EQUITABLE ESTOPPEL: UNPACKING A DOCTRINE

1. Introduction

The aim in this article is to float an idea. It is that the time has come to discard completely the notion of equitable estoppel - or, more particularly, to discard the notion that there is a 'doctrine' of equitable estoppel. Instead, we should dig a little deeper and ask what exactly the law is doing in these 'estoppel cases' and why it sees fit to do it. On examination, the estoppel cases do not appear to be united by a common theme or doctrine. Rather, they seem to be discrete examples of equitable intervention into the law of obligations - interventions into the law of contract, unjust enrichment and tort. If this is true, then acknowledging it outright would simplify legal analysis and improve remedial predictability. The potential for unpacking the doctrine of equitable estoppel in this way is the focus of this article.[1]

As undergraduates, the received wisdom was that equitable estoppel (and perhaps common law estoppel too) was a 'doctrine'. This made the area sound as if it had parallels with the 'doctrine of contract'. Equity's aim, in line with its general role, was seen as being to prevent representors (E in this article) from relying on their strict legal rights when it is against conscience to do so. Put succinctly, it seemed that equity would intervene whenever E was somehow responsible for the fact that a representee (C in this article) would suffer some detriment if E insisted on his or her strict legal rights. Estoppels could be classified

[1]The idea is not completely new, although previously it seems only to have been suggested in the context of individual cases or limited groups of cases: see, example, Allen, D.E., 'An Equity to Perfect a Gift' (1963) 79 LQR 238, Atiyah, P.S., 'When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity' (1976) 92 LQR 174, Gardner, S. 'Rethinking Family Property' (1993) 109 LQR 263.

according to the form which E's representation might take (i.e. silent and passive acquiescence, or more active encouragement, or the making of an express promise or representation); they could also be classified according to the subject matter of the representation (i.e. representations in respect of proprietary rights or in respect of personal rights); and, finally, they could be classified according to the form of remedy (i.e. a remedy granting an interest in property or a personal remedy). All these different approaches certainly help to organise a mass of previously decided cases, but they do not have much predictive value.

To devise a classification system which has predictive value, it is necessary to have a very clear sense of what the 'estoppel doctrine' is trying to achieve. It is not enough to say that it is driven by a desire to prevent unconscionability. At one level or another this is the goal of the entire legal system, and it tells us nothing of the form of intervention (if any) that is most appropriate in the given circumstances. This is the nub of the problem - we do not seem to know exactly what the estoppel doctrine is trying to do. We do not know what particular unconscionability is motivating equity's intervention.

These fundamental uncertainties suggest that equitable estoppel, despite its doctrinal tag, lacks a doctrinal underpinning. It is not like the doctrine of contract, where the various rules of contract are unified by a desire to enforce and protect mutual promises. Nor is it like the various aspects of tort law. The law of tort has a clear overarching focus, and its various manifestations, such as the law of nuisance or of negligence, which have their own internal coherence. This is not true of the various manifestations of estoppel. Estoppel cases can be classified according to the form of representation but then there is no coherent remedial response; they can be classified according to remedial response and then there is no obvious coherence in the scenarios driving that response.

This lack of a doctrine suggests that the category of 'equitable estoppel' has to be 'unpacked', as modern jargon would have it. The thesis advanced here is that equitable estoppel is simply equity making its contribution to unjust enrichment law, tort law, contract law and possibly its offshoot, the law of promises and gifts. In *Silovi Pty Ltd v Barbaro*,[2] for example, Priestley JA (with the concurrence of Hope

[2](1988) 13 NSWLR 466, at page 472.

and McHugh JJA) said: 'Equitable estoppel operates upon representations or promises as to future conduct, including promises about legal relations. When certain conditions are fulfilled, this kind of estoppel is itself an equity, a source of legal obligation.' Is this not just a complicated way of saying the facts give rise to contract, tort, unjust enrichment or other obligations? Outright recognition of this seems far more attractive than its alternative, which is to embrace equitable estoppel as a discrete source of obligation.[3]

The sense that the estoppel label is disguising something more fundamental is reinforced when it is realised that, on any given facts, the end result seems to be the same regardless of whether the court bases its analysis on the 'doctrine' of equitable estoppel, or on the 'principles' of constructive trusts, or on whichever seems more appropriate as between the law of unjust enrichment, the law of contract and the law of tort.[4] In fact, even as late as the 1800s there was no doctrinal classification headed 'estoppel'. Early cases which are now classified as estoppel cases were often argued on contractual principles[5] or on the basis of resisting fraudulent assertions to real property rights. This sense that there is some more fundamental underpinning to equitable estoppel is further reinforced by cases which deny that these various routes are independent alternatives to remedy.[6] This denial would be impossible if the claims were truly independent, as are claims in contract, tort and unjust enrichment.

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[3]Although see Allen, D.E., 'An Equity to Perfect a Gift' (1963) 79 LQR 238, at page 246; Spence, M., *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (1999, Hart Publishing, Oxford).

