties will know of representations made between them.

86 See 5.20, 5.27.

87 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 [267]. This proposition is to be distinguished from the rule of interpretation which does not allow the court to take into account a background fact known only to one of the parties, *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [21]. Where on the true construction of a contract, taken with account only of the background facts known to both parties, it is determined that a party is content to accept a statement of fact as true, it does not matter that she has no independent knowledge of truth or falsity of that fact while the other does. A contract willingly made with eyes shut still binds.

88 See 2.51–2.52.

of fact inconsistently with that determination.[89] Enforcement in this context means that a party is not permitted to go behind her own agreement that the stated facts are true.[90] That agreement becomes the equivalent of, and replacement for, a finding of facts on the evidence.[91] If actual evidence of background facts contradicts a contractually agreed statement, that evidence will be ignored in interpreting the contract.[92] Similarly, a contract will be interpreted on the basis that an agreed background fact was known to the parties, even though it was not.[93] In an appropriate case a summary judgment will issue against a party seeking to found a cause of action on facts that are contrary to those agreed,[94] or a preliminary issue will be decided against her.[95] In short, contractual estoppel allows the parties by agreement to generate a certain fact-finding outcome. It may be either to establish conclusively something that might not or would not be established on the evidence, or to make sure that their rights and liabilities are determined without account of something that may be or has been established on the evidence.

2.25 A wider formulation of contractual estoppel gives effect to the expectation of a contracting party that dealings between herself and the other party are put on an agreed substantive basis ("state of affairs").[96] That agreed basis will determine the legal incidents of the parties' relationship; it is not limited to finding facts but extends to resolution of issues of mixed of fact and law and determination of substantive rights, such as existence and quantum of debt,[97] ownership of property,[98] assumption of responsibility and duty of care.[99] Outside mandatory statutory regulation,[100] the agreed basis may be a proposition of law or mixed fact and law, as much as a statement of pure fact.[101]

89 *Springwell* [2008] EWHC 1186 (Comm) [559].

90 *Springwell* [2010] EWCA Civ 1221, [2010] 2 CLC 705 [143]; *Titan Steel Wheels Limited v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep 92 [91(i)], [92], stating forcefully that "there is no question of going beyond or outside" contractual terms even if the actual position is different. In *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm) [465] and *Wickens v Cheval Property Development Limited* [2010] EWHC 2249 (Ch) [19] it was said that the agreement was an insuperable obstacle in the way of an attempt to establish facts in contradiction to it, and could not be displaced except by fraud.

91 *HSH Nordbank AG v Intesa Sanpaolo spa* [2014] EWHC 142 (Comm) [55(ii)].

92 *Richards v Wood* [2014] EWCA Civ 327 [16].

93 *Bashir v Ali* [2010] EWHC 2320 (Ch) [28]. Though the conclusion on interpretation was reversed on appeal in [2011] EWCA Civ 707, [2011] 2 P & CR 12, the appeal proceeded on the same basis as the trial, that the parties were contractually assumed to have knowledge of the background fact.

94 As it did in *Trident Turboprop (Dublin) Ltd v First Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep 581; *Startwell Ltd v Energie Global Brand Management Ltd* [2015] EWHC 421 (QB) [73]–[77]; *Nextia Properties Limited v RBS* [2013] EWHC 3167 (QB) [10], [98]–[99] (contractual estoppel would preclude claimant showing reliance on pleaded representations; the primary ground for the decision was a finding that the representation had not been made in the first place).

95 An example is *Titan Steel Wheels Limited v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep 92.

96 In *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] EWHC 1331 (Comm) [30] a proposition that a party is entitled "to have the contractual rights and duties determined between [her] and contracting defendants upon the agreed basis" was advanced as a matter of submission, and then refined and not dissented from by the court. Contractual estoppel, however, is wider than determination of *contractual* rights, and may extends to rights that arise in other contexts, see 3.02, 3.05.

97 See 3.28–3.30, 3.35–3.37.

98 See 3.42–3.45.

99 See 3.05–3.07.

100 See 5.44–5.45.

101 An assumption of mixed fact and law, and even of pure law may support estoppel by convention, see n 116 to 7.25. Surely, what can be done by estoppel, can be done by agreement. See also 3.19.

2.26 As between the parties, then, a statement of fact or proposition of law or mixed fact and law agreed by contract is a substitute for the factual and legal reality, to which the party that has agreed the statement or proposition is held by contractual estoppel notwithstanding evidence and argument to the contrary.[102] Though unquestionably a contractual promise, it is neither a promise of action[103] nor yet a promise of truth[104] coupled with assumption of liability for loss arising from the failure to act or the untruth. Damages for breach of contract, though nominally available, can be a poor substitute for contractual estoppel.[105] That its true effect is in the nature of estoppel proper, is shown in Chapter 7.[106]

Temporal effect

2.27 Contractual estoppel may establish the truth of agreed state of affairs both prospectively and retrospectively. A party will be precluded from relying on facts that are inconsistent with the agreement, whether those facts eventuate in the future, or had occurred in the past, or are present at the time of contract, and it does not matter that at the time of contracting it is anticipated that inconsistent facts may or will eventuate, or it is in fact known that they had already happened or are then in existence.[107] Where the parties agree that any future statements are not to be treated as advice nor relied upon, then the agreement will raise contractual estoppel to bar a claim in negligence even if a party does give advice.[108] If it is agreed that no advice is deemed to have been given, contractual estoppel will bar the assertion that it had been, even if that was the case to the knowledge of the parties.[109]

102 *Springwell* [2008] EWHC 1186 (Comm) [537], [567] (rejecting the argument that contractual terms, summarised at [539], should not be given effect as inconsistent with the actual advisory relationship which allegedly existed between the parties); *Titan Steel Wheels Limited v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep 92 [91]–[92]; *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) [544(3)]; *Torre Asset Funding Ltd v RBS* [2013] EWHC 2670 [192]; *Crestsign Ltd v Natwest plc* [2014] EWHC 3043 (Ch), [2015] 2 All ER (Comm) 133 [96], [114]-[115]; *Mc Caughey v Anglo-Irish Bank Corporation Ltd* [2011] IEHC 546, affd [2013] IESC 17 (the Supreme Court of Ireland citing *Springwell* and noting that the contractual relationship was "absolutely at variance" with the relationship that had existed in reality).

103 See 2.29.

104 See 2.51.

105 See 3.48–3.51.

106 See 7.02ff.

107 *Grant Estates Ltd v Royal Bank of Scotland plc* [2012] CSOH 133 [73(4)–(5)], citing *Springwell* and *Peekay*. The summary of English law given in this Scottish judgment was cited in *Barclays Bank plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm) [69]. An example of prospective operation can be found in *Torre Asset Funding Ltd v RBS* [2013] EWHC 2670 [192] where a facility agent raised contractual estoppel to preclude an inquiry into whether it had learnt of an event of default of which it did not tell the lenders. Estoppel was raised by a clause in a facility agreement which allowed the agent to assume, going forward, that no default has occurred: "[the clause] is a contractual agreement as to the basis upon which the business between Agent and Lenders under the [facility agreement] is to be conducted, even if at certain points in time it does not correspond with the actual facts (in that the Agent in fact came to know that a Default . . . had occurred)."

108 *Titan Steel Wheels Ltd v The Royal Bank of Scotland plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep 92 [91]–[92]: "if the Bank's activities were to extend beyond mere execution, the contractual terms cater for that situation. There is no question of going beyond or outside those provisions."

109 *Springwell* [2008] EWHC 1186 (Comm) [568], where it was expressly found that the bank's salesman was "well aware" that he had in fact given investment advice in contradiction to a contractual statement that none would be deemed to have been given; contractual estoppel was raised nonetheless.

Future facts

2.28 It is now established that an agreed statement of past or present fact can raise contractual estoppel,[110] but there appears to be no direct statement of principle for future facts. It would be unprincipled, and unnecessary as a matter of policy, to recognise estoppel-raising quality in an agreed statement of past or present fact but deny it to an agreed statement of future fact where each statement is a term of a complete and binding contract. So long as contractual statement, on a true construction, is concerned with agreed fact or proposition, it ought to be able to raise the estoppel regardless of the point in time by reference to which the fact or proposition is agreed. Shortly put, a contract "it is agreed that fact A exists (or does not exist) on date X" or "it is agreed that proposition A is true (or false) on date X" ought to raise the estoppel whether X is yesterday, today or tomorrow. Some judicial observations appear to recognise that possibility.[111] In fact, there is a widely employed category of contractual estoppel provisions that are designed to bind the parties to a state of facts as stated or determined by reference to a defined or determinable point in the future.[112] An agreement which makes contractual obligations contingent on certain facts coming to pass in the future has to be distinguished from an agreement to deem a future contingency as having arisen: the former means there is no obligation absent the contingency actually arising, the latter raises contractual estoppel.[113]

Distinction from promise of future action

2.29 It is important to make a distinction between an agreement of future fact as true, which ought to raise contractual estoppel, and a promise of future action, which will not.[114] That distinction was lost in *Credit Suisse International v Stichting Vestia Groep.*[115] In response to a claim in debt under the terms of derivative transactions, the bank's corporate customer disputed the transactions as ultra vires. The bank relied on a statement, made by the customer in the (unquestionably valid) master agreement, that the customer "is and will be in compliance with its articles of association", deemed to be repeated on

110 See citation in 2.09.

111 "[Conventional] understanding may relate to the factual or legal basis on which a current transaction is proceeding, even if that understanding includes reference to events in the future", *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353, [2012] WLR 472 [64(i)], in context of estoppel by convention. There is no reason not to extend the same treatment to an understanding that amounts to a binding contract. Although the proposition that contractual estoppel may extend to agreements on the future state of facts is stated in terms in *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) [307], it is not relied on here, as the proposition is not borne out by the analysis which confounds agreement of facts with a promise of future action (on this, see 2.29).

112 They are "conclusive evidence" cases where the parties agree to be bound by a determination "what the facts are in relation to some matter which is to arise in the future and which is plainly intended to have some contractual consequence", *Brown v GIO Insurance Ltd* [1998] CLC 650, 659D. See 3.14–3.16.

113 *Police and Crime Commissioner for Greater Manchester v Butterworth* [2016] All ER (D) 99 (Dec), see [29] of the judgment.

114 The distinction was made clearly in *FSA v Asset L I Inc* [2013] EWHC 178 (Ch), [2013] 2 BCLC 480 [118]: a contractual estoppel provision (non-reliance clause) would not apply to statements which on their true construction were not statements of fact (or present intention as to the future), but promises of future action. Consider also long established authority and observations that distinguish between a covenant to act and statement of fact that raises an estoppel: see 3.32, *Doe d Chandler v Ford* (1835) 3 Ad & E 649, 655; 111 ER 561, 563.

115 [2014] EWHC 3103 (Comm).

(on their own or in combination with others) of recital,[131] direction,[132] assumption,[133] acknowledgment,[134] advice,[135] admission,[136] confirmation,[137] intention and purpose,[138] representation and warranty,[139] plain representation,[140] action and inaction,[141] non-reliance,[142] reliance,[143] denial.[144] These are merely examples: "The outcome can be expressed in different ways but with the same meaning."[145] The range of suitable language is as wide as the range of possible substantive outcomes achievable by application of contractual estoppel. Typical applications are discussed in Chapter 3.

No special requirement of clarity for contractual estoppel

2.32 Other chapters of this book consider the argument that to raise contractual estoppel, a statement must meet a heightened standard of clarity developed in the context of exclusion clauses[146] and reliance-based estoppels.[147] It is concluded that no requirement of clear and unambiguous language to raise contractual estoppel follows from the authorities.

131 "[Whereas] [t]he Assets of the Trusts are identified in the Second Schedule", *Brudenell-Bruce v Moore* [2012] EWHC 1024 (Ch) [24].

132 "You should also ensure that you fully understand the nature of the transaction", *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 [55]; "The information contained in this Memorandum should not be assumed to have been updated", *IFE Fund v Goldman Sachs International* [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449 [13(iii)].

133 In both senses of the word: "The issuer assumes that the customer is aware of the risks and practices described herein", *Peekay* (n 132) [55]; "[the customer] is capable of assuming, and assumes, the risks of this Novation Transaction", *HSH Nordbank AG v Intesa Sanpaolo spa* [2014] EWHC 142 (Comm) [14(ii)].

134 *Donegal International Limited v Republic of Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep 397 [13], [465]; *Shaker v Vistajet Group Holdings SA* [2012] EWHC 1329 (Comm) [24].

135 "Clients are advised to make an independent review and reach their own conclusions regarding the legal, credit, tax and accounting aspects of this offering relating to their particular circumstances", *Springwell* [2008] EWHC 1186 (Comm) [321(i)].

136 *Wickens v Cheval Property Development Limited* [2010] EWHC 2249 (Ch) [9(ii)].

137 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 [229(4e)].

138 ibid [229(2)]: "This Memorandum is being provided for information purposes only and is not intended to provide the basis of any credit decision and should not be considered as a recommendation that any recipient . . . should participate in the Facility."

139 ibid [209], [235], [320]. As is customary, these were used interchangeably and many statements constituted both at the same time, see 2.45.

140 *Regione Piemonte v Dexia Crediop SpA* [2014] EWCA Civ 1298 [109]; *Barclays Bank plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm) [15], [71]; *Thornbridge Ltd v Barclays Bank plc* [2015] EWHC 3430 (QB) [98].

141 "We have made our own independent decisions to enter into this letter", "We are not relying on any communication. . . as investment advice", *CRSM v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 [510].

142 "Tenant acknowledges that it is entering into this Agreement on the basis of the terms hereof and not in reliance upon any representation or warranty whatsoever", *FoodCo UK LLP v Henry Boot Developments Limited* [2010] EWHC 358 (Ch) [163].

143 "You agree that you will rely on your own judgment for all trading decisions", *Bank Leumi (UK) plc v Wachner* [2011] EWHC 656 (Comm), [2011] 1 CLC 454 [186]. This language raised contractual estoppel in answer to a negligent advice claim.

144 ibid [183]–[184]. Contractual estoppel that precluded a claim in misrepresentation was raised by the provision cited in n 143 in conjunction with a further clause stating that the bank "gives no representation, warranty or guarantee as to its accuracy or completeness",.

145 *Grant Estates Ltd v Royal Bank of Scotland plc* [2012] CSOH 133 [73(3)], approved in *Barclays Bank plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm) [69].

146 See 6.03–6.06.

147 See 7.14–7.18.

Nor is it defensible in principle. Contractual estoppel arises as a matter of contract, and the issue of whether estoppel is raised and to what extent is to be determined by ordinary principles of construction and implication of terms.[148] No special requirements should apply beyond that. In *Colchester BC v Smith*[149] Ferris J rejected the submission that a clause could not give rise to an estoppel because it was not clear and unambiguous. The judge held that the clause gave rise to estoppel by contract and construed it in the ordinary fashion to discern the meaning of those terms which counsel argued were self-contradictory to the point of failing to support an estoppel.[150]

In substance statement must be agreement to accept stated fact or proposition as true

2.33 A statement that raises contractual estoppel can take any form as long as it is in substance a contractual promise to accept a stated fact or proposition as true, and by extension, not deny or dispute it.[151] Contractual statement of this kind raises the estoppel as a matter of contractual right.[152] It has to be distinguished from non-contractual representations of fact which may raise estoppel by representation or found a claim in misrepresentation. It also has to be distinguished from contractual representations and warranties of fact which are in the nature of assumption of liability by one party to the other for the untruth of a represented or warranted fact or proposition and sound in damages. These two distinctions are dealt with below.

