LOST IN THE BIG HOUSE:
WHERE STANDS IRISH LAW ON EQUITABLE ESTOPPEL?*

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INTRODUCTION

For many years, in the absence of a body of Irish case law, equitable estoppel formed part of "Ireland's subliminal legal system."[1] In recent years, however, the doctrines of promissory and proprietary estoppel have surfaced with greater frequency in our courts.[2] This increased activity in Ireland has been more than matched elsewhere. The English courts have decisively rejected the "five *probanda*"[3] which traditionally had restricted the scope of proprietary estoppel. The Australian courts have been even more adventurous, merging promissory and proprietary estoppel into a broad unified doctrine of equitable estoppel.[4]

What view does Irish law take of these international developments? Unfortunately, there has not yet been a fully comprehensive analysis of the Irish case law on estoppel.[5] The task of the present article is to disentangle the various strands running through the Irish case law on estoppel (one of which, surprisingly, is the Administrative Law doctrine of legitimate

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* See *McIlkenny* v *Chief Constable of West Midlands Police Force* [1980] 2 WLR 689, 700-701 where Lord Denning MR developed the metaphor of estoppel as "a big house with many rooms".

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1 See Pearce "The Mistaken Improver of Land" (1985) 79 Gaz ILS 179, 182 (referring in particular to proprietary estoppel).

2 See, for example, Murphy J's recent discussion of the "still evolving principles of proprietary estoppel" in *McCarron* v *McCarron* Supreme Court, unreported, February 13 1997.

3 For discussion of the *probanda*, see text following note 21 *infra*.

4 For discussion, see text to and following note 103 *infra*.

5 For a useful textbook treatment, see Delany *Equity and the Law of Trusts in Ireland* (Dublin: Round Hall Sweet and Maxwell, 1996) pp 495-515. See also Gray *Elements of Land Law* 2nd ed (London: Butterworths, 1993) pp 312-368; Pawlowski *The Doctrine of Proprietary Estoppel* (London: Sweet and Maxwell, 1996); Parkinson "Estoppel", Chapter 7 in Parkinson (ed) *The Principles of Equity* (North Ryde, New South Wales: LBC Information Services, 1996).

expectation). This will require forays into contexts as exotic as the finding of buried treasure[6] and as mundane as the price of pigs.[7] The aim of the article is to position Irish law against the law of other common law jurisdictions. If we know where we stand, it may be easier to decide where we should go in the future.

PART ONE
THE PRINCIPLES OF ESTOPPEL

Traditionally, a number of different forms of estoppel have been recognised by our law.[8] The various overlapping categories include common law estoppel, equitable estoppel, estoppel by representation, estoppel by convention, estoppel in pais, estoppel by deed, estoppel by record, issue estoppel and estoppel *per rem judicatam*.[9] This article concentrates on just two types of estoppel, proprietary and promissory, both falling under the broad heading of equitable estoppel. As will be explained in detail shortly, proprietary estoppel is available to a claimant who acted to her[10] detriment on the basis of an expectation or belief that she was, or would become entitled to, an interest in land. Promissory estoppel, on the other hand, is triggered when a claimant has acted to her detriment on the basis of a promise that another party will not enforce his strict legal rights.

It is proposed to begin the discussion with an examination of the development and present status of proprietary estoppel.

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6 See *Webb* v *Ireland* [1988] IR 353, discussed in the text following note 142 *infra*.

7 See *Smith* v *Ireland* [1983] ILRM 300, discussed in note 62 *infra.*

8 Lord Coke *The First Part of the Institutes of the Law of England; or a Commentary upon Littleton* (1628) p 352a (quoted in Jackson "Estoppel as a Sword" (1965) 81 LQR 84, 85) offered the following general definition of estoppel: "Estoppe, cometh of the French word estoupe, from whence the English word stopped; and it is called an estoppel ... because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." This early definition reflects the view that estoppel is merely a rule of evidence. However, as will be seen in this article, at least one modern form of estoppel, proprietary estoppel, goes well beyond constituting a mere "rule of evidence" and is capable of providing an independent cause of action.

9 See the discussion of the issue of categorisation in Parkinson note 5 *supra,* p 206ff.

10 Purely in the interests of clarity, the practice is generally adopted in this article of using the female pronoun when referring to the estoppel claimant and the male pronoun when referring to the defendant.