[4]See *Grant v Edwards* [1986] Ch 638 (CA), at page 656 *per* Browne-Wilkinson VC; *Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL); *Gillies v Keogh* [1989] 2 NZLR 327 (NZ CA), at page 330 *per* Cooke P; *Baumgartner v Baumgartner* (1987) 164 CLR 137 (Aust HCt), at pages 152-154 *per* Toohey J; *Thomas v Fuller-Brown* [1988] 1 FLR 237. Also see the generally critical comments of Cooke P in *Phillips v Phillips* [1993] 3 NZLR 159 (NZ CA) in relation to equitable estoppel.

[5]*Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 (PC).

[6]See for example, *Lloyds Bank plc v Carrick* [1996] 4 All ER 630 (CA).

What follows is an overview of equity's possible contributions - via equitable estoppel - to the law of gifts and promises, to contract, to unjust enrichment, and perhaps even to tort. The conclusion is that this perspective, which sees equitable estoppel as contributing to various aspects of the law of obligations, is preferable to the perspective which sees equitable estoppel as an independent doctrine providing self-standing rights and obligations. This 'unpacking' of equitable estoppel, redistributing its input under the various heads of the law of obligations, would certainly result in an expansion of these areas. But such expansion would be accompanied by a clear sense of where the action is focused - what common law of equitable rules are being relaxed, how far that relaxation can reasonably be pushed and, perhaps most importantly, what remedy is the most appropriate response.

2. Outline of the Traditional View of Equitable Estoppel

The traditional view of equitable estoppel is well known, and needs only very brief rehearsal here. The three essential elements of equitable estoppel (including proprietary estoppel[7]) are that C acts to her *detriment* in *reliance* on an *assurance* given by E that she has or will be given a particular interest in E's property (in the case of proprietary estoppel) or a particular relief from the exercise of E's personal legal rights (in the case of promissory estoppel). In either of these circumstances E will be prevented from relying on his strict legal rights.[8] As to the first requirement, many things will count as a detriment to C. In the context of proprietary estoppel, often the detriment is found in C's expenditure on E's property; but sometimes expenditure on C's property will do, where the full enjoyment of the expenditure is dependent on acquiring

[7]Proprietary estoppel is merely a particular example of the general situation, and it has to be said that there no longer seems to be any good reason to segregate instances of proprietary estoppel from those of promissory estoppel: see *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (CA), at page 103 *per* Robert Goff J (at trial), and at page 109 *per* Goff LJ; *Crabb v Arun District Council* [1976] Ch 179 (CA), at page 193. But contrast Baker, P.V. and P. St. J. Langan, *Snell's Equity* (1990, Sweet & Maxwell, London), at page 570.

[8]*Ramsden v Dyson* (1866) LR 1 HL 129 (HL); *Willmott v Barber* (1880) 15 ChD 96.

a right over E's land.[9] Detriment may also be found in C's provision of services to E, whether or not those services enhance the value of E's property.[10] The second requirement, C's reliance, is not controversial. The final requirement is that C's belief has been encouraged by E (or E's agent or predecessor in title). This may be achieved actively, by E's direct or implied request to C to act;[11] it may also be achieved passively if E stands by in silence knowing of his own rights and of C's mistaken beliefs, and allows C to act to her detriment in reliance on those beliefs.[12] The precise remedy is then said to be at the discretion of the court. Sometimes it is to have the expectation made good, so far as this may fairly be done between the parties,[13] perhaps with some payment by C in return for obtaining a proprietary interest from E.[14] At other times it is something less, often described as 'the minimum equity to do justice to C',[15] a sentiment which suggests preservation from unwarranted harm rather than the making good of expectations.[16]

3. Equitable Estoppel as Part of the Law of Gifts and Promises?

We are all familiar with the idea that the common law enforces contracts, not gifts. According to the common law, a gift is of no value to the donee until it is fully executed. Equity mirrors this sentiment, albeit less rigorously. The rigour is reflected in equity's maxims: 'Equity will not perfect and imperfect gift' and 'Equity will not assist a volunteer'. Moreover, equity's presumption of a resulting trust is a

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[9] *Crabb v Arun District Council* [1976] Ch 179 (CA).

[10] *Basham (dec'd) Re* [1986] 1 WLR 1498 (ChD).

[11] *Pascoe v Turner* [1979] 1 WLR 431 (CA); *Inwards v Baker* [1965] 2 QB 29.

[12] *Ramsden v Dyson* (1866) LR 1 HL 129 (HL), at page 141.

[13] See for example, *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; *Pascoe v Turner* [1979] 1 WLR 431 (CA).

[14] See *Crabb v Arun District Council* [1976] Ch 179 (CA), where payment was considered but not imposed in the circumstances.

[15] *Crabb v Arun District Council* [1976] Ch 179 (CA), at page 198 *per* Scarman LJ.