Contractual character of statement

2.34 A statement raises contractual estoppel only if it is agreed as a contract. As with any statement said to be a (term of) contract, ordinary rules of formation and construction of contracts apply to determine whether the statement is objectively intended to be binding as a contract. There is no set form of words for expressing the necessary intention, although certain conventional formulae have become customary for some practical applications of contractual estoppel.[153] Factual inquiry is limited to evidence which is relevant to establish the intention to make a contract in terms of the statement and construe its meaning.[154]

2.35 The possibility cannot be altogether discounted that although contained in a document that records a contract, a statement might not be contractual. In *Springwell*, a distinction was drawn between a "contractual representation" as a contractual term

148 *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] AC 436 [46], [47] refers to estoppel raised by "express or implied contractual convention" in context which clearly contemplates contractual estoppel, see 2.13. cf *Taylor Fashions Ltd v Liverpool Trustees Co* [1982] 1 QB 133, 159 where estoppel would be raised by implied terms of an agreement (framed as a deed).

149 [1991] Ch 448, 459.

150 ibid 496. cf *Brudenell-Bruce v Moore* [2012] EWHC 1024 [24] where it was observed that estoppel-raising recital was clear and unambiguous. In context, this was merely an observation to support the judge in his primary conclusion that as a matter of construction the recital constituted an agreement to admit the truth of matters recited.

151 "If the parties do agree a certain factual basis on which a contract is made, the contractual agreement is that neither party can subsequently deny that basis", *Trident Turboprop (Dublin) Ltd v First Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep 581 [33].

152 *ACG Acquisition XX LLC v Olympic Airlines SA* [2012] EWHC 1070 (Comm) [140].

153 Considered in Chapter 3.

154 Background facts that contradict the agreed statement will be disregarded in construing the contract, *Richards v Wood* [2014] EWCA Civ 327 [16].

that raised contractual estoppel, and "a mere statement of historical fact".[155] The clear consequence of that distinction is that a "mere" statement that records a fact but is not intended to agree the fact as true will not raise the estoppel.

2.36 The decision in *Springwell* proceeded on the basis of a presumption that a statement found within the four corners of a contract is intended to be a contractual term, unless the contrary is established.[156] Yet a statement may be contractual even though it is not found within a contract. A statement that is intended to have contractual effect may take the character of a collateral contract, for which the consideration is the making of the main contract.[157] Such intention is more likely to be found where the statement is in the nature of a promise or assurance that encourages the party to make the main contract.[158] At times, the intention may be inferred from reliance on the statement.[159]

Distinction from representation of fact

2.37 As the form of statement is immaterial, a distinction has to be made in substance between a representation in the traditional sense of a non-contractual inducing statement of fact on which reliance is placed, and a contractually agreed statement of fact. The distinction matters because requirements for setting up an estoppel-based defence or bringing an estoppel-assisted claim are determined by the type of estoppel that is sought to be raised, which in turn depends on the character of the statement. A traditional representation of fact may only give rise to evidential estoppel founded upon reliance, but will not raise contractual estoppel. To create estoppel by contract, it is both sufficient and necessary to prove a contract to agree a statement of fact as true.

2.38 This distinction corresponds to the traditional dichotomy between representation and warranty:

> if a party to a contract wishes to claim relief in respect of misrepresentation as to a matter which did not constitute a term of the contract, his claim will fail unless he is able to show that he relied on this representation in entering the contract; in general, however, if a party wishes to claim relief in respect of a breach of *a term* of the contract (whether it be a condition or warranty) he need prove no actual reliance.[160]

This distinction has been applied in a plethora of cases. A litigant may argue that a statement is a representation of fact in order to avoid the consequences that would follow, or

155 [2008] EWHC 1186 (Comm) [565], [567] where Gloster J expressed her doubts about the proposition that the character of statement as a contractual term is determined by the point in time to which it is addressed (Diplock J in *Lowe v Lombank Ltd*, cited at 2.02) and, though ostensibly following that proposition (see n 49), in reality applied her own approach that considered the substance and intent of the statement.

156 This follows from the reasoning at [2008] EWHC 1186 (Comm) [567] which takes as its starting point the contractual character of the documentation in which the statements were made. The same presumption appears to be in play in the passage from *Lowe* cited at 2.02: "*Although* contained in the same document as the contract, it is not a contractual promise" (emphasis supplied).

157 *Heilbut, Simonds & Co v Buckleton* [1913] AC 30, 47, with emphasis on the need of strict proof not just of the terms of such collateral contract but also of *animus contrahendi*, ie an intention to contract.

158 *Hughes v Pendragon Sabre Ltd* [2016] EWCA Civ 18 [32]:"there is ample authority that the courts may treat a statement intended to have contractual effect as a contract collateral to the main transaction, in particular where one party enters the main contract because the statement is an assurance on a certain point."

159 See 2.42–2.43.

160 *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art* [1991] 1 QB 564, 574 (emphasis retained).

to gain an advantage that would be lost, if the statement were treated as a warranty. To name a few typical examples, the objective may be to escape the application of an entire agreement clause that defeats a collateral warranty,[161] or collect compensation in excess of contractual limit of liability for breach of contract,[162] or avoid the claim being barred by contractual limitation of time,[163] or avoid altogether contractual exclusion or restriction of liability,[164] or claim a tortious measure of damages as opposed to contractual measure,[165] or escape liability by relying on the "reasonable belief" exception under section 2 of the Misrepresentation Act 1967, or avoid liability for repudiatory breach for misdescription of a chattel sold,[166] or make liability dependent upon proof of actual reliance on the statement,[167] or escape altogether from the contract by claiming rescission,[168] or avoid application of regulations which control the reasonableness of contractual terms.[169] The litigant's opponent would wish to rely on the same statement as a warranty to produce the opposite result.

2.39 The same distinction may have to be applied to decide whether a statement is a contractual term capable of raising contractual estoppel.[170] It will be recalled that an agreed statement of fact is effective for the purposes of contractual estoppel in the same manner as any other contractual term is effective for the purposes of substantive relief, that is regardless of inducement and reliance. However, before those can be discounted, a conclusion is required that the statement is in truth contractual. This conclusion has to follow from the objective interpretation of the statement itself and the manner and circumstances in which it was made. In the course of that exercise, matters of inducement and reliance may influence the characterisation of the statement. Even the way the issue is framed will have an impact, as reliance on a statement is necessary for a finding of representation of fact but is of no relevance to contractual construction.[171]

161 See 4.11–4.13.

162 *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) [203(v)].

163 *Idemitsu Kosan Co Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm) [8].

164 *BSkyb Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC), 129 Con LR 147 [520]; *Bottin (International) Investments Ltd v Venson Group plc* [2004] EWCA Civ 1368 [65], followed in *Bikam OOD Central Investment Group SA v Adria Cable sarl* [2012] EWHC 621 (Comm) [45]–[47].

165 *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) [135], *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch). For a recent comprehensive Court of Appeal guidance on the distinction between the two measures of damages, see *Karim v Wemyss* [2016] EWCA Civ 27.

166 Sale of Goods Act 1979, s 13(1), *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art* [1991] 1 QB 564.

167 *Karim v Wemyss* [2016] EWCA Civ 27 [26].

168 Before 1967, rescission was not available if the representation had become a warranty and, in that case, the party could escape the contract only if it showed that the breach of such warranty was repudiatory, *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 55 Ll L Rep 271. Misrepresentation Act 1976, s 1 reformed the law and opened the opportunity for litigants to argue that a term of contract ought to be construed as a representation of fact which entitles them to rescission if false. In *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 rescission was ordered on the basis of what appears to have been a term of an oral contract of sale (see [5]), although the judgment is silent as to whether oral exchanges were followed by a written contract. In light of s 1 is did not matter to the outcome in *Salt* whether the basis of rescission was a pre-contractual misrepresentation or misrepresentation by a term of the contract.

169 *Shaftsbury House (Developments) Ltd v Lee* [2010] EWHC 1484 (Ch) [66]–[67]. The argument was rejected as an evasion of the (now revoked) Unfair Terms in Consumer Contracts Regulations 1999, see n 86 to 6.23.

170 It is also of first importance in the context of determining whether the statement is addressed by entire agreement and non-reliance clauses, see 4.11–4.14, 4.22.

171 *Leslie v News Group Newspapers Ltd* [2016] EWCA Civ 79 [34] explained that construction proceeds on an objective basis and without reference to the parties' subjective state of mind, so a party's reliance is excluded

Inntrepreneur Pub Co v East Crown Ltd[188] states that the parties' intention is to be ascertained objectively on the totality of the evidence and that inducement and reliance may raise an inference of requisite intention, subject to the all-important question

> whether reliance on the inducement afforded by the representation or promise should be understood as intended to continue and extend to the contract subsequently concluded.[189]

2.43 So, when considering whether a description of a sold article was a term of an oral contract of sale, the majority of the Court of Appeal were prepared to take actual reliance by the purchaser on the description as evidence that the description was a term of the contract, which would not be the case absent that reliance.[190] A representation on which the purchaser of land relied was found to have become part of contractual description of the sold property.[191] From that, it is a short step to suggesting that contractual character of a non-contractual document could be established by acceptance and reliance on it[192] and the proposition that a collateral warranty may "take precedence over the inconsistent wording of even a signed contract . . . on the basis that the effect of the collateral warranty is to misrepresent the primary contract".[193]

Characterisation of statement that is part of written contract

2.44 Whether a statement that is part of an admitted contract operates as a representation or warranty is a question of contractual construction which has a direct impact on a plea of contractual estoppel. The question is not always straightforward and may generate substantial argument and difference of judicial opinion.[194] An express designation of a statement as representation does not of itself exclude the possibility of it being a warranty unless the contract expressly draws the distinction between the two types of

188 [2000] 2 Lloyd's Rep 611.

189 ibid 615, approved and applied by the Court of Appeal in *Business Environment Bow Lane Ltd v Deanwater Estates Ltd* [2007] EWCA Civ 622, [2007] LT & R 389 [46], [60]; *Hanoman v London Borough of Southwark* [2008] EWCA Civ 62, [2009] 1 WLR 374 [47]–[48]. Note that it is critically important for that purpose whether the statement is followed by negotiations and whether the resulting contract has a term that corresponds to the pre-contractual statement. If negotiations followed but there is no such term, it will be harder to infer that the statement was intended to have contractual effect.

190 *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art* [1991] 1 QB 564, 575, 584–585.

191 *Taylor v Hamer* [2002] EWCA Civ 1130 [91]–[92], and this finding was material as it entitled the purchaser to damages in contract. Unusually, it was essential to that outcome that the representation had been fraudulent, inter alia because of the need to avoid application of a term that might have raised contractual estoppel, *Wickens v Cheval Property Developments Ltd* [2010] EWHC 2249 (Ch) [18]–[19].

192 *IFE Fund v Goldman Sachs International* [2007] EWCA Civ 811, [2007] 2 Lloyd's Rep 449 [52], Waller LJ considering a document that expressly declared itself not to "form the basis of any contract" and noting his inclination (contrary to the view of Toulson J at trial) to say that the statements in the document "were contractual terms accepted by [the party] when they accepted the [document] and relied on it."

193 *Thinc Group v Armstrong* [2012] EWCA Civ 1227 [83], and a finding of reliance is a necessary ingredient for that, [93].

194 In *BSkyb Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC), 129 Con LR 147 [394], [397] two statements that were advanced as representations of fact were held to be warranties. In *Olympic Airlines SA v ACG Acquisition XX LLC* [2013] EWCA Civ 369, [2013] 1 LLoyd's Rep 658 [46], [54] the Court of Appeal considered a statement which had been held below to be a representation of fact (and could only raise evidential estoppel) and decided that on the true construction of the contract as a whole, the statement was contractual and raised contractual estoppel.

terms.[195] Conversely, it is quite possible that what appears to be a warranty will be found to be a representation of fact by one party to the other. In that case what appears to be a contractual term will be devoid of effect unless the test of reliance is satisfied.[196]

Warranty confounded with representation

2.45 It has long been recognised that one and the same statement may have effect both as warranty and representation.[197] Drafting technique of designating statements of fact as both representations and warranties is widely used.[198] At times, this has contributed to confusion and produced some difficult case law.

2.46 Bizarrely, it has been held that a contractual statement expressly designated solely as a warranty may found an action in misrepresentation, dubbed "misrepresentation by warranty".[199] The action succeeded on the basis that immediately before the execution of the contract warranties set out in its text constituted representations made at that time, and were relied on when the contract was executed.[200] Subsequent decisions of courts of co-ordinate jurisdiction resisted this surprising notion on the grounds that treating an express warranty as a representation: (1) violated the clear intention of the parties, (2) cut through contractual agreement on distribution of risks and limitations of liability (which did not cover misrepresentation) and (3) was a conceptual impossibility because something that was only ever intended to take effect as an agreed term of contract when

195 Such a distinction was called "most decisive" in *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) [296]; at [300] terms which appeared under the heading "representations" were treated as both representations and warranties. In *NRAM plc v Mc Adam* [2015] EWCA Civ 751, [2016] Bus LR 232 [57] representations in a contract were found to also constitute warranties by reason of "their context and prominence" (they were capitalised and boxed warnings to a consumer borrower).

196 As happened in "evidential estoppel" cases, see 2.05, 4.17–4.19.

197 See eg F Pollock, *Principles of Contract* (7th edn, London: Stevens & Sons Ltd 1902) 524, *Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch) [68]; cf *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC (Ch) 2198 [134] which observed that a warranty of fact does not necessarily exclude an implied representation of reasonableness of opinion on the same fact.

198 Recognised in eg *Man Nutzfahrzeuge AG v Freightliner Ltd* [2005] EWHC 2347 (Comm) [141] which held that the use of two designations is to be construed as a conscious distinction drawn in the knowledge of different characteristics of the two types of terms and intended to give them "a life of their own as representations separate from their life as warranties" ([137]). This technique increases the options available to the party that has the benefit of these statements by allowing it to choose between the causes of action in misrepresentation and in breach of contract, and in consequence between different forms of relief. The widespread use of that technique sometimes results in unsuccessful attempts to impute this dual character to provisions which are only intended as warranties, see *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) [203]. Dual character of a statement may be established as a matter of construction without express designation at all, see *NRAM plc v Mc Adam* [2015] EWCA Civ 751, [2016] Bus LR 232 [57].

199 *Invertec Limited v De Mol Holding BV* [2009] EWHC 2471 (Ch) [363]. The same argument was made in *Welven Ltd v Soar Group* [2011] EWHC 3240 (Comm) [111] without reference to *Invertec*; the argument was accepted and a misrepresentation action only failed for the twin reasons that no actual reliance was found on the evidence and establishing reliance was precluded by operation of a non-reliance clause (a similar clause was construed out of the way in *Invertec* [391]).

200 Importantly, these warranties were not treated as pre-contractual misrepresentations repeated by the contract. It was accepted that prior to the contract the statements never existed other than as proposed draft terms, and both the draft and the executed contract expressed them to be warranties. There was no suggestion that as a matter of construction they were both warranties and representations. By contrast, in *BSA International v Irvine* [2010] CSOH 78 the contract expressly contemplated reliance on contractual warranties as representations.

made, could not have operated before to induce the making of that very contract.[201] This view now prevails at first instance.[202]

2.47 At the appellate level, there is a conflict of dicta along similar lines. It was indicated in *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* that a representation of fact may be implicit in the language of warranty, and an exchange of draft contracts or the proffer of a draft for signature may constitute pre-contractual misrepresentation.[203] A contrary observation in *Leofelis SA v Lonsdale Sports Ltd* has it that a draft is nothing more than an indication that if and when the contract is made the statement shall be made at that time, for the very first time, as a term of that contract.[204] It follows, for instance, that a draft contract could not found an action under section 2(1) of the Misrepresentation Act 1967 since the threshold condition would not be met that the representee enter into the contract *after* a misrepresentation had been made to her.