I PROPRIETARY ESTOPPEL

(i) Ramsden v Dyson: The Two Limbs of Proprietary Estoppel

The classic authority on proprietary estoppel is the decision of the House of Lords in *Ramsden* v *Dyson*.[11] Two limbs of proprietary estoppel emerge from this case. The first originates in the speech of Lord Cranworth, and is generally described as the "mistake limb". The second limb, based on expectation, derives from the speech of Lord Kingsdown (who dissented only on the facts). An understanding of the development of proprietary estoppel will be facilitated by a separate consideration of the two limbs.

(a) The Mistake Limb

The case of *Ramsden* v *Dyson*[12] concerned a tenant who had expended money on improving the land he was leasing, allegedly in the belief that he was entitled to demand the grant of a long lease. The general principle of the law, encapsulated in the Latin maxim "superficies solo cedit",[13] is that the owner of the land owns anything which is built on, or attached to, the land. In other words, any improvements to land accrue to the benefit of the owner of that land. It is to this general principle that the mistake limb of proprietary estoppel provides a limited exception.

In a famous passage in *Ramsden* v *Dyson*, Lord Cranworth explained the relevant doctrine as follows:

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.[14]

The trigger for this mistake limb of proprietary estoppel is the dishonesty of the landowner in

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[11] (1866) LR 1 HL 129.

[12] *Ibid.*

[13] The maxim translates as "a building becomes part of the ground." See Gray note 5 *supra*, p 7.

[14] Note 11 *supra*, 140-141.

remaining "wilfully passive on such an occasion, in order afterwards to profit by the mistake which [he] might have prevented."[15]

(b) The Expectation Limb

In *Ramsden*, Lord Kingsdown put forward an alternative formulation of the doctrine of proprietary estoppel. His formulation is regarded as giving rise to the "expectation limb" of proprietary estoppel.

Lord Kingsdown stated that:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.[16]

Lord Kingsdown's statement clearly reflects the fact-situation with which he was dealing. Nonetheless, one can discern in his comments the basic elements of a wider principle. This principle is that an estoppel will arise if (a) a landowner has created or encouraged an expectation in the claimant that she is, or will become, entitled to an interest in certain land; and (b) the claimant has acted to her detriment on the basis of that expectation.

A convenient illustration of this wider principle is provided by the modern English case of *Inwards* v *Baker*.[17] In that case, a son wished to build a home for himself. However, the site which he was considering was beyond his means. His father suggested to him: "Why not put the bungalow on my land and make the bungalow a little bigger"?[18] On the basis of this, the son proceeded to build on his father's land. Some years later, the father died, leaving his property under an old will to other beneficiaries. Ultimately, these successors sought to eject the son. The

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15 *Ibid*, 141. See also *Hamilton* v *Geraghty* (1901) 1 SR Eq NSW 81; *Norris* v *Walls* [1997] NI 45.

16 *Ibid*, 170.

17 [1965] 2 QB 29.

18 *Ibid*, 35.

Court of Appeal held that, because the son had been led to believe that the bungalow would be his home for life, the father and his successors in title would be estopped from evicting the son. The son was therefore granted an indefinite license to occupy the land.

It is interesting to note that the expectation limb involves a principle which is more wide-ranging than that underlying Lord Cranworth's mistake limb. Although there is a tendency in the context of the expectation limb of proprietary estoppel to speak in terms of detrimental reliance on a "representation", it is impossible to deny that in many cases a "representation" will be indistinguishable from a promise.[19] This means that the doctrine of proprietary estoppel is trespassing on the domain of the law of contract by allowing certain legal consequences to flow from a promise which is unsupported by consideration.