[16] See for example, *Raffaele v Raffaele* [1962] WAR 29 (WA SCt), where C was given an equitable lien for expenditures.

presumption against gift-giving where the intentions of the donor are unclear. But equity is not quite as dogmatic as the common law. It does sometimes assist volunteers. If an intending donor has done all that needs to be done by the donor personally, and has put it beyond his or her powers to recall the gift, then equity will regard the gift as effective.[17] The donee is then seen by equity as having the equitable title to the gift, and anything which remains to be done to perfect the gift at law can be done either by the donee or by some third party.

The issue for this article is whether this is equity's only contribution to the law of gifts, or whether the equitable estoppel cases suggest that equity is prepared to go further than this, and to intervene even earlier to *compel* the donor to act to perfect a promised gift. Some of the older proprietary estoppel cases might seem to support the possibility. In *Dillwyn v Llewelyn*,[18] for example, a father promised to make a gift of a farm to his son. The father had not put anything in writing, so he had certainly not done 'all that the donor was required to do . . .' to make the gift effective in equity. Nevertheless, the court enforced the promise. It did this because the son had detrimentally relied on the father's assurance, and it would be unconscionable for the father to go back on his word. But a closer examination of the case renders the inference of compulsory gift-giving less certain. It is not at all clear from the judgments whether the decision rests on an analogy with part performance and the enforcement of unenforceable contracts (unenforceable for lack of writing), or on some equity to perfect an imperfect gift, or on a separate doctrine which was inherent in the estoppel cases cited to the court. Lord Westbury said, 'I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made. The case is somewhat analogous to [part performance].'[19]

Given this uncertainty, it is impossible to read the case as unequivocal confirmation that equitable estoppel adds anything to

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[17]*Milroy v Lord* (1862) 4 De G F & J 264, 45 ER 1185; *Re Rose* [1952] Ch 499.

[18]*Dillwyn v Llewelyn* (1862) 4 De GF & J 517.

[19]*Ibid*, at page 521.

equity's existing role in perfecting gifts.[20] *Re Basham (dec'd)*[21] comes closer to providing support. However, that case is outside the mainstream[22] and the facts can perhaps be analysed in other ways. This case aside, the more usual response is to deny equitable intervention, notwithstanding that the donor gave distinct assurances of an intended gift and the donee acted detrimentally in reliance on the assurances.[23] *Taylor v Dickens*[24] - the case of the gardener promised a bequest of the widow's house in her will - is a typical example. The court in that case denied that it had jurisdiction to hold a person to a promised gift simply because the court thought it unfair, unconscionable or morally objectionable for the promisor to go back on the promise.[25] The gardener's detrimental reliance was not enough to compel intervention. Instead, what the courts seem to want in these cases is detrimental reliance *asked for or agreed as the price* for an irrevocable promise to make the transfer in the future (either by will or inter vivos). Such an arrangement is, in legal terms, a contract.[26]

This contract-based approach has already been noted in the judgments in *Dillwyn v Llewelyn*.[27] It is evident in *Raffaele v Raffaele*.[28] It also seems to underpin the approach adopted in *Wayling v Jones*.[29] These cases suggest that equity is looking to enforce contracts, not

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[20]Although see the argument advanced in Allen, D.E., 'An Equity to Perfect a Gift' (1963) 79 LQR 238.

[21]*Basham (dec'd) Re* [1986] 1 WLR 1498 (ChD). Also see *Pascoe v Turner* [1979] 1 WLR 431 (CA).

[22]See *Taylor v Dickens* [1998] 1 FLR 806 (ChD), which criticised the case as providing too general and generous a statement of the true legal position.

[23]See *Combe v Combe* [1951] 2 KB 215.

[24]*Taylor v Dickens* [1998] 1 FLR 806 (ChD). Also see *Gillett v Holt* [1998] 3 All ER 917 (ChD).

[25]Also see *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204.

[26]And if the contract is unenforceable for want of writing, then the appropriate remedy may lie in unjust enrichment: see sections 4.3 and 5 below.

[27]*Dillwyn v Llewelyn* (1862) 4 De GF & J 517. See note 19 above.

[28]*Raffaele v Raffaele* [1962] WAR 29 (WA SCt), although note that the remedy does not seem consistent with the analysis.

[29]*Wayling v Jones* (1995) 69 P & CR 170 (CA).

gifts. In short, it seems that equity does not intervene to perfect an imperfect gift that the donor is still in a position to recall. Equitable estoppel does not add to the law of gifts and promises in this way.[30] It intervenes only outside that arena, when other obligations need to be enforced.