2.48 The approach in *Sycamore* and *Leofelis* is to be preferred. Both commercial common sense and policy of the law on contract formation militate against the suggestion that an actionable misrepresentation (or, for that matter, a collateral warranty) may be made by nothing more than a proffer, in the course of negotiations, of terms which are intended only to take effect as part of a contract if and when one is made. It is quite implausible that terms proffered in draft should be intended to acquire any sort of life other than as terms of the eventual contract.[205] It is equally implausible that negotiating parties should fathom that when those terms do come to life they should be anything other than what the contract, as made, says they are. The true construction of the contract alone determines whether the terms are intended as warranties only, or as representations only, or as a combination of both, and it is not for nothing that evidence of prior negotiations would not be admissible for that purpose.

2.49 It is to be expected that the parties would ordinarily intend to avoid exposure to liability in misrepresentation purely as a result of negotiating future terms, the more so when these terms are expressly negotiated only as warranties. That intention can be made express and incontrovertible by the inclusion of a contractual provision that negatives the making of representations or agreement of terms outside the contract that is in fact

201 See masterly analysis by Mann J in *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch) [200]–[211], approved and adopted in *Idemitsu Kosan Co Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm) [18]. To like effect are *Harris v Charalambous* [2013] EWHC 1317 (QB) [21] and *General Motors UK Ltd v Manchester Ship Canal Co* [2016] EWHC 2960 (Ch) [62], [104], see n 207. This analysis does not depend on the presence of a non-reliance clause.

202 In terms of rule of precedent, the conflict between decisions in *Invertec* and *Sycamore* would be resolved in favour of the latter, as a subsequent decision that fully considered and rejected the earlier one, see *Colchester Estates (Cardiff) v Carlton Industries plc* (1986) 1 Ch 80, 85. The judgment in *Idemitsu Kosan* both agreed with and followed the decision in *Sycamore*, settling the position at the High Court level.

203 [2002] EWCA Civ 1235 [23]–[25]. Agreed contractual designation of the statement as "representation and warranty" was found to be merely supportive of this analysis and not the primary basis for it.

204 [2008] EWCA Civ 640, [2008] ETMR 63 [141] (obiter). The judgment in *Eurovideo* was cited but the conflict of views was not resolved. The point has been since treated as arguable in *Bikam OOD Central Investment Group SA v Adria Cable sarl* [2012] EWHC 621 (Comm) [27], which analysed possible responses on the basis of both the overall scheme of contractual allocation of risk and reward ([38]) and express contractual exclusion ([45]). In *Idemitsu Kosan Co Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm) [24] a theoretical possibility was recognised that pre-contractual representation may be made by tendering draft wording for a contract but on the facts the proffer of the draft was found to be no more than an expression of willingness to give contractual warranties as part of a concluded contract, [30]. *Leofelis* [141] was not considered.

205 And it is an equally difficult, though distinct, proposition that the proffer of a transaction could constitute conduct by which an implied representation of fact is made (the representation not being in terms of draft contract), argued but not found in *Property Alliance Group Ltd v RBS* [2016] EWHC 3342 (Ch) [406], [407].

executed.[206] But quite apart from any such special provision, that intention ought to be inherent in the nature of negotiation as an adversarial process governed by self-interest in which the parties engage without thereby assuming any duties or responsibilities.[207] This proposition is not undermined by the possibility that a statement made in the course of "subject to contract" negotiations may found a collateral contract in consideration of which or in reliance on which the contract under negotiation is eventually made.[208] That possibility has never been realised by statements put across in negotiations *as proposed terms of the main contract*: such a proposal conveys only an intention to agree terms of the main contract, not to make them into a collateral representation or warranty.

2.50 Reliance on a representation may be disproved if evidence shows that the representee had actual knowledge of facts that contradict the representation.[209] Communication of a draft contract is capable of conveying information to give the would-be representee that knowledge.[210] By the same token, such communication may also convey information which engenders a misapprehension of true facts. In either case it is not the intention of the profferor to convey information; her intention is to make a proposal of contractual terms. True information so conveyed creates an awareness that precludes reliance and defeats an action in misrepresentation, but false information does not become a misrepresentation just because it happens to engender a misapprehension, not unless it qualifies as an actionable representation of fact.[211] It is not reasonable and foreseeable that the recipient of a draft contract should place reliance on it as a statement of fact when the draft is only ever intended as a contractual offer. For a contract to be made, it is necessary and sufficient for both parties to demonstrate objectively an intention to contract on agreed terms. Demonstration of such intention by a party does not of itself constitute a representation of fact in terms of the contract. The other party's expectation that a contract will be made in terms proposed, or her actual intention to make it in those terms in response to an offer, should not be equated with inducement and reliance on a representation of fact. An offer of contractual terms does not of itself invite reliance on them for the truth of what they say, it merely invites a contractual expectation

206 cf *Welven Ltd v Soar Group* [2011] EWHC 3240 (Comm) [113]. There was no such clause in *Eurovideo* but there was in *Leofelis* (though it did not affect the analysis of the point there made). On these clauses, see Chapter 4.

207 *Watford v Miles* [1992] 2 AC 128, 138E. This is subject to a qualifier that each party is able to pursue his own interests "so long as he avoids making any misrepresentations", yet it has never been suggested that this means that the mere proffer of a term to be negotiated could of itself constitute a misrepresentation. The reference is obviously to a representation of fact that was an inducement to make the contact in terms proffered. cf *General Motors UK Ltd v Manchester Ship Canal Co* [2016] EWHC 2960 (Ch) [62], [104] rejecting an attempt to spell out a representation from a draft contract where the representation "was made in the context of without prejudice subject to contract negotiations and would have only come into force if the draft [contract] had been executed."

208 *Business Environment Bow Lane Ltd v Deanwater Estate Ltd* [2007] EWCA Civ 622 [24], [45]. Observe special emphasis put on the point that the collateral contract does not arise at any time before the main contract is made.

209 *Redgrave v Hurd* (1881) 20 Ch D 1, 21.

210 *Reinhard v Ondra LLP* [2015] EWHC 1869 (Ch) [111], [116] (and awareness will be established if the draft is read by the representee even though the representee might think it does not apply to him).

211 See judgment of Lord Reed in *Cramaso LLP v Ogilvie-Grant* [2014] UKSC 9, [2014] AC 1093. A representation made in the course of pre-contractual discussions may produce a misapprehension in the mind of the other party which causes the making of a contract ([16]), but it can have no such effect if the other party "discovers the truth" before the contract is signed ([20]). "Discovery of truth" is a matter of hard fact which exists regardless of intention and may happen by accident. The mere fact of misapprehension is not enough to establish reliance, for there must be a representation that is objectively intended to induce reliance (Spencer Bower, Turner & Handley, *Actionable Misrepresentation* (5th edn, LexisNexis 2014) 6.05); but the mere fact of discovery of truth (by whatever means and whether intentional or accidental) is enough to displace reliance.

that they will be fulfilled, or liability for breach will follow.[212] In *Eurovideo* an offer to make a contract was in effect treated as a contract-inducing representation of fact in terms of the offer. That approach loses the basic distinction between representation of fact and contractual promise, between reliance and contractual intent.

Distinction from promise of truth

2.51 Once it is determined that a statement relied on to raise contractual estoppel is a contractual term, there is a further distinction to be made between contractual terms as a matter of their substantive intent. It is a distinction between a promise that the statement *is the truth* and acceptance of the statement *for the truth*.[213] Traditional intent of factual statements made by contract is that one party promises to the other that the statement is true and *answers for the other's loss if the statement is untrue*.[214] Contractual estoppel gives effect to a very different intent that a party agrees to have her own and the other's rights and liabilities determined *as if the statement were true*. This is an outcome that will not always be adequately substituted by award of compensation for loss.[215] Where a contractual statement is made as a representation of fact, its very form serves to make the court alive to the distinction.[216] The point becomes rather more subtle, but no less real, and acquires major significance where what is in reality a warranty of fact is mistaken for an agreed statement of fact. The mistake has at times been made in academic comment[217] and

212 And it does not matter whether or not the proposal is false to the knowledge of the offering party (particular emphasis was put on a fraudulent "misrepresentation by warranty" in *Invertec* (n 199) [363]). Making a contract in the knowledge that what it says is false will not be fraud because of the falsity as such (it will simply be a case of knowingly accepting liability for the inevitable breach). It will only be fraud if there is no genuine intention to be bound by the contract, and the fraud will be founded not on the falsity of terms but on the falsity of the represented intention to be bound, *Axa Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1 [27]. For a rare example where such representation was found (but fraud was not), see *Maple Leaf Macro Volatility Master Fund v Rouvroy* [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep 475 [329]–[334], affd on other grounds [2009] EWCA Civ 1334, [2010] 2 All ER (Comm) 788.

213 In the former case, a party to whom the statement is made expects it to be factually true, and will have been told a lie if it is not. In the latter case, factual truth is irrelevant, and there can be no lie since there is no expectation of truth.

214 This is so whether the statement is a representation, or warranty, or both: the intent is the same, and the difference lies in the measure of recoverable loss and reliance as condition to recovery.

215 See 3.48–3.51.

216 *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) [303] refers to representations made by contract as "mere representations" which do not raise contractual estoppel. That is, of course, not a hard and fast rule, and the answer lies in the true construction of the contract, not in the form of words, see 2.30, 2.31, 2.35.

217 Andrew Burrows, *A Restatement of the English Law of Contract* (OUP 2016) 78 says that contractual estoppel "may apply to all situations in which a party has warranted that a certain state of affairs exists". He gives an example of a party to a contract for the sale of a business giving a warranty "that equipment is of a certain age, or that there are no outstanding claims against the business, or that the order books are full" and says that "the party giving that warranty cannot then deny that the state of affairs is different than warranted". That leads him to suggest that the situation is not one of estoppel but of breach of contract. This confounds contractual estoppel with liability for breach of warranty of fact. A seller who gives a warranty of fact to the buyer warrants the truth of the stated fact and assumes liability for loss if the warranty proves false; it is inconceivable both that the seller should deny the truth of his own warranty, thereby admitting liability for the buyer's loss, and that the buyer should wish somehow to keep the seller to that truth rather than recover loss suffered when he paid for a business with old equipment, or riddled with claims, or with order books empty. By contrast, a party who agrees that a statement of fact is true thereby agrees to have her position determined as if it were true, so that the falsity need not and may not be relied upon; this outcome is achieved by estoppel.

judicial decisions.[218] Preference ought to be given to observations and decisions which recognise the distinction.[219]

2.52 Application of the distinction requires construction of the contract to determine whether a party has promised that a statement is true (and will answer if it is shown to be untrue) or she has promised to accept the statement as true (and be bound on that basis without inquiring into the actual truth of it).[220] Depending on construction, a recital couched in characteristically neutral terms may either avail a party by contractual estoppel or make her liable in misrepresentation.[221]

"Basis of contract"

2.53 Early cases formulated the principle of contractual estoppel in terms of parties' freedom to agree a certain state of affairs as the basis for their contract.[222] The formulation may be of assistance in applying the distinction between agreed statement of fact and warranty of fact, discussed at 2.51. However, it does not appear that it was intended to lay down a test or attribute which a contractual statement must satisfy before it will raise contractual estoppel. A considerable number of authorities never use the "basis of contract" formula at all, even though they clearly apply the principle of contractual estoppel.[223] Where used, references to "basis of contract" appear to be descriptive, not prescriptive: either of the

218 *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) is a case of contractual estoppel in name but in reality of liability in damages for breach of contractual representation and warranty of fact, see 3.49. Patent inadequacy of an award of damages for breach of what appears to have been a warranty of fact led the courts to give relief by estoppel in *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2016] EWHC 2908 (Comm) and *Merrill Lynch v Commune di Verona* [2012] EWHC 1407 (Comm), see 3.51. See also 3.27.

219 *Raiffeisen Zentralbank Osterreich AG v RBS* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 [255] observed that contractual estoppel "may not be the same as a contractual promise or obligation"; in *BSkyb Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC), 129 Con LR 147 [390], [394], [397] a single clause was found to be made up of a warranty of fact that sounded in damages for breach and an acknowledgment that raised an estoppel. See also n 205 to 5.44.

220 See more at 3.48–3.51.

221 See n 119 to 3.31.

222 *Peekay* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 [56]; *Springwell* [2008] EWHC 1186 (Comm) [567], affd [2010] EWCA Civ 1221 [2010] 2 CLC 705 [143]; *Raiffeisen v RBS* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123 [230].

223 Early examples are *Bottin (International) Investments Ltd v Venson Group plc* [2006] EWHC 3112 (Ch) [154] and *Donegal International Limited v Zambia* [2007] EWHC 197 (Comm), [2007] 1 Lloyd's Rep 397 [465], both cited in *Springwell* [2008] EWHC 1186 (Comm) [562]. Although both cases relied on *Peekay*, no reference was made to "basis of contract" test and the term that raised contractual estoppel was a standalone boilerplate non-reliance clause. Remarkably, on an interlocutory appeal in *Bottin* [2004] EWCA Civ 1368 [67]–[68] the Court of Appeal considered a pre-contract letter by which the parties had agreed the (non-reliance) basis on which the eventual contract was to be negotiated. Counsel sought to persuade the court to find contractual estoppel raised by the letter but the court held that the letter fell to be considered at trial as part of the "whole matrix of fact". At trial, the letter was not discussed and contractual estoppel was raised by a lone non-reliance clause without any reference to "basis of contract". In *Trident Turboprop (Dublin) Ltd v First Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep 581 contractual estoppel was raised by a provision that was part of "as is" lease terms; the formula was not used.

fact pattern,[224] or of the parties' motives in agreeing the statement.[225] The description normally reflects construction of the contract and does not rest on real evidence of the statement's relative importance to the contract or the degree of attention paid to it by the parties.[226] In reality, when made, the description is intended to say no more than that the state of affairs is agreed "for the purpose of" the contract.[227]

2.54 It would be quite contrary to principle to limit contractual estoppel to those statements which form the "basis of contract" in the sense of being definitive of the parties' entire relationship or transaction, or otherwise of a fundamental nature or some special importance in the context of a given contract. As masters of their contractual fate, parties are free to decide by which terms they wish to be bound, however trivial.[228] A term will not be implied unless necessary,[229] but an express term cannot be denied effect merely because it is (or is perceived as) unnecessary.[230] Contractual estoppel may arise as well

224 *Peekay* (n 222) [56] referred to *Colchester BC v Smith* [1991] Ch 448, affd [1992] Ch 421 as a case of compromise "to settle a disagreement as to an existing state of affairs in order to establish a clear basis for the contract itself and its subsequent performance"; the fact pattern in *Springwell* and *Raiffeisen*, n 222, characteristically of investment banking cases, saw a host of provisions scattered around multiple contractual documents come together as a whole to define the nature and character of the investment adventure relationship between the parties and thus form the basis for their dealings, of which a specific agreed element (that raised contractual estoppel) was the absence of advice, duty of care and representations of fact.

225 Nothing at all turns on whether such a motive can be established, and in any even an inquiry into the parties' subjective state of mind is out of bounds in construing the terms of their contract.

226 A remark in *Shaker v Vistajet Group Holdings SA* [2012] EWHC 1329 (Comm) [25] that contractual acknowledgment was "in a real sense the factual basis" for the contract was made in context of construction. If seen as a finding of fact, it would have been reverse engineered from the terms of the contract itself in a self-fulfilling exercise which found the contract to be its own basis. An observation in *Spencer Bower: Reliance-Based Estoppel* (5th edn, Bloomsbury 2017) 8.78 suggests that a receipt clause will raise an estoppel if the evidence shows that the clause "was agreed as the basis for the transaction between the parties, as opposed to the clause being a standard term to which no attention was paid". The observation does not follow from the authorities cited in support: no findings were made in those cases on how the receipt clauses had come to form part of the contracts, and the estoppels were raised on ordinary principles of contractual construction (which include, of course, the need to consider admissible factual background). In one of the cited cases, *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] 1 AC 436 (Gibraltar), the Board decided that if there is a valid contract, the party is "entitled on ordinary contractual principles to rely upon the terms" which raise the estoppel (at [54]), and rejected the attempt to single out the receipt clause from the rest of the contract as allegedly bogus (see 5.42). The observation in *Spencer Bower* was made in the context of discussion how receipt clauses in deeds raise an estoppel notwithstanding the rule in equity that a receipt by deed is never conclusive. That specific issue is considered in Chapter 3, where it is shown that receipt clauses are not affected by the rule in equity where they raise contractual estoppel rather than estoppel by deed (see 3.34). Generally, whether raised by a receipt clause or any other provision in a contract, contractual estoppel does not depend on evidence that the parties had paid special attention to the provision. Ordinarily, where a contract is made, its terms are all equally agreed (cf the exception discussed in 5.26). There is no principled basis for requiring a party to show that a term has been individually negotiated and agreed before that term would raise contractual estoppel, any more than produce a more familiar contractual outcome, such as an award of damages.