In addition, the expectation limb of proprietary estoppel appears to involve a far more interventionist approach on the part of Equity. In the case of estoppel by mistake, Equity is coming to the aid of a person who may well have been taking reasonable care to protect her own interests. A person who makes a mistake is not consciously placing her trust in the hands of another. However, in relation to the expectation limb of estoppel, matters are different. Persons who rely on what they know to be a non-binding promise could, on a harsh view of the law, be condemned to their fate on the basis that they should have known the possible consequences of their actions. If X assures me that he will never go back on a certain promise, I will normally be aware that X's obligations to me lie in the moral sphere. It is not immediately obvious that the courts should hold X to his promise simply because I have been so trusting as to rely on it. Nonetheless, under the expectation limb of estoppel this is what happens; Equity steps in and seeks to remedy the unconscionability involved in a person resiling from (what would otherwise be) a non-legally binding promise. Of course, there are limitations on the extent of Equity's intervention in these circumstances. However, the point is simply that this second limb of estoppel involves a higher level of paternalism on the part of Equity. This makes it easier to understand why, as will be discussed in the next section, this part of the estoppel doctrine was, until recent decades, suppressed in favour of the more limited mistake limb.

(ii) The Probanda

[19] Note that Lord Kingsdown himself referred in his formulation of the law (see text to note 16 *supra*) to a claimant acting on the basis of a "promise or expectation".

Although both limbs of proprietary estoppel appear to have been recognised by the House of Lords in *Ramsden* v *Dyson*,[20] at an early stage in the years following that landmark decision it became common to regard Lord Cranworth's "mistake" formulation as an exhaustive statement of the doctrine.[21] This tendency is attributable to the influence of *Willmott* v *Barber*.[22] In that case, Fry J restated the requirements for a claim based on proprietary estoppel. Fry J laid out five propositions which had to be proven (the so-called five *probanda*) as a prerequisite to success in a claim based on proprietary estoppel. The *probanda* are as follows:[23]

> (1) The claimant must have made a mistake as to her legal rights.
> (2) The claimant must have expended money or done some other act (not necessarily upon the defendant's land) on the basis of her mistaken belief.
> (3) The landowner must have been aware of his own rights.
> (4) The landowner must have been aware of the claimant's mistaken belief.
> (5) The landowner must have encouraged the expenditure or other act of the claimant, either directly or by abstaining from asserting his rights.

The first, third and fourth of the *probanda* emphasise the need for the claimant to be mistaken about her legal rights and for the landowner to be aware of his own rights and of the claimant's mistake. Therefore, if taken seriously, the *probanda* allow no room for the expectation limb. This is because the expectation limb applies to a claimant who, although not mistaken as to her rights, acts to her detriment on the basis of an expectation created by the defendant. Unfortunately, Fry J (who was dealing with a case where both parties were mistaken as to their legal rights) did not address the possibility that the expectation limb of proprietary estoppel could exist alongside the mistake limb which he had formulated.

Although some decisions took a wider view, it seems to have been accepted for a time

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[20] Note 11 *supra*.

[21] One notable exception is *Plimmer* v *Mayor of Wellington* (1884) 9 App Cas 699 where Lord Kingsdown's views were expressly approved and applied by the Privy Council.

[22] (1880) 15 Ch D 96.

[23] See *ibid*, 105. In the text, the Fry J's five requirements have been slightly abbreviated for convenience.

that the *probanda* were essential prerequisites to a claim of proprietary estoppel.[24] Unfortunately, whatever the possible attractions in restricting Equity's intervention to cases of mistake,[25] the reality is that such cases occur comparatively rarely in practice.[26] One may speculate that the limited utility of the mistake principle led to a judicial desire to revive the expectation limb which, in any case, had never been formally disapproved.

In recent years, the English courts have moved away from a reliance on the *probanda*. The decisive case was *Taylor Fashions* v *Liverpool Victoria Trustees Co Ltd*.[27] In that case, Oliver J undertook a detailed analysis of the case law and concluded that a failure to satisfy all of the *probanda* was not fatal to a claim of proprietary estoppel. In a famous passage, Oliver J explained the position as follows:

> [T]he application of the *Ramsden* v *Dyson*, LR 1 HL 129 principle ... requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.[28]

According to Oliver J, it was necessary to apply "the broad test of whether in the circumstances the conduct complained of is unconscionable."[29] The central emphasis is therefore on the notion of unconscionability. The issues addressed by the *probanda* are simply factors which, in appropriate cases, should be taken into account in the overall inquiry. Oliver J's views have

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[24] See *eg Kammins Ballrooms Co Ltd* v *Zenith Investments Ltd* [1971] AC 850, 884-885 *per* Lord Diplock; *E & L Berg Homes Ltd* v *Berg* (1979) 253 EG 473. See also *Cullen* v *Cullen* [1962] IR 268. Contrast *Electrolux Ltd* v *Electrix* (1954) 71 RPC 23; *Shaw* v *Applegate* [1977] 1 WLR 970.