4. Equitable Estoppel as Part of the Law of Contract?

Almost instinctively, contract seems an appropriate head for instances of promissory estoppel.[31] Promissory estoppel arises where E makes an unambiguous promise or assurance to C, whether by words or conduct, which is fully intended to affect their legal relations (contractual or otherwise) and, before it is withdrawn, C acts to her detriment upon the promise. In these circumstances E will not be permitted to act inconsistently with the promise.[32] The classic example is where E, as a landlord, agrees to accept a reduced rent from C, a tenant. The landlord cannot thereafter demand the full rent retrospectively (although he can give notice of his prospective intention to do so).[33]

Despite this intuitive attraction, the problem with attempting to classify many equitable estoppel cases as cases of contract is that they do not seem to fit the strict common law model of enforceable contracts. Perhaps the parties lacked an explicit intention to contract, or perhaps there was no clear consideration, or perhaps the necessary formalities had not been complied with. In each of these areas, however, equity takes a slightly more relaxed attitude to the requirements for a valid contract. If this more relaxed attitude comes with an equitable estoppel tag, then it seems preferable to recognise explicitly what is really being done to the law of contract. We are then in a better position to assess how far we want the relaxation to proceed.

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[30]However, without enforcing the promise, it may remedy any unjust enrichment which results to the promisor because of unwarranted reliance by the promisee: see section 5 below.

[31]The same is not so obviously true of cases of proprietary estoppel.

[32]*Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130. Also see Baker, P.V. and P. St. J. Langan, *Snell's Equity* (1990, Sweet & Maxwell, London), at page 571.

[33]*Ibid.*

4.1 Intention to Contract

There can be no binding contract unless the parties intend to create legally enforceable obligations. The assessment of this intention is objective. What can reasonably be assumed from the parties' conduct? Sometimes this assessment is made by looking at the form of the assurance. Sometimes it is made by looking at detrimental reliance.[34] In part, the equitable estoppel cases do seem to draw distinctions based on an assessment of some form of intention to contract. This is illustrated especially in the distinctions drawn between cases such as *Taylor v Dickens*, on the one hand, and *High Trees*, on the other.[35] This instinct that the courts are really searching for an intention to contract is made even more evident by claims that promissory estoppel depends upon affirmative proof that E intends his promise to affect the legal relations between the parties.[36] Moreover, that intention must be real; it cannot be induced by threats or coercion.[37]

This idea that an intention to contract is important gains still further support from cases on sunk investments, cases where the courts have to deal with detrimental reliance by one party on the pre-contractual negotiations between the parties. The short answer to these disputes is often that there is no contract between the parties requiring one to pay for the expenditure incurred by the other, and so there is no remedy.[38] *Waltons Stores (Interstate) Ltd v Maher*[39] is a case which goes against this trend, but nevertheless it illustrates the analysis being argued for here. In that case it was crucial to the court's decision that the

[34]Then there seem to be parallels with part-performance: the actions can only be explained by the existence of some contract, and are consistent with the contract alleged.

[35]See notes 24 and 31 above, respectively.

[36]Although see *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (CA), at pages 107 and 109.

[37]See for example, *D & C Builders Ltd v Rees* [1966] 2 QB 617.

[38]*AG (Hong Kong) v Humphreys Estate Ltd* [1987] 1 AC 114 (PC).

[39](1988) 164 CLR 387.

defendants' conduct might reasonably be viewed as demonstrating their intention to be bound by the contract.[40]

However, if this is all that is being done, then equity does not seem to be reaching very far into the law of contract, at least as it relates to relaxing the assessment of an intention necessary to create a binding contract. But in one particular arena the push of equitable estoppel appears to be much more dramatic. This is in the arena of 'family property' disputes.[41] In these cases the courts look for an express agreement to share,[42] or they look for an inferred agreement to do the same.[43] These days, the inference of an agreement seems to come down to social expectations, much as the law of the merchant inspired developments in commercial law in the past. All of this might seem to lend still further support to the allegation that a contractual analysis underpins quite a number of equitable estoppel cases. But these cases

[40]This is only one of several requirements for a binding contract. However, as noted below, whatever the defendants' intentions (assessed objectively), the absence of a concluded written agreement in this case remained a problem in the plaintiff's assertion of any contractual claims. Unless the absence of writing could be excused on other grounds, this case might have been better analysed in tort - see section 6 below - and even then equity would need to expand upon the current traditional approaches. For the sake of completeness, it should be noted that an unjust enrichment analysis would not be appropriate here, since the defendant would not be enriched by the plaintiff's work unless the disputed contract was concluded.

[41]At least as these cases are analysed by the UK courts. Superficially the analyses adopted in different jurisdictions are dramatically different, although the end results are remarkably similar. In Australia the driving force is 'unconscionability', in New Zealand it is 'reasonable expectations', but in both jurisdictions the analysis seems to lead to much the same contract-style remedy. In Canada, the driving force is 'unjust enrichment'. Doctrinally this is a very different analysis, but because of the way enrichment is assessed in these cases (seemingly based on C's expectations of benefit rather than E's enrichment), here too the remedies awarded are often the same as in other jurisdictions.

[42]*Eves v Eves* [1975] 1 WLR 1338; *Grant v Edwards* [1986] Ch 638 (CA). The courts have not so far, it seems, treated this intention to share as an intention to create a trust (although see Nourse LJ in *Grant v Edwards* [1986] Ch 638 (CA)), but the fiduciary analogies proposed by Simon Gardner may eventually come down to much the same thing: see Gardner, S., 'Rethinking Family Property' (1993) 109 LQR 263.