227 Compare Martin B in *Horton v Westminster Improvement Commissioners* (1852) 7 Ex 780, 791; 155 ER 1165, 1170: "The meaning of estoppel is this – that the parties agreed, for the purpose of a particular transaction, to state certain facts as true; and that, so far as regards that transaction, there shall be no question about them." *Springwell* [2010] EWCA Civ 1221, [2010] 2 CLC 705 [143] used both "basis" and "purpose" formulations to explain the principle of contractual estoppel.

228 *Pagnan SPA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, 619, endorsed by the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH* [2010] UKSC 14, [2010] WLR 753 [49].

229 *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 [21] (the test is a value judgment of the term's objective necessity to business efficacy of the contract).

230 That is why it would be contrary to principle to adopt as "basis of contract" test the requirement that the agreed state of affairs must be such that the contract can only be operative on the assumption that it is true, *Stirling v Maitland* (1864) 5 B & S 840, 852; 122 ER 1043, 1048. The doctrine of that case is that a party has

from the body of the contract as from recitals, and it follows that to raise the estoppel a statement need not be framed as a recital or have some special quality of recital.[231] Estoppel by convention has been said to arise where assumption of fact is adopted as the basis for the parties' relationship, yet where the assumption is in fact adopted, relief does not depend on subjecting the relative importance or weight of the assumption to a "basis" test.[232] The raising of any reliance-based estoppel does depend on whether the detriment suffered is sufficiently substantial, but this is a facet of unconscionability[233] and has no bearing whatever on contractual estoppel, raised as a matter of contractual right.

2.55 Words of a contract cannot be ignored, however "parenthetical", "throw-away" and detracting from "the clear purpose of the clause" they might appear.[234] It follows that every contractual term is of equal importance and equally binding by virtue of nothing more than being part of a contract. A boilerplate provision is entitled to the same treatment as a negotiated bespoke clause.[235] Boilerplate clauses routinely raise contractual estoppel, with no trace in the reports of an inquiry into whether they had been individually negotiated[236] or had special significance which the other clauses did not.[237] There is no case (and one hopes none will be decided) where a term would not raise contractual estoppel for the reason only that it was seen as purely incidental, circumstantial or not part of the "basis of contract".[238]

2.56 Adoption of a prescriptive materiality test would be wholly unwelcome in view of resulting uncertainty, need for evidence and potential for erosion of basic principles of party autonomy and contractual allocation of risk and benefit which contractual estoppel is designed to promote. No such test is in any event necessary. Where contractual estoppel is raised to answer or supplement a cause of action, it necessarily addresses material issues.[239] Pleading and procedure can take their course, and there is no benefit in creating more taxonomy of contractual terms by reference to "basis of contract".[240]

an implied duty not to bring about the end of a state of affairs that actually exists where its continued existence is necessary for the operation of the contractual arrangement. It is one thing to protect a contract by implying a duty to preserve such actual reality as had objectively informed the parties' decision to exercise their freedom of contract; it is quite another to restrict that freedom by testing agreed statement of facts analytically to determine how necessary they are for the arrangement to operate.

231 In truth, recitals themselves do not have any special "basis of contract" quality, see 3.31.

232 *Spencer Bower: Reliance-Based Estoppel* (5th edn, Bloomsbury 2017) 8.2. The same is true of estoppel by representation: the matter represented may be objectively quite immaterial just as long as it is intended to induce, and does induce, the representee, Handley, *Estoppel by Conduct and Election* (2nd edn, Sweet & Maxwell 2016) 5–011.

233 *Banner Industrial & Commercial Properties Ltd v Clark Paterson Ltd* [1990] 2 EGLR 139, 140F; *Gillett v Holt* [2001] Ch 210, 232E; *Sinclair Gardens Investments (Kensington) Ltd v Poets Chase Freehold Company Ltd* [2007] EWHC 1776 (Ch), [2008] 1 WLR 768 [73].

234 *Shaker v Vistajet Group Holdings SA* [2012] EWHC 1329 (Comm) [21]–[22] where contractual estoppel was raised by a "notwithstanding" clause in a statement of acknowledgment.

235 Possibly subject to the "unusual and onerous" exception in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433. See 5.26.

236 See 5.30–5.31 for the discussion of an exceptional case and whether it should be followed.

237 eg boilerplate deeming, conclusive evidence and receipt clauses (Chapter 3), also non-reliance and entire agreement clauses (Chapter 4; note citation at 4.11).

238 In *Shaker* (n 234) the estoppel was raised in the face of just such an argument.

239 See explanation of "cause of action", with particular emphasis on materiality, in *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, 405. See also 2.60.

240 But there is a real danger of creating more confusion. The formula is reminiscent of drafting practices where representees are expressed to enter into transactions "on the basis of" representations made to them, which connotes reliance. Contractual estoppel is independent of reliance.

2.57 It is open to draftsmen to state expressly that a statement of agreed state of affairs forms the basis of the contract, but this would not be of much assistance. If (as submitted) there is no requirement that the statement must have a special "basis" character, the wording would be at best redundant and at worst would invite unwelcome attention and suggest that the requirement exists after all. If the requirement does exist, the wording would not be conclusive. Temptation to draft the issue away ought to be resisted, lest the story of (now outlawed) "basis of contract" clauses in insurance contracts repeats itself.[241]

Contractual estoppel resolves a matter in issue between contracting parties

2.58 Estoppel by deed was traditionally limited to actions founded on the deed and could not be raised in a collateral action.[242] Contractual estoppel is not so limited, and will be raised in any action where a statement agreed by contract on its true construction resolves an issue between the litigants. Next following paragraphs examine the detail of that proposition.

Contract between claimant and defendant

2.59 For estoppel to be raised by a contract, the estopped party has to be bound by the contract and the estopping party has to be entitled to rely on the contract.[243] A statement in an information memorandum distributed to subscribers to a tax scheme could not be set up to estop claims by subscribers against those promoters of the scheme with whom the subscribers never had any contract.[244] Contractual terms that might have raised an estoppel in favour of a promoter of a collective investment scheme against an aggrieved investor would not avail the promoter as against the Financial Services Authority.[245] An individual who signed a contract that acknowledged his personal guarantee was not estopped from denying the formal validity of the guarantee because he was not a party to the contract and only signed it on behalf of a corporate entity.[246] As between parties to a contract, no estoppel will be raised by a document which is not contractual: so, a disclaimer on a slide in a presentation that was never part of the contract would not raise a contractual bar to an action in misrepresentation.[247] A contract needs to subsist as between the parties to raise the estoppel.[248]

241 See 3.26.

242 *Carpenter v Buller* (1841) 8 M & W 209, 213; 151 ER 1013, 1014–5 (noting that the terms of the deed, though not raising an estoppel, would be evidence in a collateral action), followed in *Carter v Carter* (1857) 3 K & J 617, 645; 69 ER 1256, 1268. For an example in practice, see *Lainson v Tremere* (1834) 1 Ad & E 792, 110 ER 1410, discussed at 7.31.

243 For the position under the Contracts (Rights of Third Parties) Act 1999, see 3.52–3.55.

244 *Brown v Innovatorone plc* [2012] EWHC 1321 (Comm) [896].

245 *FSA v Asset L I Inc* [2013] EWHC 178 (Ch) [120].

246 *Fairstate Ltd v General Enterprise & Management Ltd* [2010] EWHC 3072 (QB), 133 Con LR 112 [73].

247 *Taberna Europe CDO II plc v Selskabet AF* [2015] EWHC 871 (Comm) [120], affd on this point [2016] EWCA Civ 1262, [2017] 2 WLR 803 [16] (but reversed on the point that the disclaimer was an (ineffective) exclusion of liability; rather, it went to the nature and scope of the representations, [20]. On that, see 6.12–6.13).

248 *Riddle v United Service Organisation Ltd* [2004] EWHC 1263 (Ch) [19]: "any estoppel created by the terms of the contract would have lasted only for the length of the contract itself and would not have precluded the second defendant asserting the contrary after the contract had come to an end."

Agreed statement must address a matter in issue between the parties

2.60 In *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd*,[249] the contract stated that each party had not relied on any representations or advice by the other party or its affiliates. In an action for declaratory relief, brought in response to US arbitration proceedings started by the defendant against the claimant's affiliate, the claimant sought a declaration that the defendant was estopped by the contract from making contentions against the affiliate contrary to the agreed statements. The court refused to give a declaration that *as between the claimant and the defendant* the contract conclusively established the absence of misrepresentation, advice or fiduciary duty made, given or owed *by the affiliata to the defendant*, because the declaration would not be addressed to an issue between the parties to the contract.[250]

In *Bottin (International) Investments Ltd v Venson Group plc*[251] contractual estoppel was raised in favour of two out of three co-defendants to a claim in negligent misrepresentation, but not the third who was not party to the contract.[252]

Agreed statement must respond to substance of the issue

2.61 Contractual estoppel will answer a pleading only if in substance the pleading avers a fact or proposition which is disproved by the contract on its true construction.[253] So, a claim by an investor that a bank misrepresented the risk of an investment was barred by the investor's agreement that it understood the risk of that investment.[254] But where the claim averred a misrepresentation of *criteria* applied to the restructuring of a credit instrument, that representation was not covered by the parties' agreement dealing with *risks* of restructuring (even though the criteria had an impact on the risks), and the agreement raised no estoppel in response to that claim.[255] A pleaded misrepresentation of suitability of an investment was not necessarily inconsistent with (and therefore not disproved by) an agreed statement of the arm's length basis of the transaction, and an averment of oral misrepresentation was not answered by contractual acknowledgment that a written document did not constitute advice or recommendation.[256] Contractual statement of non-reliance on certain representations would not raise an estoppel in answer to a pleading of misrepresentations that were outside the scope of the statement.[257] A statement

249 [2012] EWHC 1331 (Comm).

250 ibid [58(i)]. The claim for a declaration was characterised as inappropriate forum shopping, intended to defeat the arbitration against the affiliate, [59(iii)]. On declarations founded on contractual estoppel, see 3.47.

251 [2006] EWHC 3112 (Ch).

252 ibid [155]. The judge observed that it would be "very odd" if the contractual provision were to be ignored in deciding whether the third co-defendant owed the requisite duty of care, but did not act on the observation since the claim was withdrawn.

253 *CRSM v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 [525]–[526].

254 ibid.

255 ibid [527].

256 *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 2793 (Comm) [169]–[170]. It was arguable that the claim could be answered by contractual terms which required the client to make its own assessment of the transaction, but the matter was unsuitable for summary determination since the issue whether a representation was addressed by those terms could depend on the precise circumstances in which the representation had been made.

257 *Roberts v Egan* [2014] EWHC 1849 (Ch) [71]–[72] (confirmation of absence of reliance on representations as to the constitution and operation of an LLP did not extend to representations concerning investment schemes and funding agreements made by the LLP). cf the observation of Stanley Burnton LJ in *Axa Sun Life*

the principle that by a valid agreement the parties may conclusively agree the validity of another, otherwise void, contract is sound, and can be a proper case of contractual estoppel. In *HSH Nordbank AG v Intesa Sanpaolo spa*[14] it was observed that a party was contractually estopped from denying her own assumption of the risk of invalidity of a separate contract. A warranty in a valid and binding loan agreement that separately made security instruments were valid, raised contractual estoppel in *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd.*[15]

Capacity to contract cannot be established by estoppel raised by the same contract

5.06 A corporate entity or public body cannot extend its capacity to contract by estoppel purportedly created by the terms of that very contract.[16] But it is a prior question of law whether the estoppel is sought to be raised to answer the issue of capacity. A party's status as a qualified investor for the purposes of an Italian financial regulation was treated as not involving capacity to contract, and was resolved by application of contractual estoppel.[17]

Whether unenforceable contract can raise estoppel

5.07 A void contract has no contractual effect.[18] Not so with a contract that is unenforceable. An unenforceable contract, such as a guarantee that does not comply with the requirements of section 4 of the Statute of Frauds 1677 or a consumer loan agreement improperly executed within section 61 of the Consumer Credit Act 1974, is one that cannot be enforced by action. It is established that "agreements or securities that are unenforceable are not devoid of all legal effect".[19] That the agreement is unenforceable by procedural action does not mean that substantive rights created by it do not exist or are voided.[20] Contractual intention manifested by the parties can be given effect if that does

14 [2014] EWHC 142 (Comm) [57], [61].

15 [2016] EWHC 2908 (Comm) [55]. See 3.51 for a discussion why the warranty, on a true construction, did not support the estoppel.

16 *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm) [304], [305] (but see 5.05 as to estoppel on the issue of capacity to make a separate contract); *Regione Piedmonte v Dexia Crediop spa* [2014] EWCA Civ 1298 [62]; *Police and Crime Commissioner for Greater Manchester v Butterworth* [2016] All ER (D) 99 (Dec), see [33.1] of the judgment. cf *Westdeutsche Landesbank Girozentrale v Islington BC* [1994] 4 AER 890, 905B: "it is recognised by the plaintiffs in this action that it was ultra vires the council to give this warranty [of capacity] just as it was ultra vires the council to enter into the contract as a whole." Interestingly, where a company or statutory body was given borrowing powers by statute for a specific purpose, it was estopped by a statement in a bond that the funds were borrowed for that purpose, *Hill v Proprietors of the Manchester and Salford Water Works Co* (1831) 2 B & C 544, 109 ER 1245; *Horton v Westminster Improvement Commissioners* (1853) 7 Ex 780, 155 ER 1165 (Martin B). To avoid the estoppel, it would take the company showing that consideration for the bonds was non-existent, or illegal, or contrary to the enabling statute.

17 *Regione Piedmonte* (n 16) [109], [122]–[124]. Contrast with *Dexia Crediop spa v Comune di Prato* [2015] EWHC 1746 (Comm) [249]–[250] where a different provision of the same regulation applied to make the contract null and void for breach of requirement of form; no contention was made that contractual estoppel could assist, quite rightly in light of discussion at 5.05. (The conclusion that the regulation applied to render the contract was void was reversed on appeal, [2017] EWCA Civ 428.)

18 *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23 [21] (contract for the sale of land that did not meet the requirement of signed writing under Law of Property (Miscellaneous Provisions) Act 1989, s 2. Note that a joint and several contract for the sale of land may be void as against one of the joint and several parties and valid as against another, *Marlbray Ltd v Laditi* [2016] EWCA Civ 476, [2016] WLR 5147).

19 *Orakpo v Manson Investments Limited* [1978] AC 95, 106B.