[25] See text following note 19 *supra*.

[26] See Gray note 5 *supra*, p 321.

[27] [1982] QB 133n.

[28] *Ibid*, 151-152. Oliver J felt (*ibid*, 147) that it might still be necessary to satisfy the *probanda* in cases where the defendant has merely "stood by without protest while his rights have been infringed". However, he commented (*ibid*) that even this point was "open to doubt".

[29] *Ibid*, 154. For an interesting criticism of some aspects of the post-*Taylor Fashions* English approach, see Finn "Equitable Estoppel", Chapter 4 in Finn (ed) *Essays in Equity* (Sydney: Law Book Company, 1985).

subsequently been approved by the Court of Appeal[30] and by the Privy Council.[31]

Interestingly, in two subsequent English decisions, judges have purported to apply the *probanda*.[32] The case of *Coombes* v *Smith*[33] is of particular interest because it reveals an intriguing strategy of reinterpreting the *probanda* so that they can accommodate the expectation limb.[34] The strategy is to reclassify the "expectation" created in a claimant by a promise as a "mistaken belief" in a present or future entitlement to an interest in land. Thus, for example, if a landowner promised the claimant that she could remain in a house for her life, this promise would be treated as creating, not an expectation that the promise would not be withdrawn, but rather a mistaken belief in the claimant that she had a legal entitlement to remain in the property. This strategy, at the cost of a great deal of artificiality,[35] allows the court to give lip-service to the *probanda* at the same time as granting a remedy in many cases covered by the expectation principle.

On the whole, however, despite the occasional appearance of the *probanda* in the modern English case law, the weight of judicial and academic opinion in England clearly favours the view that the *probanda* are no longer of decisive importance in that jurisdiction. The same

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30 See *eg Habib Bank Ltd* v *Habib Bank AG Zurich* [1981] 1 WLR 1265; *Amalgamated Investment* v *Texas Commerce International Bank* [1982] QB 84; *Lloyds Bank plc* v *Carrick* [1996] 4 All ER 630.

31 *AG of Hong Kong* v *Humphreys Estate (Queen's Gardens) Ltd* [1987] 1 AC 114; *Lim Teng Huan* v *Ang Swee Chuan* [1992] 1 WLR 113. Contrast the approach of Judge Weeks QC in *Taylor* v *Dickens* [1998] 1 FLR 806, criticised by Thompson "Emasculating Estoppel" [1998] Conv 210. *Cf Gillett* v *Holt* [1998] 3 All ER 917.

32 *Coombes* v *Smith* [1986] 1 WLR 808 (Judge Thomas QC); *Matharu* v *Matharu* (1994) 16 P & CR 93 (CA), discussed by Milne "Proprietary Estoppel in a Procrustean Bed" (1995) 58 MLR 412. The application of the *probanda* in *Matharu* was not blatantly illogical since the facts involved at least an element of mistake on the part of the claimant, who believed that her husband, rather than his parents, owned the house under dispute. Moreover, the claimant in *Matharu* succeeded in her claim despite the application of the *probanda*. *Cf Orgee* v *Orgee* Court of Appeal, unreported, November 5 1997 (LEXIS).

33 Note 32 *supra* (where the claim was, in fact, unsuccessful).

34 This strategy was implicit in the speech of Lord Cranworth in *Ramsden* v *Dyson* note 11 *supra*, 142. See also *Crabb* v *Arun DC* [1976] 1 Ch 179, 193-195 *per* Scarman LJ (treating Lord Kingsdown's speech as reconcilable with the *probanda*); *Stilwell* v *Simpson* (1983) 133 NLJ 894; *Griffiths* v *Williams* (1977) 248 EG 947, 950 *per* Goff LJ; *Matharu* v *Matharu* note 32 *supra*; *Tickner* v *Wheeler* (1985) 3 NZLR 782, 787.