[43]*Pettitt v Pettitt* [1970] AC 777 (HL); *Gissing v Gissing* [1971] AC 886 (HL).

are not so easily boxed. In truth there is rarely any real intention to contract. Social expectations do not inevitably suggest that property sharing has been agreed.[44] So, although the courts' general approach is simple enough, and perhaps inherently defensible, the real difficulty with these cases is their context. Express agreements are rare, and inferred agreements are often fictions in search of a remedy.[45] Statutory intervention seems to be the only way to rationalise this area of the law.[46] Certainly this degree of relaxation of the rules relating to intention to contract seems unwarranted and hazardous if it is to be seen as of general application.

4.2 Consideration

Even with the necessary intention to contract, there will be no binding agreement unless the parties have provided consideration. In many situations where equitable estoppel is alleged, especially proprietary estoppel, it is easy to find the necessary consideration. If E makes a promise in order to induce C to do (or refrain from doing) some act, and C agrees, then there is a contract. Both parties have provided something of value to the other at a cost to themselves. In *Giumelli v Giumelli*,[47] for example, the parents promised land and other benefits to their son in return for work, other services, and his agreement to live locally.[48]

At other times, and especially with promissory estoppel, the contractual analysis is more difficult. When there is a bare representation that E's existing legal rights will not be enforced to the letter, it is often said to be impossible to find consideration moving from C to

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[44]*Lloyds Bank plc v Rosset* [1991] 1 AC 107 (HL); *Coombes v Smith* [1986] 1 WLR 808.

[45]See for example, *Greasley v Cooke* [1980] 1 WLR 1306 (CA). The inference of an agreement (a contract) is often not so far-fetched when the dealings are between strangers or more distant family members, rather than partners: see for example, *Sharpe (a bankrupt) Re* [1980] 1 WLR 219 (ChD).

[46]Gardner, S., 'Rethinking Family Property' (1993) 109 LQR 263.

[47]*Giumelli v Giumelli* (1999) 161 ALR 473 (Aust HCt).

[48]And his construction of a house can be seen as part of carrying out the deal. It proves the agreement; it does not provide consideration for it.

support the contractual enforceability of the promise. This is especially so where C seems to benefit from the arrangement, not to suffer a detriment: then, where is the consideration supplied by C? But this approach seems to ignore the realities of these sorts of arrangements. For example, when E's promise allows C to pay a reduced rent, the arrangement does not signify a munificent intention on E's part to make a gift to C.[49] It is usually a self-interested arrangement promoted by E because it seems preferable to have C remain as a tenant, albeit under less favourable tenancy arrangements, than to have C breach the terms of the original contract and be liable only for damages for breach. In short, E is motivated by a view that something less than the original tenancy terms will be better for E than a right to damages for breach of those terms. On this basis, the consideration supplied by C - who is entitled to breach and pay damages - is to refrain from that course of action. In a sense, a 'promissory estoppel' is a contract for a moratorium period. That moratorium period need not last forever: usually E will be allowed to resile from the arrangement, but only so far as it affects the future dealings between the parties. The counterpart is that C, too, is then entitled to resort to the full range of options open to her.[50]

The promissory estoppel requirement that C must rely on the promise to her detriment seems designed to fill the role of the requirement for consideration in contract. Yet consideration seems to better express what is needed. It goes against common sense to suggest that C suffers a detriment in being allowed to remain a tenant at a reduced rent, and that sentiment is assuaged only a little by the gloss that it is the requirement to pay the backdated rent as a lump sum which causes the detriment.

Context is important, however. In the context just described, the consideration is real. On the other hand, if E were to promise to accept a lesser sum in full satisfaction of a debt, then C's agreement to the

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[49] *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

[50] An interesting issue, and one which it seems has not yet been addressed by the cases, is what should happen if C, rather than E, proposes to resile from the new arrangement. Can E simply terminate the moratorium and sue for damages for future losses calculated according to the old agreement?

proposal would not count as consideration.[51] This is because C's original obligation is either to pay the debt or to pay damages for failure to pay the debt; the two are equally draining on C's resources. It follows that C's agreement to E's proposal does not require C to forego a potentially less demanding course of action. With rent reductions and other 'promissory estoppel' type promises, this is not the case.

In short, equity does not 'invent' consideration in these cases, but it does engage with the practical or commercial realities in assessing whether real consideration exists. This mode of equitable intervention in the law of contract seems realistic and readily defensible.

4.3 Formalities

The crucial problem in many equitable estoppel cases is that, even were it possible to discover an intention to contract for an agreed and real consideration, the purported contract would not be enforceable for want of writing. Sometimes this lack of writing renders the contract not merely unenforceable, but void.