20 *McGuffick v Royal Bank of Scotland Plc* [2009] EWHC 2386 (Comm), [2010] 1 All ER 634 [67].

not involve the bringing of an action.[21] The same is true of raising contractual estoppel: though a method of effectively enforcing a contract, it does so without the need to bring an action on that contract.[22]

Whether agreement that raises estoppel can itself be contractual consideration

5.08 Recognition that a statement of fact may be a contractual promise,[23] coupled with the classic proposition that good consideration may be given by way of exchange of promises,[24] opens up the possibility that consideration for a contract which raises an estoppel may be found in an exchange of the very estoppel-raising promises to agree stated facts or propositions as true. It would satisfy the requirements that consideration must capable of being identified and its recipient must be aware of it being offered.[25] The requirement that some benefit should be conferred both ways[26] will most of the time be satisfied by the mutuality of agreement to admit the truth of a contractual statement, or, where one party only agrees to that, by her obtaining in exchange the benefit of other terms that make up the contract. It assists that the courts are not supposed to inquire into the adequacy of benefit and may be willing accept the very fact that an arrangement has been made as evidence enough that the parties drew some benefit from it.[27]

5.09 The requirement of consideration is so diluted that courts will strive to declare it satisfied in order to avoid commercial intentions of contracting parties being defeated by a technicality.[28] Nevertheless, difficulties may arise, for instance with standalone receipt clauses which may appear manifestly uncommercial. In *Prime Sight Ltd v Lavarello*,[29] contractual receipt for a sum stated as paid in consideration for the assignment of an underlease was held to be binding by way of contractual estoppel, even though nothing

21 *Burgess v Rawnsley* [1975] 3 All ER 142 (joint tenancy automatically severed by an agreement intended to achieve that result through sale but unenforceable for want of writing).

22 Contractual estoppel that is relied on to complement a cause of action in contract will not benefit from that distinction, as the cause of action itself will be barred by the contract's unenforceability. A defensive estoppel, though capable of being raised by unenforceable contract, would be strictly unnecessary in view of the bar to action on the contract that would call for a defence. However, one can conceive of an action brought by a party to the contract whose cause of action is not barred (guarantor in a guarantee or borrower in a consumer loan agreement) even though her defendant's action in reliance on the same contract would be barred. It is also possible that contractual estoppel could be raised by an unenforceable contract in response to an action between the same parties brought other than on that contract (such as a claim for breach of non-contractual duty of care or non-contractual misrepresentation).

23 See 2.18, 2.26.

24 *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, 643–645, 654; more recently, *Cavendish Square Holdings BV v Makdessi* [2015] UKSC 67, [2015] 3 WLR 1373 [296].

25 *PM Project Services Ltd v Dairy Crest Ltd* [2016] EWHC 1235 (TCC) [27].

26 *Makdessi* (n 24) [296]. cf *Spencer Bower: Reliance-Based Estoppel* (5th edn, Bloomsbury 2017) 8.71: a contractual convention cannot be treated as an exchange of promises where it is known that the convention benefits one party only.

27 This was how the Court of Appeal approached agreements for maintenance framed as exchange of mutual promises where in reality the wife alone stood to benefit. In *Goodinson v Goodinson* [1954] 2 QB 118, 126 the very fact that the wife made a promise established that it was "presumably and, indeed, manifestly of value to the husband"; in *Williams v Williams* [1957] 1 WLR 148, 155 a contingent benefit to the husband was enough, and the court would not measure the probability of it actually accruing, "for the court does not inquire into the adequacy of consideration". Another line of cases accepts as consideration what is called "practical benefit" of the type first identified in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, see recent decisions in *MacLeod v Mears Ltd* [2014] EWHC 2191 (QB) [38] and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ, [2016] 3 WLR 1519 553 [48] (which refers also to the notion of commercial advantage to the parties of making the agreement).

28 For a neat expression of this policy, see *Hodgson v Lipson* [2009] EWHC 3111 (QB) [12].

29 [2013] UKPC 22, [2014] 1 AC 436 (Gibraltar), see 2.11–2.13.

had been paid. Since the action in *Lavarello* was a statutory winding up petition which pleaded an unpaid contractual debt, the existence of contract was not there argued but assumed.[30] If the question is asked whether there was any consideration to support the contract, the only possible candidate for consideration by the assignee is the receipt clause itself, which stated that the assignment was made in consideration of "the sum . . . now paid by the Assignee to the Assignor (receipt and payment of which the Assignor hereby acknowledges)". This was not an executory promise,[31] so non-payment of the receipted sum would go not to breach of covenant to pay (against which contractual estoppel could be, and was in fact, raised) but to the very existence of contract because disputing the receipt would dispute the (purportedly executed) consideration.[32] Further, construction of the receipt clause as a mutual agreement to treat payment as already made would have raised the problem of one-sided benefit, in that on its face the agreement would appear to benefit the assignee only, by giving her the underlease free of charge. The problem can be resolved if it is accepted that the agreement to treat the assignment as a sale, not gift, was of sufficient benefit to the unpaid assignor.[33]

Total failure of consideration

5.10 A promise to agree the truth of a statement or proposition is, as it were, self-executed, in that it is completely performed at the time it is made, does not require any further performance and is enforceable by estoppel. Where such promise is accepted as good consideration, it is not possible to conceive of its failure. The test for total failure

30 ibid [54].

31 Which, artificially but unimpeachably, might have been waived at the same time as it was given, ibid [57]. For distinction between receipt and covenant to pay, see 3.32.

32 The contract in *Lavarello* was made as a deed, which allowed the Board not to deal with consideration, ibid [30], though its analysis was entirely contractual, [54]. Had the issue been raised for decision, reliance on formality of the deed might have been a practical answer, though it would not have been intellectually honest; it evades, but does not resolve, a purely contractual problem. This answer would also require deciding whether upon failure of consideration expressed on the face of the deed, the deed fails notwithstanding its form. A deed "always imports consideration" (*Llanelly Railway and Dock Co v London and North Western Railways Co* (1875) LR 7 HL 550, 562; also 2 Bl Comm 446), and evidence can be given to show consideration given in addition to what is "imported" or expressed in the deed (*Clifford v Turrell* (1841) 1 Y & CCC 138, 148–149; 62 ER 826, 830), just as long as additional consideration "stands with the deed and is not repugnant to it" (*Bedell's Case* (1572) 7 Co Rep 40a, 77 ER 470.) It has been observed that if consideration is expressed but fails (for instance, because it is non-existent, or past, or void), then the deed will be a *nudum pactum*, a void contract ((1843) 26 *The Legal Observer* 517, though no authority was cited and a similar point had been dismissed by Heath J in argument in *Rowntree v Jacob* (1809) 2 Taunt 141, 143–144; 127 ER 1030, 1031). The observation is supported by *Hill v Proprietors of the Manchester and Salford Water Works Co* (1831) 2 B & Ad 544, 553; 109 ER 1245, 1248: "It was for the company, if they disputed their liability, to open the estoppel arising from their own admissions, by showing that the consideration of the bonds was illegal, or inconsistent with the statutes under which they acted; or that there was no consideration." Consistently with that, it was said in *Triggs v Staines Urban District Council* [1969] 1 Ch 10, 18–19 that consideration "imported" by the deed is displaced by consideration expressed on the face of it, with the result that the formality of the deed cannot save the intended contract when the express consideration for it is found to be void. In modern commercial practice, it is usual to include express nominal monetary consideration in the deed, or reference to "other good and valuable consideration", which avoids problems of this kind (though this practice, it appears, was not followed in framing the deed considered in *Lavarello*).

33 Which ought to be entirely unobjectionable, and preclude both questioning the value or reality of such benefit and an inquiry into the actual position, unless there were a violation of public policy or a statutory prohibition (such as defrauding the creditors, which conceivably may have been the case in *Lavarello*, but the assignor's trustee in bankruptcy there chose to seek to recover the unpaid price and thereby affirm the transaction, rather than challenge the transaction itself to reclaim the property, as noted at [54]).

of consideration, that "the state of affairs contemplated as the basis or the reason for [performance by the promisor] has failed to materialise or . . . to sustain itself"[34] cannot be satisfied, since the requisite state of affairs will materialise at the time when the agreement is made and will sustain itself, by contractual estoppel, for as long as the agreement subsists.

Rather, contractual estoppel may be raised in answer to a plea of total failure of other consideration. In *ACG Acquisition XX LLC v Olympic Airlines*[35] it was said that lessee of an aircraft could not show total failure of consideration by relying on lessor's failure to deliver contractually compliant aircraft because the lessee would be contractually estopped from establishing the non-compliance. In *HSH Nordbank AG v Intesa Sanpaolo spa*[36] total failure of consideration would not be established, as the claimant was contractually estopped from denying that it had accepted the risk of the state of affairs not being as contemplated.

Finding terms of the contract is a prior exercise

5.11 Contractual estoppel is raised where a statement or proposition is agreed as true by contract. A determination that a contract subsists of necessity involves establishing the terms of that contract. It is not enough to find that "a contract" was made, it is necessary to say on what exact terms it was made.[37] Therefore the finding of true contractual terms is a question of objective intention to make a contract; resolution of that question determines the raising of contractual estoppel, but estoppel cannot resolve the question itself. As contractual estoppel can only arise in consequence of contractual terms, after they have been found and construed, the estoppel cannot enlarge or restrict terms of the contract by which it is raised.[38] This principle is developed in the next following paragraphs which discuss contractual bars to implication of terms, rectification and the raising of reverse estoppels.

Contractual estoppel is no bar to implication of terms

5.12 It has been recently decided at the highest level of authority that construction of express terms and implication of terms are different processes.[39] Yet ultimately both determine what the terms of the parties' agreement are, and both rest on the foundation of objective contractual intention.[40] Implied terms are essentially a continuation of express

34 Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) 223, approved in *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, [2013] Ch 23 [24] and *Patel v Mirza* [2016] UKSC 42, [2016] 2 Lloyd's Rep 300 [13].

35 [2012] EWHC 1070 (Comm) [171] (obiter, and untested on appeal).

36 [2014] EWHC 142 (Comm) [61]–[62] (obiter).

37 *Baird Textile Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737 [59]–[64]; *Cayzer v Beddow* [2007] EWCA Civ 644 [57]: "There can be no contract without some terms, express or implied".

38 Observe the difference from estoppel by convention, see 1.21.

39 *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 [25]–[31], where Lord Neuberger demoted from authoritative guidance to "a characteristically inspired discussion" Lord Hoffmann's view of implication as part of a single process of construction in *Attorney General of Belize v Belize Telecom* [2009] UKPC 10, [2009] 1 WLR 1988.

40 It could be said that the courts are striving to be conspicuously objective in finding implied terms, *Marussia Communications Ireland Ltd v Manor Grand Prix Racing Ltd* [2016] EWHC 809 (Ch), [2016] Bus LR 808 [64]: "the implication of a contractual term under English law does not necessarily depend upon an actual (albeit unstated) agreement or consent by the parties. On the contrary, sometimes a term will be implied which

agreement; they reveal the necessary, intrinsic terms of the parties' intended bargain which have not been made express.[41] Both express and implied terms are equally terms of contract, and there is no reason in principle why contractual estoppel could not be raised by an implied term.[42] Implication is subject to a stringent test of business necessity[43] which means that a term will not be implied to raise an estoppel unless strictly necessary.[44]

5.13 There has been some discussion whether implication of terms could be barred by the very contract into which they are to be implied. In *Axa Sun Life Services plc v Campbell Martin Ltd*[45] a purely textual analysis of an entire agreement clause led to the conclusion that it was not intended to shut out implied terms but the reasoning left

is effectively imposed upon the parties, or to which they are deemed to have consented, merely because notional reasonable people in their position would have consented and there is nothing to show that they did not." In this, an implied term differs from implied representation of fact: for the latter, some conduct by the representor is required, but the former is based on assumption that arises from express terms alone, *Property Alliance Group Ltd v RBS* [2016] EWHC 3342 (Ch) [405]. Reference to an implied term being "effectively imposed" is a figure of speech that is aimed at making it clear that subjective intentions of the parties are irrelevant, and must be read subject to the requirement that implication of terms in fact may not impose terms which the parties have not themselves agreed, *Prometric Ltd v Cunliffe* [2016] EWCA Civ 191 [19]. An "imposition" of terms occurs where terms are implied by law as a necessary incident of the parties' relationship, *Geys v Societe Generale* [2012] UKSC 63, [2013] 2 WLR 50 [55]. Implication of terms by law is said to be made without regard to intention, in that the views of notional reasonable people on the necessity of some incidents to some relationships are so uniform and universally applicable that they come to be enacted by Parliament or set by the common law and will be implied once an objective intention to create the qualifying relationship is established, without inquiry into the necessity of the terms so implied to the actual relationship in fact devised by the parties (but subject to exclusion by express terms agreed by them).

41 *Hamlyn & Co v Wood & Co* [1891] 2 QB 488, 491: the court has no right to imply a term unless upon construction of express terms "an implication necessarily arises that the parties must have intended that the suggested stipulation should exist". The process of implication starts where construction of express terms ends, and that construction is taken into account, *Marks and Spencer* (n 39) [27]–[28]; implication will happen "where court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent", *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85 [35]. Implication may not start at all unless a concluded contract is found, and it cannot complete a contract that is unconcluded by reason of failure to agree on a term that is essential to its formation, *Wells v Devani* [2016] EWCA Civ 1106 [19], [24] (though where the parties have in fact impliedly agreed terms that are essential to the formation of a contract, an implied contract will be found, *Heis v MF Global UK Services Ltd* [2016] EWCA Civ 569; note that the party asserting an implied contract does not benefit from presumption of intention to contract that applies in the commercial context, and carries the onus of showing it, *Modahl v British Athletic Federation* [2001] EWCA Civ 1447, [2002] WLR 1192 [102]; *Assuranceforeningen Gard Gjensidig v IOPC Fund* [2014] EWHC 3369 (Comm) [102]–[103]). Nor can the court, by implication, impose terms that were not agreed by the contract as actually made, *Prometric Ltd v Cunliffe* [2016] EWCA Civ 191 [19], or where it is found that the parties simply never thought of what was to happen, the court cannot assist them, *Estafnous v London & Leeds Business Centres Ltd* [2011] EWCA Civ 1157 [29].

42 In *Littlewoods Retail Ltd v HMRC* [2014] EWHC 868 (Ch) [229] it was argued that an agreement under s 85 of the VAT Act 1994 by HMRC to refund overpaid VAT meant, by necessary implication, an agreement by HMRC that no VAT had ever been due. It was held that a s 85 agreement was not a contract at all, and so was unable to give rise to contractual estoppel. Apart from that, there appears to be no reason why estoppel would not have been raised by the implication. In *Taylor Fashions Ltd v Liverpool Trustees Co Ltd* [1982] 1 QB 133, 159 an estoppel would be established by implication from the agreement of the parties, even though it was framed as a deed. *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] AC 436 [46], [47] makes reference to "express or implied contractual convention" in context which clearly contemplates contractual estoppel, see 7.27–7.28, 7.35.

43 Reaffirmed and developed in *Marks and Spencer* (n 39) [21]–[23], see also *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2, [2017] Bus LR 784 [7] urging that "the concept of necessity must not be watered down."

44 This would take care, in the contractual context, of the prohibition against raising estoppel by construction or implication that originated with Co Litt 352b setting an exacting standard of evidential certainty for formal unilateral admissions, as opposed to contractual promises, see 7.29–7.32.

45 [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1.

open the possibility of an express provision to the contrary.[46] That possibility fell to be considered in *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust*,[47] which concluded that it is conceptually impossible to exclude implication of terms in view of their character as necessary or intrinsic to the contract.[48] An express agreement that no "other" terms are to be implied will be construed to give effect to that principle.[49] This conclusion does not extend to terms implied on the basis of usage or custom or by operation of law, which may be excluded by agreement (subject of course to statutory constraints).[50]

5.14 Although the conclusion in *Compass Group*[51] was reached in reliance on Lord Hoffmann's analysis in *Belize Telecom*, it should hold good both as a matter of authority and principle notwithstanding the treatment that *Belize Telecom* had received in *Marks and Spencer*.[52] In that later case, the Supreme Court focused on the *process* of implication, not its ultimate result. It does not matter by which exact process intrinsic terms of a contract are ascertained, be it construction or implication. Even though at the start of the implication exercise there are no words in the contract which are to be

46 ibid [41]–[42]. The clause used a standard form of words "This Agreement . . . constitute[s] the entire agreement and understanding between us in relation to the subject matter thereof." Stanley Burnton LJ said that implied terms were intrinsic to "the Agreement" and therefore fell within that defined term, and observed: "The Agreement might have included, but does not include, an express specific exclusion of such implied terms". He also said, at [42], that the clause would not exclude terms that "might be implied as a result of matters extrinsic to the written contract, but did not explain what those matters or terms would be. In *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC) [61] an entire agreement clause was interpreted as excluding only such collateral terms as had been the subject of express discussion or consideration, which implied terms would not have been.

47 [2012] EWHC 781 (QB). The issue arose out of a definition by which the contract defined itself to exclude "all other terms, conditions and warranties other than [those] implied by law in favour of [a named party]."

48 ibid [44]. The judge proceeded to find an implied term. On appeal, [2013] EWCA Civ 2013 [92], the finding was reversed for the reason that the proposed implied term was unnecessary in light of express provisions of the contract. However, the Court of Appeal did not decide that the process of implication itself was barred by contractual exclusion. *Compass Group* was not cited in *Marussia Communications Ireland Ltd v Manor Grand Prix Racing Ltd* [2016] EWHC 809 (Ch), [2016] Bus LR 808 which observed, at [79], that non-reliance and entire agreement clauses "tend to exclude the possibility of implied terms" and on that basis suggested that they can reinforce the application of the principle that implication is rendered more difficult where the parties have made "a lengthy and carefully-drafted contract but have omitted to make provision for the matter in issue", *Philips Electronique Grand Public SA v British Sky Broadcasting Ltd* [1995] EMLR 472, 481, endorsed in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] 2 WLR 1843 [19]. It is not in dispute that an entire agreement clause may have a bearing on determining the true contractual intention, and forensic account of it may be taken in (or alongside) the application of necessity test, *Marplace (Number 512) Ltd v Chaffe Street* [2006] EWHC 1919 (Ch) [250], but that makes the clause part of the implication exercise, not something that bars the exercise altogether (see 4.08–4.09, 4.28–4.29).

49 *Barden v Commodities Research Unit* [2013] EWHC 1633 (Ch) [47] considered the effect of contractual clause which said "No other terms or conditions (whether written or oral) shall be included or implied into this agreement": "[the clause] does not have the effect of preventing a necessary implication to make [the contract] work and to prevent commercial absurdity. It simply prevents new additional, supplementary or *"other"* terms or conditions being added." (emphasis retained).

50 *Exxonmobil Sales and Supply Corporation v Texaco Ltd* [2003] EWHC 1964 (Comm), [2003] 2 Lloyd's Rep 686 [24], [27]; *Great Elephant Corporation v Trafigura Beheer BV* [2012] EWHC 1745 (Comm) [90] (as a matter of construction, the contract excluded implication of some statutory terms but not others). cf also *L'Estrange v F Graucob Limited* [1934] 2 KB 394 where a contractual provision that "any express or implied condition, statement or warranty, statutory or otherwise not stated herein is hereby excluded" was a good defence to a claim for breach of implied statutory warranty of fitness.

51 [2012] EWHC 781 (QB) [44].

52 *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, see n 39.

implied,[53] the outcome is that the words are put into the contract with effect from the time it was originally made. The reason why that happens is that without those words "the contract would lack commercial or practical coherence".[54] It follows that implied provisions, just as those that are express, "spell out the terms which the parties have agreed".[55] They reflect the parties' objective intention and are as intrinsic to the contract as express terms. They are enforced in like manner and have the same incidents (eg liability for breach), which ought to include the raising of contractual estoppel where appropriate. On that basis, even though implication of terms is no longer to be conceived of as part of the process of construction, it is not, and does not result in, addition to a contract of extraneous terms.[56]

5.15 Refusal to recognise a self-imposed contractual bar to the discovery of the true contractual intention is consistent with the basis on which a decade-long conflict of authority on entrenched contractual writing was recently resolved. It is now settled at the level of the Court of Appeal that a contract which requires amendments or variations to be made in a particular form will not prevent the parties from making an amendment or variation without observing that form.[57] The reason is that party autonomy is free from any self-imposed limitations.[58] That is a universal principle[59] which determines the inability of contractual estoppel to bar a finding of true contractual intention.

53 Which is the circumstance relied on to distinguish implication from construction, *Marks and Spencer* (n 52) [27].

54 *Marks and Spencer* (n 52) [21].

55 *Great Elephant Corporation v Trafigura Beheer BV* [2012] EWHC 1745 (Comm) [90]. Although this conclusion again relies on *Belize Telecom*, it is supported both by principle and by post-*Marks and Spencer* decisions, such as *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85 [35] ("where court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent") and *Irish Bank Resolution Corp Ltd v Camden Market Holdings Corp* [2017] EWCA Civ 7 [40] (a term will not be implied where it is "substantively inconsistent" with express terms such that the two cannot be construed in a coherent way). The position was neatly put by counsel in *Harrison v Shepherd Homes Ltd* [2011] EWHC 1811 (TCC) [56] where implied terms were called "an unexpressed part of the contract itself"; that is consistent with the distinction between intrinsic and extrinsic terms for the purposes of an entire agreement clause, drawn by the court at [61].

56 This takes implication out of the mischief to which entire agreement clauses are directed, see 4.01.

57 *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, 168 Con LR 59; approved in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2016] 3 WLR 1519. That conclusion follows as a matter of contractual intention and does not rely on characterising the form-prescribing provision as an exemption clause, as was done in *Hughes v Pendragon Sabre Ltd* [2016] EWCA Civ 18 [34]. Note that in *Globe Motors* [109] the court acknowledged difficulties of proof that may arise when an informal variation is claimed, but rejected the suggestion that "strong evidence" would be required and made clear that the normal balance of probabilities standard must apply; that standard was applied in *Four Marketing Ltd v Bradshaw* [2016] EWHC 3292 (QB) [53], see also n 145.

58 *Rock Advertising* (n 57) [34]; also *Globe Motors* (n 57) [100], [119], comparing the position to the constitutional principle that Parliament cannot bind its successors. In response to Shmilovits [2016] LMCLQ 367, 365, a substantial difference is that as an institution, Parliament cannot exercise legislative power except through constitutional formalities which (whatever they are and however set) are an inherent part of its position as an institution, much like rules of procedure are an inherent part of the institution of court (see 1 Bl Comm 163 (at 160–1 it is made clear that this applies to Parliament in its legislative capacity) and Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 268). By contrast, private parties are inherently free of any formal constraints in forming their contractual intention. See also n 59 and n 145.

59 Applicable also to formation of contracts, see discussion of how formalities prescribed by the parties for the making of a contract can be overridden by contrary intention, *Reveille Independent Llc v Anotech International (UK) Ltd* [2016] EWCA Civ 443, 166 Con LR 79 [40]–[42].

Contractual estoppel is no bar to rectification

5.16 It has been long established by high authority that estoppel by deed is liable to be "destroyed" by rectification.[60] In its application to deeds, rectification corrected the injustice that would arise where the law gave effect to a formal instrument without taking account of less formal evidence that might show that the instrument distorted the parties' intentions.[61] Rectification avails parties to simple contracts in like measure: in all cases the principled basis for equity's jurisdiction, and the touchstone of relief, is the self-evident justice of holding contracting parties to their true contract.[62]

5.17 A line of High Court cases has established that a claim for rectification of a contract cannot be precluded by the terms of that same contract (such as an entire agreement clause).[63] Where by mistake a written record of the parties' contract does not reflect their true intention, the record may be rectified, that is, corrected so it shows the terms that were actually agreed.[64] Rectification is concerned with reforming a document that fails to set out the intended terms correctly, not with varying, modifying or extending the terms themselves; the point was memorably made that it is the instrument that is mended, not the bargain.[65] It follows that an inquiry into the true terms of the intended bargain cannot be barred by an entire agreement clause because showing that the record of the bargain is mistaken necessarily shows that the clause is itself "infected" with the mistake.[66] It is only once the rectification exercise is complete that the true terms of the "entire" contract will first appear from the record, as rectified.[67] An entire agreement clause will not stand in the way of that exercise (which in the end determines the clause's own fate), but may be taken into account as evidence against establishing a continuing common

60 *Greer v Kettle* [1938] AC 156, 172. See 7.34.

61 See *Norton on Deeds* (2nd ed, Sweet & Maxwell 1928) ch VIII "*Extrinsic evidence inadmissible to add to deeds*".

62 "No doubt, but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts: so that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified", *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves Sen 317, 318; 27 ER 1055.

63 *JJ Huber Ltd v The Private DIY Co Ltd* (1995) 70 P & CR 33; *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch) [71]-[75]; *Procter & Gamble Co v Svenska Cellulosa AB* [2012] EWHC 498 (Ch) [100]-[106] (no appeal was made against that part of the judgment); *DS Rendite Fonds v Titan Maritime SA* [2013] EWHC 3492 (Comm) [48]; *Rosesilver Group Corp v Paton* [2015] EWHC 1758 (Ch) [34] (the judge noting, parenthetically and as a matter of course, that an entire agreement clause could not stand in the way of a rectification claim); *LSREF III Wight Limited v Millvalley Limited* [2016] EWHC 466 (Comm), 165 Con LR 58 [122].

64 To bring about rectification, it must be shown that the intention to agree the true terms (i) was common, (ii) continued to the point of execution of the record and (iii) had some objective, outward expression (purely subjective inward intentions will not suffice), *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EGLR 71, approved in *Chartbrook Limited v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 [48].

65 *Svenska Cellulosa* (n 63) [105], [109], echoing James LJ in *McKenzie v Coulson* (1869) LR 8 Eq 368, 375. To like effect is *Frederick E Rose (London) Ltd v William H Pim Jr & Co Ltd* [1953] 2 QB 450, 461, approved in *Chartbrook* (n 64) [60]. The decision in *Frederick Rose* is itself an illustration of the point: a contract for the sale of horsebeans would not be rectified though the parties had really meant to buy and sell feveroles. Objectively, they intended to contract for the horsebeans, wrongly believing the word to mean feveroles. To order rectification would have been to mend that bargain. (The decision was made before *Re Butlin's Settlement Trusts* [1976] Ch 251 recognised that rectification is available to correct a mistake in the intended meaning of words actually used.) Arden LJ's dictum that "rectification obviously involves interfering with the sanctity of contract", *Ahmad v Secret Garden (Cheshire) Ltd* [2013] EWCA Civ 1005 [29], appears misconceived: rectification is designed to promote the sanctity of what the parties had truly intended, as established (in line with objective theory of contract formation) by a finding of outward expression of their accord.

66 *JJ Huber* (n 63) 34; *Surgicraft* (n 63) [73].

67 *Millvalley* (n 63) [123].

intention contrary to recorded terms.[68] The clause makes it somewhat more difficult to show "convincing proof" of such intention, required to make the case of rectification.[69]

5.18 That result follows from the understanding of an entire agreement clause as a means to remove legal effect from terms that are extraneous to the contract, not bar the finding of terms that are intrinsic to the very bargain the integrity of which it is designed to protect.[70] It follows that an entire agreement clause that is supposed to guard the four corners of the true common accord from "side, collateral or additional agreement qualifying or adding to" it[71] cannot be a bar to rectification which brings out that accord. It is ultimately a matter of the court's jurisdiction, unaffected by the clause, to decide whether giving relief would correct a mistake in expressing what the parties intended as the "complete" contract or give effect to an extraneous collateral warranty.[72]

5.19 It is debatable whether an entire agreement clause strictly raises an estoppel,[73] but cases which consider its effect on rectification establish a general principle which applies to any contractual terms that do. Contractual estoppel and rectification share the same principled basis of contractual intention.[74] Rectification is designed to reveal it; estoppel is a means of giving effect to what has been revealed. It follows that entitlement to contractual estoppel may be defeated, or indeed established, by rectification.

Mistake

5.20 A case of common mistake of fact or law which nullifies contractual consent and renders the contract void[75] may be answered by estoppel raised by the same contract. This proposition is no more circular than (and in fact follows from) the settled rule that terms

68 *Snamprogetti Ltd v Phillips Petroleum Co UK Ltd* [2001] EWCA Civ 889, (2001) 79 Con LR 80 [32], approving, obiter, a statement from ICF Spry, *Equitable Remedies* (5th edn, Sweet & Maxwell 1997) 612. As a matter of principle, if not strict authority, this proposition is better law than the suggestion made in *Surgicraft* (n 63) [75] that an entire agreement clause cannot be, without more, an indication of the parties' intention unless positive evidence is adduced to show that "either party specifically turned its mind to meaning and effect of [the clause] (even assuming their lawyers did so) or that it played any part in the development of their common intention". The suggestion erodes the principle of objective contractual formation, cf 2.55, 5.30–5.31.

69 *Svenska Cellulosa* (n 63) [131]. Convincing proof is necessary "in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself", *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 521, harking back to *Crane v Hegemann-Harris Co Inc* [1939] 4 AER 662, 664. The real weight of an entire agreement clause in counterbalancing that evidence is rather small; in *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2011] EWHC 503 (Ch) [186]–[189] (affd [2012] EWCA Civ 55) presence of an entire agreement clause was treated as one of mere "cautionary points".

70 The distinction is commonly expressed as one between terms "within" the contract and those arising from dealings "outside" it, see eg *Svenska Cellulosa* (n 63) [100]; cf observations made on an interlocutory appeal in *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69 [41], [59] that an entire agreement clause affects the ascertainment of *contents* of the contract by excluding (extraneous) collateral or side terms but cannot inhibit the ascertainment of *meaning* of (intrinsic) contractual terms, including by reference to extraneous factual material (and see on that n 133 to 4.29).

71 *Svenska Cellulosa* (n 63) [106].

72 ibid [104], [106]–[107]; *Compass Group Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* [2012] EWHC 781 (QB) [44].

73 See 4.26–4.29.

74 *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch) [74] drew a contrast between rectification as founded on mistake and contractual estoppel as founded on "a statement by one party as to his own position which he could expect to be bound by." In truth, contractual estoppel binds a party not to a *statement* but to a *contractual agreement* in terms of the statement, and the record of that agreed statement is itself amenable to be rectified for mistake in capturing the parties' intention.

75 *Chitty On Contracts* (32nd edn, Sweet & Maxwell 2015) 6–015.

of a contract may establish that it is not void for mistake.[76] A contract will be void if both parties were mistaken in making a fundamental assumption which turns out wrong and that renders performance of the essence of the contract impossible.[77] But there can be no mistake if the parties agree to accept the assumption as true regardless of the actual truth of it.[78] A finding of such agreement answers the case of mistake, with the result that the contract subsists.[79]

Terms of a subsisting written contract may be affected by mistake, so that no contractual estoppel can be raised by them. Evidence will be admitted to rectify the instrument, whether the mistake is common[80] or unilateral.[81] In case of common mistake, relief is based on the injustice of holding the parties to a distortion of their true contractual intention.[82] In case of unilateral mistake, the basis for giving relief is the unconscionability of sharp practice by a party who profits from the other party's making the agreement in ignorance of the truth.[83] The principle has been expressed in these terms:

> where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A's conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract that is sufficient for rescission. But it may also not be unjust or inequitable to insist that the contract be performed according to B's understanding, where that was the meaning that A intended that B should put upon it.[84]

76 In cases of common mistake authorities require consideration of contractual terms to determine whether the parties have allocated the risk of mistake as between them, to the intent that agreed contractual allocation of the risk will prevent the contract being void, *Associated Japanese Bank (International) Limited v Credit du Nord SA* [1989] 1 WLR 255, 268; *Chitty on Contracts* (n 75) 6–015 (ii). Consent is not nullified by mistake if the terms to which consent is given accept the risk of mistake.

77 *Great Peace Shipping Ltd v Tsavliris (International) Ltd ("The Great Peace")* [2002] EWCA Civ 1407, [2003] QB 679 [82].