In these circumstances it is sometimes alleged that equity, via equitable estoppel or via some other doctrine, can and will step in to provide a remedy by enforcing the contract.[52] This surely is not right.[53] Equity's outright displacement of such clear statutory rules is not warranted by the circumstances. There are other routes available to equity to ensure that these statutes are not used to cloak a fraud, or that the absence of writing is not used to work some other injustice. Equity's intervention should be confined to reversing any unjust enrichment which would otherwise go to E; it should not ride roughshod over legislative policy by enforcing the unenforceable or void

[51] *Foakes v Beer* (1884) 9 App Cas 605 (HL). Perhaps even in these circumstances special facts might prompt a contrary conclusion.

[52] See, example, *Neville v Wilson* [1997] Ch 144 (CA); *Yaxley v Gotts* [1999] 3 WLR 1217 (CA).

[53] See the more careful reasoning in *Lloyds Bank plc v Carrick* [1996] 4 All ER 630 (CA); *United Bank of Kuwait plc v Sahib* [1996] 3 All ER 215 (CA); and also *Taylor v Dickens* [1998] 1 FLR 806 (ChD).

agreements in favour of C. This preferable possibility of intervention grounded in unjust enrichment principles is discussed later.[54]

4.4 Remedies

If the facts support the existence of a contract, even one found on equity's more relaxed rules, then the remedy awarded by the courts should - and does in many equitable estoppel cases - follow the contractual model. The remedial options are specific enforcement or contractual damages. In proprietary estoppel cases - cases which generally concern land - specific enforcement is common. The property is transferred or divided (by way of constructive trust) as the parties contemplated. Alternatively, if specific performance is not appropriate, the courts may give C expectation damages, either as an unsecured personal remedy or as a monetary remedy secured against the property which was the subject of the agreement. *Giumelli v Giumelli*[55] can be seen as such a case. However, these are not the only options open on a contractual analysis. Sometimes the courts find a binding arrangement between the parties, yet they do not enforce performance of the deal or award expectation damages. Instead they award a remedy that reverses detriment.[56] Notwithstanding the difference in remedy, these are contract cases. They are not unjust enrichment cases, although there is a common instinct to regard them as such. The reversal of C's detriment, on the one hand, and restitution of E's enrichment, on the other, are not equivalent responses. The former is reliance damages for breach of contract; the latter is restitution for unjust enrichment, however similar the eventual quantum.

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[54]See section 5 below. Also see Youdan, T.G., 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v Bousted*' [1984] CLJ 306.

[55]*Giumelli v Giumelli* (1999) 161 ALR 473 (Aust HCt). Also see *Stratulatos v Stratulatos* [1988] 2 NZLR 424 (NZ HCt).

[56]See, example, *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72, 53 ER 563; *Re Foster, Hudson v Foster (No 2)* [1938] 3 All ER 610; *Dodsworth v Dodsworth* (1973) 228 EG 1115 (CA); *Hink v Lhenen* (1975) 52 DLR (3d) 301, at pages 315-316. Some of these cases might equally well be subjected to a restitutionary analysis; see below.

In short, some equitable estoppel cases can be seen as contributing to developments in the law of contract. But the nature of the contribution is disguised by the 'equitable estoppel' tag. In these cases what equity is doing is permitting a more sophisticated and context-sensitive assessment of intention and of consideration, two issues which are critical in the law of contract. It would be better to recognise this input directly, rather than let it be hidden behind the screen of the 'doctrine' of equitable estoppel.

5. Equitable Estoppel as Part of the Law of Unjust Enrichment?

Not all equitable estoppel cases can - or should - be re-analysed as contract cases. There are instances where the law is quite clearly doing something else under the rubric of 'equitable estoppel'. Consider first those cases where a contractual analysis might have been available, but where any alleged contract is either unenforceable or void for want of writing.[57] The equitable doctrines of part performance, common intention constructive trusts, equitable estoppel, and even the catch phrase that equity will not allow a statute to cloak a fraud, all seem designed to eliminate the injustices perceived to flow from a rigid application of this rule. Now, however, we might be better off to concede that the strict statutory rule applies, but that the context of contractual intention (albeit unenforceable) indicates that on both sides the transfer was not intended as a gift. Retention of benefits in the face of that common assumption of reciprocation should count as unjust enrichment and deserve a remedy in restitution.

However, this approach does not seem to be the one adopted in the UK: the cases which have already been cited show that.[58] Moreover,

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[57]Query whether equity could regard the arrangement as an agreement to enter into a binding contract, and order specific performance of *that* agreement, thereby forcing the parties to formalise their arrangement. However, even if this were possible, it would follow that C would not obtain any interest in E's property until a written (and therefore specifically enforceable) contract was entered into.

[58]See note 52 above.