78 It is a question of construction whether the parties did so agree or merely recorded a common assumption that may or may not be mistaken, cf *Golden Ocean Group Ltd v Humpuss Intermoda Transportasi Tbk Ltd* [2013] EWHC 1240 (Comm), [2013] 2 Lloyd's Rep 421 [45]: "The recitals are more naturally read as a statement of the understanding on which the agreement was entered into than a mutual warranty of allocation of risk.[Counsel] did not argue for a contractual estoppel."

79 In *HSH Nordbank AG v Intesa Sanpaolo spa* [2014] EWHC 142 (Comm) the claimant agreed by the terms of a novation contract that it had made its own decision to accept novation of an (arguably void) swap transaction and accepted its risks. The clamant could not deny that it made the novation based on its own judgment but sought to establish that its judgment had been mistaken; it would be precluded from doing so by contractual estoppel, [59]–[62] (obiter). The paradigm case of contractually agreed allocation of risk of mistake is one where a party has warranted to the other that a state of affairs exists, *The Great Peace* (n 77) [76]. An agreement that a state of affairs is taken to exist is different from such a warranty (see 2.51), but it plainly qualifies as an acceptance of the risk and its agreed allocation, in terms that it will rest where it falls.

80 *Brooke v Haymes* (1868) LR 6 Eq 25, a case of recital affected by common mistake, followed in *Greer v Kettle* [1938] AC 156.

81 *Whiteley v Delaney* [1914] AC 132, also a case of misstated recital. Although the judgment indicates, at 143, that relief is given for common mistake, it was found that only one party was mistaken, for the reason that the other party had wrongfully concealed the truth.

82 See 5.16–5.19.

83 In *BCCI v Ali* [2001] UKHL 8, [2002] 1 AC 251 [32] Lord Nicholls suggested that the law would be defective if it failed to provide a remedy in such a case.

84 *Commission for New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, 280B, approved and applied in *Hurst Stores v ML Europe Property Ltd* [2004] EWCA Civ 490 [19]. This way of putting the principle is redolent of estoppel; cf *Snell's Equity* (33rd edn, Sweet & Maxwell 2015) 16–019 which treats *Whiteley v Delaney* (n 81)

The remedy of rectification for unilateral mistake is subject to strict conditions because of its drastic character.[85] If that remedy is to be given to answer a case of contractual estoppel, a party who would raise the estoppel must be shown to have had the requisite degree of knowledge that at the time of the contract the party to be estopped was mistaken as to the terms now relied on to raise the estoppel against her.[86]

Reverse estoppel

5.21 A party who seeks to raise contractual estoppel may find herself estopped from doing that by what has been dubbed "reverse estoppel".[87] To displace contractual estoppel, however, it is not enough simply to show a mismatch between the agreed and the factual state of affairs, since (and that is the entire point of it) the estoppel is raised regardless of actual reality.[88] It would take showing a representation or convention at odds with the contract and meant to be relied on (and in fact relied on) notwithstanding the contractually agreed position.[89] Contractual estoppel has also been argued in response to reverse estoppel.[90] In theory, there is no limit to the number of estoppels barring one another but in practice it would take a rather convoluted, not to say tortuous, relationship between the parties to support more than one or two such iterations.

5.22 There is a conflict of first instance authority on whether reverse estoppel would be prevented by an entire agreement clause. In *Sere Holdings Ltd v Volkswagen Group UK Ltd*[91] it was suggested that an entire agreement clause would bar estoppel by convention because the clause operated to denude of legal effect a promise made in pre-contractual

as authority for the proposition that equity will relieve against estoppel by deed for unilateral mistake by estopping the party at fault from disputing that the mistake was common. Earlier authority rested the relief on the absence of real contractual intention of the mistaken party, *Hartog v Colin & Shields* [1939] 3 AER 566, 568F.

85 *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, 103 Con LR 67 [75] explains that "it is drastic because rectification for unilateral mistake has the result of imposing on the defendant a contract which he did not, and did not intend to, make and relieving the claimant from a contract which he did, albeit did not intend to, make."

86 *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm) [595]. "Shut-eye" knowledge of the mistake will qualify, *Cooper* (n 84) 292F; *Hurst Stores* (n 84) [20]; *Rowallan Group Ltd v Edgehill Portfolio No 1 Ltd* [2007] EWHC 32 (Ch) [15].

87 *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) [534] (in that case, contractual estoppel would arguably be reversed by estoppel by convention or acquiescence); *Springwell* (n 86) [596]–[597] (estoppel by representation was unsuccessfully put forward as reverse estoppel). Cf Co Litt 352b: "estoppel against estoppel doth put the matter at large."

88 *Springwell* (n 86) [597]; *Ceylon Petroleum* (n 87) [544(3)]: "The point and effect of the Non-Reliance Statements is to require the parties to accept a particular state of affairs as true, even if the actual reality was different. One cannot, merely by referring to what is asserted to be the underlying reality, avoid the effect of those provisions." Reverse estoppel failed on that basis in both cases.

89 In *De Tchihatchef v Salerni Coupling Limited* [1932] 1 Ch 330, 345 a representation as to the meaning and effect of the contract raised an estoppel against construing the contract contrary to the representation. A similar representation as to the state of affairs agreed by contract might raise a reverse estoppel. See also 5.27.

90 *Ceylon Petroleum* (n 87) [545]. In response to an action in misrepresentation, the bank pleaded contractual estoppel by a non-reliance clause, this was countered by reverse estoppel by convention, and in response the bank relied on an entire agreement clause by way of further (reverse on reverse?) estoppel. *Parabola Investments Ltd v Browallia CAL Ltd* [2009] EWHC 901 (Comm), [2009] 2 All ER (Comm) 589 [195], [197] considered, obiter, contractual estoppel as a bar to an action brought with the support of estoppel by representation (this was not a reverse estoppel). A trader misrepresented the trading account balance to the customer. The customer succeeded in a claim of deceit, but there was also an alternative claim for an account, or in debt, for the amount of the balance as misrepresented, on the basis that the trader was estopped from denying it. The court decided that the claim would have been completely answered by a conclusive evidence clause in the trading contract; that would have been a case of reverse contractual estoppel.

91 [2004] EWHC 1551 (Ch), [2004] All ER (D) 76.

negotiations, and it did not matter whether the promise was express or arose out of a shared assumption.[92] On a summary judgment application in *Dubai Islamic Bank PJSC v PSI Energy Holding Company*,[93] Hamblen J disagreed. He noted that estoppel by convention could arise out of pre-contractual matters[94] and applied the principle established in rectification cases: like rectification, raising estoppel by convention does not involve an assertion of a collateral or side promise in addition to the main contract (at which alone the entire agreement clause is aimed) but reveals the true terms of the parties' bargain and prevents enforcement of the written contract in contradiction to them. At the trial of the same case, though, Flaux J considered that the entire agreement clause presented "an insuperable difficulty" to the raising of estoppel by convention on the basis that the clause raised contractual estoppel against asserting that "something outside the four corners of the [agreement] had contractual effect".[95] He relied on *Matchbet Ltd v Openbet Retail Ltd*[96] where an entire agreement clause in a later contract was held to exclude an earlier agreement from the matrix of fact admissible to construe the later contract.[97] However, Flaux J's approach is not supported by *Matchbet,* seeing that estoppel by convention was never considered there and the issue was put in terms of effect of an entire agreement clause on admissibility of material relevant to construction. That something is not admissible for construction purposes does not mean that it is inadmissible to raise an estoppel by convention.[98]

5.23 The approach in *Sere Holdings* and *Dubai Islamic Bank* (Flaux J) ignores the distinction between exclusion of extraneous exchanges and ascertainment of intrinsic terms of the contract, discussed in preceding paragraphs.[99] The same principled distinction is engaged in all three cases of implication, rectification and reverse estoppel.[100] Hamblen J's approach to the issue in *Dubai Islamic Bank* has the advantage of uniformity. It would be anomalous if estoppel by convention could be barred by contract where neither implication nor rectification can be so barred. The Court of Appeal has since rejected the suggestion that an entire agreement clause inevitably bars estoppel by representation or convention that qualifies the terms of the contract; there always remains the possibility that the true

92 ibid [25]. This reasoning rested on the finding that the pleaded assumption was not one of fact or law but was directed to the future conduct of the defendant, and therefore was in effect a promise. The argument for estoppel by convention therefore was problematic, as it sought to make binding a promise which could not be binding as a contract, ibid [24] (and see 1.22). The judgment has been cited in support of potentially opposing propositions that an entire agreement clause cannot preclude estoppel by convention as to a shared interpretation of the contract (*Seakom Ltd v Knowledgepool Group Ltd* [2013] EWHC 4007 (Ch) [117]) and that the clause makes the prospects of such estoppel "fragile" (*Jet2.com Ltd v Blackpool Airport Ltd* [2010] EWHC 3166 (Comm) [40]). Both cases also cited *Lloyd v MGL (Rugby) Ltd* [2007] EWCA Civ 153 but that authority found proprietary estoppel raised by an understanding that arose post-contract and was not affected by entire agreement clause by reason of its timing, at [28]. In *Barclays Bank plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm) [90] it was held as a matter of construction that the entire agreement clause could not preclude an estoppel because the estoppel was pleaded on an issue to which the clause was not addressed.

93 [2011] EWHC 2718 (Comm) [72], [83].

94 *Chartbrook Limited v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 [47].

95 *Dubai Islamic Bank PJSC v PSI Energy Holding Company* [2013] EWHC 3781 (Comm) [31].

96 [2013] EWHC 3067 (Ch) [112], [132].

97 The later contract was expressed to supersede the earlier heads of terms made up of a mixture of legally binding and non-binding provisions. Non-binding terms were merely evidence of pre-contractual negotiations and were inadmissible on that basis; it is doubtful that the issue of admissibility of legally binding terms was correctly resolved, see 4.10.

98 *Chartbrook* (n 94) [42].

99 See 5.12–5.14, 5.18.

100 Even though reverse estoppel ex hypothesi arises by reason of something less than contractual agreement, the analogy is apposite by the effect which it has on contractual terms, see 1.21 and 5.27.

construction of the contract and the particular nature of the alleged estoppel lead to the conclusion that "the nature and extent of the estoppel itself may define the limitations of what the contract provides."[101]

Whether signature raises contractual estoppel

5.24 It is a salutary rule of English contract law that in the absence of consent-vitiating factors,[102] it is no defence for a party charged with a signed contract to show that she had not in fact read it:

> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.[103]

The rule is concerned with the content of a contract, not its validity.[104] A signature is an objective manifestation of assent to the entirety of the signed document.[105] It is merely

101 *Shoreline Housing Partnership Ltd v Mears Ltd* [2013] EWCA Civ 639 [17] (interlocutory appeal). The court recognised it as arguable that it was part of the convention itself that no amendment to the contract would be necessary to give effect to it, [15]. Just such a convention (also a representation) was found at trial, *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC) [79], and the estoppel raised by it was unaffected by the terms of the contract, [70]: "The 'entire agreement' clause does not exclude or limit reliance on any established and effective estoppel, either on its express wording or by way of interpretation." This is another instance of protection of contractual autonomy from self-imposed restrictions, see 5.15. Earlier cases which reached the opposite conclusion were decided on their special facts. In *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 1341 (TCC) [589], affd [2007] EWCA Civ 443 [109] it was observed, obiter, that an unusual (in truth, quite unique) provision in an entire agreement clause designed to deal specifically with pre-contractual exchanges would "shut out" the argument that a party was estopped from relying on the entire agreement clause to contend that an oral agreement, allegedly made in the negotiations leading to the written contact, did not become a term of it. In *Lloyd v MGL (Rugby) Ltd* [2007] EWCA Civ 153 [28] an entire agreement clause was found not to be a bar to proprietary estoppel arising from an understanding made *after* the clause was agreed.

102 This is Lord Millett's phraseology in *Agnew v Lansforsakringsbolagens AB* [2001] 1 AC 223, 265A for the factors which enable a party to avoid an apparently concluded contract, such as misrepresentation, undue influence and duress. His Lordship refers to mistake also, but the law of mistake is rather convoluted and in the majority of cases the effect, if any, will be to render the contract void, as will an established defence of *non est factum*, see *Chitty On Contracts* (32nd edn, Sweet & Maxwell 2015) Ch 6.

103 *L'Estrange v F Graucob Limited* [1934] 2 KB 394, 403. Over the page, at 404, the principle is repeated in terms redolent of estoppel: "the plaintiff, having put her signature to the document and not having been induced to do so by any fraud or misrepresentation, cannot be heard to say that she is not bound by the terms of the document because she has not read them." This was echoed by Lord Denning in *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805, 808 when he said that the signature is "irrefragable evidence of his assent to the whole contract." These observations are probably remnants of the earlier approach (see *Harris v The Great Western Rwy Co* (1875–76) LR 1 QBD 515, 530 which suggested that the signing of a contract constituted a representation by the signatory that she had read and agreed the terms, from which she would be precluded from resiling), long since abandoned (see the judgment of Lord Devlin in *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 explaining that the rule cannot be founded on estoppel by representation, as that would make it necessary for the party seeking to establish a binding contract to show actual belief in the other party's assent to it). The observations should now be seen as demonstrating the inherent justice of the signature rule which is not one of estoppel but of policy: "It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community", *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 [43].

104 *Peekay* (n 103) [43].

105 To constitute signature, the writing or impression or electronic reproduction of a name, or a mark meant to represent that name, has to be applied with the objective intention to authenticate the instrument as one that comprises agreed terms, *Caton v Caton* (1867) LR 2 HL 127, 139, 143 (approving earlier authority); *Goodman v J*

presumptive and not conclusive of contractual intention to be bound.[106] It remains open to the signatory to show that notwithstanding the signature, her contractual consent had been vitiated.[107] Conversely, what is intended to be binding will bind though unsigned:

> . . . when a party assents to a document forming the whole or part of his contract, he is bound by the terms of the document, read or unread, signed or unsigned, simply because they are in the contract.[108]

The true test is objective intention to contract, found in assent or acceptance (however manifested) to or of a document of a contractual character, that is a document of which the assenting party knows that it contains "conditions of some sort" and is therefore meant to be contractual.[109]

5.25 An observation in *Peekay*[110] suggests that contractual estoppel may resolve the issue whether terms of a signed contract had been read. The signature block of a letter stated that terms over the signature had been read and understood. Chadwick LJ said it seemed to him that the statement "operated as a contractual estoppel to prevent Peekay from asserting in litigation that it had not, in fact read and understood the [terms]".[111] The observation is unnecessary to bind the signatory to the *content* of the letter; that is already done by the policy rule in *L'Estrange*. As for *validity* of the letter as a binding contract, the observation is a conclusion from a prior premise that the letter was a contractual document.[112] No estoppel is a substitute for genuine contractual consent,[113] much less so contractual estoppel which depends on such consent for its own existence.

5.26 A potential qualification to the rule in *L'Estrange* is the proposition in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*[114] that a particularly onerous or unusual term in standard (unsigned) conditions will not be deemed incorporated into the contract unless sufficient notice of that term was given to the party intended to be held to it. It

Eban Ltd [1954] 1 QB 550, 564; *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA Civ 265, [2012] 1 Lloyd's Rep 542 [32].

106 In *Jervis v Berridge* (1872–3) LR 8 Ch App 351, 359 the "only real agreement" between the parties was verbal and the signed document was not; at 360 Lord Selbourne LC stated that a signed instrument is not a contract by reason of signature "if it is not such according to the . . . real intention of the parties". In *Hursey v Horne-Payne* (1878–9) 4 App Cas 311, 323 he applied the same principle to decide that signed letters did not amount to a contract because they were, in modern parlance, written on a subject to contract basis. To like effect is the rule that the sealing of a deed does not render it binding unless intention to be bound is shown by delivery, *Xenos v Wickham* (1866) LR 2 HL 296, 312. *Golden Ocean* (n 105) [30] drew a distinction between intention to authenticate the instrument and intention to be bound by its terms.

107 The underlying policy was aptly expressed in context of *non est factum* in *Lloyds Bank plc v Waterhouse* [1993] 2 FLR 97, 117D-G where Woolf LJ said that "confusion and uncertainty would be caused if it was too easy for a person to deny responsibility for what is contained in a contract or deed which he has signed simply by asserting that he did not appreciate what he was signing" and that on balance "it is preferable to protect, when appropriate, the position of a defendant who has been misled by the activities of the plaintiff as to the nature of the document which he has signed on the grounds of misrepresentation and breach of the duty not to mislead another party to a written contract as to the nature of that contract".

108 *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125, 134.

109 ibid 136.

110 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511.

111 ibid [70]. None of the other judges subscribed to this view.

112 ibid [60], which was a conclusion made by Moore-Bick LJ on the issue of contract formation. At [63], Chadwick LJ adopted Moore-Bick LJ's reasons.

113 See 1.22, 7.07.

114 [1989] QB 433.

is not a question of that party's actual assent to the term; if such notice is given, then it is again irrelevant whether the condition was in fact read and actually accepted. It has not been decided whether *Interfoto* applies to terms that are set out in a signed contract rather than incorporated by reference to an unsigned document. Preponderance of judicial opinion leans against applying the rule that limits incorporation of unsigned terms to qualify the principle that signature is an objective manifestation of contractual consent.[115] Whatever the limit to its application, to the extent that the *Interfoto* principle does apply to prevent a statement from taking effect as a term of contract, it will inevitably prevent that statement from raising contractual estoppel.

Misrepresentation of content or effect of estoppel-raising term

5.27 Contractual statement that would raise contractual estoppel will not do so if the content or effect of that statement has been misrepresented to the party sought to be estopped. This limit on contractual estoppel was considered in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd*:

> From time to time one party to a contract misrepresents to the other the content or effect of the document which is intended to embody their agreement. In such cases it has been held that the party making the misrepresentation is prevented from enforcing the contract in accordance with its terms. An example is to be found in the well-known case of *Curtis v The Chemical Cleaning and Dyeing Co Ltd* [1951] 1 K.B. 805 in which the defendant was prevented from relying on a general exemption clause on the back of the cleaning ticket after its shop assistant had induced the customer to sign it by telling her that it excluded liability only for damage to beads or sequins.[116]

115 See discussion in *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm) [579]–[586] and *Do-Buy 925 Ltd v National Westminster Bank plc* [2010] EWHC 2862 (QB) [90]–[92]. The upshot is that it would take a provision of an "extraneous or wholly unusual nature" in a signed contract for *Interfoto* to apply but an alternative explanation for holding such provision ineffective might also be available, such as implied misrepresentation of the effect of the document, *Amiri Flight Authority v BAE Systems plc* [2003] EWCA Civ 1447, [2003] 2 Lloyd's Rep 767 [15], and see 5.27. In *Dawson v Bell* [2016] EWCA Civ 96 [37] the court upheld a judgment below which found no basis for applying *Interfoto* to a clause in a signed contract.

116 [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 [44]. The next following para [45] states that the principle does not apply on the facts of the case. The point is made again at [60]: ". . . it was part of the contract between them that Peekay was aware of the nature of the investment . . . . In those circumstances, and since it is not suggested that the bank misrepresented to Mr. Pawani the effect of the documents, I do not think that it is open to Peekay to say that it did not understand the nature of the transaction." These passages show that the decision in *Peekay* followed the principle in *Curtis* by recognising expressly that contractual estoppel provisions could be avoided (without rescinding the entire contract) if *they* had been misrepresented, and noting that no such representation was alleged on the facts. There is no hint of a suggestion (imputed to *Peekay* by Gerard McMeel, *The Construction of Contracts* (2nd edn, OUP 2011) 26.74) that, contrary to *Curtis*, rescission of the entire contract is required to defeat a contractual estoppel provision. McMeel misinterprets the passage at *Peekay* [57] which states that a contractual estoppel provision may be relied on to bar rescission of the entire contract for a misrepresentation that is *not specific to that provision*. The problems that arise from that proposition are discussed in the following paragraphs, but the proposition itself is in no way an attack on *Curtis*. After *Peekay*, the possibility that contractual estoppel may be defeated by misrepresentation that affects the specific clause that would otherwise raise the estoppel was recognised in *Springwell* [2008] EWHC 1186 (Comm) [590] and [2010] EWCA Civ 1221 [2010] 2 CLC 705 [166]; *CRSM v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 [505]; *Standard Chartered Bank v Ceylon Petroleum Corporation* [2011] EWHC 1785 (Comm) [529]; *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), [2011] 2 BCLC 54 [183] (see n 118); *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 2793 (Comm) [157]; *FSA v Asset LI Inc* [2013] EWHC 178 (Ch) [120] (observe a fine distinction made there to conclude that the defence was not made out: "investors who asked about the contract were reassured that they need not be concerned about it, but they were not advised about the legal effect of its provisions").

Curtis v Chemical Cleaning and Dyeing Co[117] has been explained alternatively as a case of misrepresentation which avoids assent to incorporation into the contract of the misrepresented provision,[118] or a misstatement of the main contract which takes effect as a collateral contractual warranty in precedence to misstated terms.[119] In either case, the contract will not take effect as written. In context of contractual estoppel, the issue is whether contractual statement is a genuine agreement to admit untrue facts as true, or a product of misrepresentation, and it is answered as a matter of construction of the contract.[120] However, the misrepresentation contemplated here will only affect the term at which it is directed, without affecting other terms or the contract as a whole. It is an occasion for the determination of a true meaning and effect of contractual statement by which it is sought to raise contractual estoppel, but not for the avoidance of the contract in its entirety. Misrepresentation that might constitute grounds for such avoidance is considered next.[121]

The problem of rescission for misrepresentation

5.28 Where a contract is induced by misrepresentation, that affects the misrepresentee's contractual consent and renders the contract voidable. When the contract is avoided, any estoppel that would be raised by it is necessarily destroyed. This was recognised early on when the judgment in *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* said that a clause which acknowledged absence of inducement by misrepresentation "may be challenged on the grounds that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation".[122] Yet the passage went on to say that the challenge could be met by that same acknowledgment, since there is no reason in principle "why a clause of that kind, if properly drafted, should not give rise to a contractual estoppel".[123]

In strict logic, there is a whiff of circularity about the suggestion that estoppel could be raised by contract to meet a case of rescission for misrepresentation that had induced that same contract. It is unclear how "proper drafting" could logically enable a contractual clause to rescue itself (and then the contract as a whole) from avoidance of the entire contract of which it was part. The issue did not arise for decision in *Peekay*. The averment that the contract had been induced by misrepresentation was disposed of primarily by a finding that the misrepresentation had been corrected by the contract itself.[124] An

117 [1951] 1 KB 805.

118 *Axa Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1 [105]. An example is *Camerata* (n 116) [183]: a term of contract attributed to a corporate investor an acknowledgment that it has received sufficient information to make the investment. This could raise contractual estoppel but the investor was held to be not bound by that term because it had been misled into agreeing to it. In *De Tchihatchef v Salerni Coupling Limited* [1932] 1 Ch 330, 345 a representation as to the meaning and effect of the contract raised an estoppel against construing the contract contrary to the representation.

119 *Axa Sun Life* (n 118) [104]; *Thinc Group Ltd v Armstrong* [2012] EWCA Civ 1227 [85]–[87].

120 *Thinc Group* (n 119) [87] (determination of effect of assurance that misrepresents the contract is "ultimately a question of construction.")

121 It has been suggested that the *Curtis* doctrine is also applicable to "misrepresentation as to the whole of the contents of the document" rather than a separate clause or part of it, *Lloyds Bank plc v Waterhouse* [1993] 2 FLR 97, 120F, but it is unclear how such a representation differs from one that constitutes grounds for avoiding the contract.

122 [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511 [57].

123 ibid.

124 Although the contract had not been read, and no actual knowledge of correct terms could be shown to satisfy the requirements of *Redgrave v Hurd* (1881) 20 Ch D 1, 21–22. It was held, *Peekay* (n 122) [52], that the

alternative ratio was founded on contractual estoppel, and it is material here that the relief sought was damages, not rescission. The form of relief sought makes no difference to the factual issue whether the misrepresentation had induced the contract, but it makes all the difference as an election to affirm the contract[125] which then subsists and is capable of raising estoppel on the issue of inducement.

5.29 Post-*Peekay* cases on contractual estoppel for the most part did not have to address claims for rescission.[126] Typically, a non-reliance clause will raise contractual estoppel against a claim in misrepresentation by disposing of all or some of its factual ingredients.[127] Where there is no claim to rescission,[128] this result can be explained on the basis that a contract subsists until rescinded, and a subsisting contract operates to estop a party from showing facts which, if established, would have led to rescission. Further, a claim to substantive relief other than rescission is in itself an affirmation of the contract.[129] However, that logic does not assist where the relief sought *is* rescission (or it is argued that the contract had been rescinded before the action was brought). More often than not the illogicality can be avoided one way or another.[130] In some early cases it was said that the contract may,[131] and even decided that the contract did,[132] raise contractual estoppel in response to an action for rescission for misrepresentation. There is no escape from the circularity of this

proffer of correct terms was enough to replace inducement by the bank's misrepresentation with self-inducement by the investor's own reckless assumption that the contract would replicate the misrepresentation. In *Watersheds Ltd v Dacosta* [2009] EWHC 1299 (QB) [44] contractual terms had in fact been read (at least in draft) and it was held on conventional principles that any misrepresentation as to the nature of the contract (not found on the facts) would have been corrected by reading them.

125 On election to affirm, see Spencer Bower & Handley, *Actionable Misrepresentation* (5th edn, LexisNexis 2014) Ch 14.

126 In *CRSM v Barclays Bank* [2011] EWHC 484 (Comm), [2011] 1 CLC 701 [521]-[526] *Peekay* was followed although the original misrepresentation was never corrected. The investor was found to be contractually estopped from relying on a misrepresentation which had induced the very contract that he had made. There was no claim for rescission. In *Wickens v Cheval Property Developments Ltd* [2010] EWHC 2249 (Ch) [19] the passage in *Peekay* (n 122) [57] was accepted as authority for the general proposition that clauses disclaiming reliance "ordinarily present an insuperable obstacle" to a claim in misrepresentation, and it takes showing fraud to avoid their preclusive effect on the issue of inducement.

127 See 4.14.

128 That may be due, for instance, to the claimant's unwillingness or inability to give counter-restitution, eg *Barclays Bank plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm) [6]. Although it has been said that rescission is the normal remedy that should be awarded if possible, *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 [24], in practice awards of damages for misrepresentation are far more frequent than orders for rescission, and counter-restitution is a necessary condition of the latter form of relief, *Dunbar Bank plc v Nadeem* [1998] 3 All ER 876, 884H.

129 That is, unless affirmation is found to have occurred prior to the bringing of the action, eg *Barclays Bank plc v Svizera Holdings BV* [2014] EWHC 1020 (Comm) [6].

130 In *Ahmed v Landstone Leisure Ltd* [2009] EWHC 125, [2009] BPIR 227 (Ch) [31] it was held arguable that the conditions relied on to raise contractual estoppel in response to a claim for rescission had not been incorporated into the contract. In *UBS AG v Kommunale Wasserwerke Leipzig GMBH* [2014] EWHC 3615 (Comm) [783] contractual terms could not address the pleaded misrepresentation as a matter of construction. In *Deutsche Bank AG v Unitech Global Ltd* [2013] EWHC 2793 (Comm) [6], [8] the right to rescind had been lost by novation of the contract. Sometimes problems of logic may be suppressed, but not resolved, by means of procedure. In *FoodCo UK LLP v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch) [2] rescission was treated as a remedy only, and in the course of trial on liability contractual terms were considered without regard to how the position might be affected by a claim for rescission. Consider also statutory discretion to refuse rescission under s 2(2) of the Misrepresentation Act 1967. How is the issue of liability to be determined in the face of a contractual estoppel clause if it cannot be known whether an order for rescission would be ultimately made?

131 *Donegal International Ltd v Zambia* [2007] EWHC 197 (Comm) [465], citing *Peekay* (n 122) [56]–[57].

132 *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep 581 [36].

result.[133] On the assumption that a misrepresentation would be established,[134] no other answer to the claim for rescission was given except the terms of the contract sought to be rescinded. The same circularity has recently appeared in the way conditions of relief for misrepresentation were formulated in *Property Alliance Group Ltd v RBS*.[135] It was said that, to succeed on alternative claims for rescission or damages, in addition to the usual ingredients of representation, falsity, inducement and intention to induce, the claimant had to prove that it "is not precluded by contract from advancing its claim".[136] When applied to the claim for rescission, this places on the claimant the burden of proving that the contract she seeks to rescind does not preclude rescission. That (rather novel) formulation can be explained in terms of policy but not logic.[137]

5.30 An attempt to break the logical circle was made in *Morgan v Pooley*.[138] It rested on the possibility of finding (one is tempted to say, inventing) independent contractual consent to estoppel-raising terms. On a sale of property, the sellers completed their Seller's Property Information Form (SPIF). After completion, the buyers asserted that the from contained a misrepresentation and sought damages.[139] The misrepresentation was not established on the evidence but Edwards-Stuart J went on to say that the claim in misrepresentation would have been barred by a non-reliance clause in the Special Conditions:

> In my view, there is a difference between two types of situation. The first is where the non-reliance clause is one of many clauses in a long contract prepared by lawyers which the parties to it may have had limited opportunity to read in detail beforehand. In that situation it might well be argued successfully that the party relying on the clause should not be allowed to do so because the clause falls with the contract when it is avoided for misrepresentation. The second type of situation is like the one here. As I have already explained, the Special Conditions were known to [buyers], or at least to their solicitors, well before they entered into the contract but probably after they had seen the SPIF. It was a short document and the conditions were printed in large type and were easily readable. This, taken together with the early notice that the sellers were entering into the transaction on the basis of the *William Sindall* clause,[140] leads to the conclusion that in the circumstances of this case the non-reliance clause should be given effect.[141]

133 cf *UBS AG v Kommunale Wasserwerke Leipzig GmbH* [2014] EWHC 3615 (Comm) [693] where a contract was sought to be rescinded for misrepresentation, bribery and conflict of interest and the court said, addressing the latter two: "If the transaction can be avoided on those grounds, it is hard to see what independent validity could remain for the [contractual terms]. . . If the [contract] itself is voidable by reason of bribery and/or conflict of interest, the [terms] can have no independent life." The position on misrepresentation can be no different, where one is found. In *UBS*, the contract was rescinded for bribery and conflict of interest but it was found there had been no misrepresentation, at [913].

134 In *Donegal* (n 131) [458] the primary finding of fact was that there had been no misrepresentation, so the observation was strictly obiter. In *Trident*, n 132, the decision was reached purely as a matter of construction of the contract and a summary judgment was given dismissing the misrepresentation claim without inquiry into the facts.

135 [2016] EWHC 3342 (Ch).

136 ibid [2], [207].

137 See 5.36–5.38.

138 [2010] EWHC 2447 (QB).

139 There was no claim to rescind the contract but the judge was obviously not content with relying on that circumstance alone.

140 This was a clause in the Standard Conditions which stated that the information supplied in the SPIF was provided on the basis of the sellers' best knowledge only and referred to *William Sindall plc v Cambridge County Council* [1994] 3 All ER 932. The judge noted (n 138, [109]), that the effect of the clause was to displace the implied representation that the sellers had taken reasonable steps to ascertain the truth of their SPIF answers. Although not expressed in these terms, the wording of the clause and this observation suggest that the clause raised contractual estoppel against that implied representation.

141 [2010] EWHC 2447 (QB) [114].