[59]See *Yaxley v Gotts* [1999] 3 WLR 1217 (CA).

even with the new Law of Property (Miscellaneous Provisions) Act 1989 (section 2, which renders void - not merely unenforceable - unwritten contracts for the transfer of interests in land), the courts are prepared to enforce unwritten agreements on equitable grounds.[59] All this seems misguided. Certainly justice demands a remedy, but in the face of such clear statutory imperatives, the appropriate remedy seems to lie not in contract but in unjust enrichment. To be consistent with the policy of the legislature, these cases should be analysed - and remedied - as unjust enrichment cases, not as contract cases.[60]

Outside this class of cases plagued by want of formalities, there are still other equitable estoppel cases - especially proprietary estoppel cases - which, stripped of the equitable estoppel tag, seem to provide simple illustrations of the law of unjust enrichment in action. These are the cases where it is impossible to spell out an intention to contract from the arrangement between the parties. With these cases, the court cannot possibly enforce a fictitious contract or give damages for breach of an invented agreement. It must either leave the parties without a remedy or find another basis for intervention. Again, the appropriate basis seems to be the law of unjust enrichment, not the 'doctrine of equitable estoppel'. Even if the arrangement between the parties indicates that there is no intention to enter into a binding contract for the exchange of E's property (or an interest in it) for C's services or for some other benefit from C, the facts may well support the assertion that C did not intend to make a gift of the services or benefit to E, *and* that E knew that fact. E's retention of the benefit in such circumstances renders the enrichment unjust. A lot of 'estoppel by acquiescence' seems to be 'unjust enrichment by free acceptance' under a different label. Whatever the difficulties with the notion of free acceptance, the general idea of unjust enrichment is clear, and its potential relevance in the context of many equitable estoppel situations is evident.

This restitutionary response where there is no intention to contract but, equally, no intention to make a gift, can also be seen in certain family property cases. The argument from the Canadian jurisdiction is

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[60]See note 53 above.

that an unjust enrichment approach is appropriate in these cases, since there is rarely an intention to contract, but that its application should be mediated by a sensitive application of quantum meruit rules and subjective devaluation possibilities when (usually) the woman's services are being valued as the enrichment received by the man.[61]

None of this suggests that equitable estoppel's contribution to the law of unjust enrichment would do anything to oust the general rule that a person who expends money improving the property of another will have no claim to reimbursement or to any proprietary interest in the property.[62] Equitable estoppel merely concedes the exceptions to this rule. These exceptions arise because of the law of contract and the law of unjust enrichment. Then the law is as stated in *Ramsden v Dyson*.[63] We would do better to recognise these exceptions for what they are, rather than labelling them as equitable estoppels.

If an unjust enrichment analysis is adopted, then the remedy must be one calculated to reverse the unjust enrichment. It should oblige E to restore to C any enrichment which was gained at C's expense and which it would be unjust for E to retain. It cannot give C what was promised, or expected, or even what is needed to reverse any detriment suffered by C. If a restitutionary analysis is adopted at the start, then it must be carried through to the end in determining the appropriate remedy.[64]

In summary, it is arguable that a number of equitable estoppel cases are, in reality, cases in the law of unjust enrichment. Perhaps more equitable estoppel cases belong in this class than we currently concede. If we were to recognise that the alternative is often between a contractual and an unjust enrichment analysis, the latter might more often seem the preferable approach.

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[61]See for example, *Everson v Rich* (1988) 53 DLR (4th) 470 (Saskatchewan Court of Appeal).

[62]*Falcke v Scottish Imperial Insurance Co Ltd* (1886) 34 ChD 234 (CA), at page 248 *per* Bowen LJ.

[63]*Ramsden v Dyson* (1866) LR 1 HL 129 (HL).

[64]See for example, *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72, 53 ER 563; *Re Foster, Hudson v Foster (No 2)* [1938] 3 All ER 610; *Hink v Lhenen* (1975) 52 DLR (3d) 301, at pages 315-316. Also see *Raffaele v Raffaele* [1962] WAR 29 (WA SCt), where the remedy was restitutionary, but not the reasoning.

6. Equitable Estoppel as Part of the Law of Tort?

As a final question, it might be asked whether there are any equitable estoppel cases which could - and should - be re-classified as tort cases, rather than as contract or unjust enrichment cases. At first sight this seems a novel suggestion, yet intuitively it is the right category for some of the estoppel cases. For example, when a government body or a local authority makes statements which induce reasonable but detrimental reliance by citizens, then justice demands that the law provide a remedy. However, it stretches the facts beyond what they will sensibly bear to suggest that there is a contract between the parties, with the government body (or like party) contracting to abide by its representations. This is so even though, in cases such as *Crabb v Arun District Council*,[65] where a local authority was dealing with a private individual, the choice seemed to be put as one between adopting an analysis based on contract or adopting an analysis based on a 'doctrine of equitable estoppel'. Equally, the law of unjust enrichment is usually at a loss to assist. The citizen may have relied to her detriment (as in *Crabb*), but the government or local authority is rarely enriched as a result. In such circumstances it is impossible to argue for a restitutionary remedy. That leaves the law of tort. The law of tort, and in particular the law of negligent misstatement, does seem to best describe the circumstances in issue. Moreover, the law of tort also indicates the appropriate remedy: most commonly monetary compensation for detrimental reliance, but alternatively a mandatory injunction ordering the government body to do something (perhaps comply with the representation made, perhaps something less) so as to preserve the citizen from harm.

On this basis it might seem surprising that such cases have not already been argued on tort grounds, rather than on the grounds of equitable estoppel. But it must be remembered that the law of negligent misstatement is quite new. Cases such as *Plimmer v Mayor of*

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[65]*Crabb v Arun District Council* [1976] Ch 179 (CA). See Atiyah, P.S., 'When is an Enforceable Agreement Not a Contract? Answer: When it is an Equity' (1976) 92 LQR 174; but contrast Millett, P.J., 'Crabb v Arun District Council - A Riposte' (1976) 92 LQR 342.

Wellington[66] pre-date the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*[67] Moreover, if the law of negligent misstatement is to be applied, then it is necessary to decide which statements will count as those of the corporation or government body. The attribution rules necessary to determine this issue are also still evolving.[68]

Perhaps it is no wonder, then, that these cases have been decided under the rubric of 'equitable estoppel'. Nevertheless, the cases already mentioned, as well as cases such as *Commonwealth v Verwayen*,[69] seem more appropriately classified under a tort umbrella. Under this umbrella, and given proof of the tort, this last case also illustrates quite pointedly the remedial alternatives. The case concerned a representation made by the Commonwealth of Australia that it would not rely on the expiry of a limitation period to defeat a claim against it by a tort victim. When the Commonwealth decided to reverse its stance, the Australian High Court held that an equitable estoppel was raised. The majority decided that the minimum equity to do justice to the claimant was to insist that the Commonwealth abide by its original representation.[70] Mason CJ, dissenting, was of the opinion that all that was needed was that the Commonwealth be made liable for the legal costs so far incurred by the claimant in pursuing his action against the Commonwealth. This illustrates the difference between the remedies of injunction and tort damages.

So it seems that some equitable estoppel cases would be better analysed as tort cases - more specifically, as negligent misstatement or negligent misrepresentation cases. This reclassification does not seem to require an expansion of tort obligations as they are currently understood, or of their remedies. But again, a direct acknowledgement that these equitable estoppel cases are part of an existing and established doctrinal class, rather than an independent and *sui generis* class, seems better calculated to provide consistency in analysing the relevant cases.

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[66]*Plimmer v Mayor of Wellington* (1884) 9 App Cas 699 (PC).

[67][1964] AC 465.

[68]See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 (PC).

[69](1990) 170 CLR 394.

[70]As in *Crabb v Arun District Council* [1976] Ch 179 (CA).

7. Conclusion

The idea advanced here - as part of a project to sensibly integrate the rules of equity and the common law - is that equitable estoppel does not create a new 'equity' in the claimant, or impose a new form of obligation on the representor. The cases classed under the head of equitable estoppel are, arguably, really examples of the law of obligations at work - albeit with an equitable assistant at hand. If equitable estoppel were 'unpacked', as advocated here, some of the perceived uncertainty (or flexibility) in remedial response to estoppel would disappear. An appropriate initial classification of the facts would give parties - and the courts - a better sense of the likely remedy should the claim prove successful.

To some extent this 'unpacking' of equitable estoppel has already taken place. There are obvious parallels between the ideas conceded to underpin equitable estoppel and those which underpin the indoor management rule, or ostensible authority, or the rules relating to priority between competing equitable interests, or part performance, or waiver. Yet we do not attempt to subsume all those issues within estoppel. We allow them to play their appropriate role in contract, tort, unjust enrichment and other claims. We should recognise the components of equitable estoppel and do the same with them.

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Res Judicata in The Malaysian Syariah Court With Special Reference to the Case of *S Osman Bin S Karim & Another v AK Othman Shah Bin Pg Mohd Yussof & Another*

Res Judicata is a fundamental doctrine of all courts that there must be an end of litigation.[1] Where this doctrine is pleaded by way of estoppel to an entire cause of action, it amounts to an allegation that the entire legal rights and obligations of the parties are concluded by the earlier judgment. It is however interesting to note whether the doctrine of Res Judicata is applicable in a Syariah Court? Does it require similar elements[2] which are necessary to support the defence of Res Judicata as in civil courts? Is there a limitation to this defence in Islamic law? It is the main aim of this paper to discuss the suitability of the application of the doctrine of Res Judicata in the Syariah Court. The whole discussion in this paper will be based on the case of *S Osman bin S Karim & Another v AK Othman Shah bin Pg Mohd Yussof & Another*[3] which shall be referred to as the "Karambunai" case.

[1] *Halsbury Law Of England*, Volume 16, Reissue 1995, paragraph 973, at page 858.

[2] That is, (i) The subject matter in dispute was the same, namely that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit; (ii) it came into question before a court of competent jurisdiction; and (iii) the result was conclusive so as to bind every other court.

[3] [1998] 5 MLJ 597.