35 Note, however, the evidence of one of the claimants in *Re Basham* [1987] 1 All ER 405, 409 which suggested that they believed that they had some legal entitlement to the inheritance they had expected: "I'm not very bright but I'm not soft in the head. Anyone who worked like my wife and I did for him could expect a will leaving it to us. A promise is a promise." It is not possible to tell whether the claimant was influenced in making this assertion by what he had been told of the legal rules governing proprietary estoppel.

position appears to prevail in Australia,[36] Canada,[37] and New Zealand.[38]

(iii) The Irish Position

Lord Cranworth's mistake limb has long been recognised in the Irish courts.[39] Indeed, in perhaps the leading Irish case, *McMahon* v *Kerry County Council*,[40] Finlay P took an extremely wide view of its scope, granting a remedy on the basis of a very doubtful claim.[41]

However, there was until very recently no Irish example of a successful claim based on Lord Kingsdown's expectation limb[42] nor indeed was it entirely clear that the principle formed part of Irish law. Kenny J took the view in *Cullen* v *Cullen*,[43] where the expectation principle would have been clearly applicable on the facts, that proprietary estoppel could not operate unless there had been a mistake on the part of the claimant.[44] Another case which might have

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[36] The very broad view of estoppel taken by the Australian courts (discussed in the text to and following note 103 *infra*) is clearly inconsistent with a rigid application of the *probanda*. *Cf Austotel Property Ltd* v *Franklins Selfserve Property Ltd* (1989) 16 NSWLR 582, 609ff *per* Priestly JA.

[37] See *Canadian Superior Oil Ltd* v *Paddon-Hughes Development Co Ltd* (1969) 3 DLR (3d) 10, 15 *per* Johnson JA (affirmed (1970) 12 DLR (3d) 247 (SCC)) (an estoppel may arise even if owner is unaware of his rights); *Litwin Construction (1973) Ltd* v *Pan Ltd* (1988) 52 DLR (4th) 459 (BC CA); *Goutsoulas* v *Liao* Ontario Court of Justice, unreported, August 6 1993 (LEXIS) pp 7-8 *per* Ellen MacDonald J ("a softening of the older approach"). *Cf Voyager Petroleums Ltd* v *Vanguard Petroleums Ltd* (1983) 149 DLR (3d) 417 (Alberta CA) (*probanda* applied and found to be satisfied on the facts).

[38] See *Andrews* v *Colonial Mutual Life Assurance Ltd* [1982] 2 NZLR 556; *Wham-O MFG Co* v *Lincoln Industries Ltd* [1984] 1 NZLR 641; *Westland Savings Bank* v *Hancock* [1987] 2 NZLR 21; *Stratulatos* v *Stratulatos* [1988] 2 NZLR 424; *Gillies* v *Keogh* [1989] 2 NZLR 327, 331 *per* Cooke P; 344-346 *per* Richardson J.

[39] See *Cullen* v *Cullen* [1962] IR 268 (discussed by Brady "An English and An Irish View of Proprietary Estoppel" (1970) V Ir Jur (ns) 239); *O'Sullivan* v *Cork County Council* High Court, unreported, December 18 1969 (Teevan J); *Fuller* v *Galway County Council* Supreme Court, unreported, May 29 1973. For a more recent example, see *O'Callaghan* v *Ballincollig Holdings Ltd* High Court, unreported, March 31 1993 (Blayney J).

[40] (1976) [1981] ILRM 419.

[41] See the detailed discussion of this case in the text following note 125 *infra*.

[42] Note, however, the somewhat obscure decision of Pringle J in *Callan* v *McAvinue* High Court, unreported, May 11 1973 which appears have been decided on a basis similar to the expectation principle.

[43] [1962] IR 268.

[44] See also the early cases of *O'Sullivan* v *Cork County Council* note 39 *supra* and *Fuller* v *Galway County Council* note 39 *supra*. Oddly enough, in *Cullen* note 43 *supra*, 282 Kenny J did discuss the closely related principle of *Dillwyn* v *Llewelyn* (1862) 4 De GF & J 517. In *Dillwyn*, a father had made an imperfect gift of some of his lands to his son. The son proceeded to expend a great deal of money in building a house on the land. It was held by Lord Westbury LC that, in

been fitted within the expectation limb, *Re JR (A Ward of Court)*,[45] was instead dealt with (like *Cullen*) under promissory estoppel. However, *Re JR*[46] did provide general support for the expectation principle, given Costello J's citation of English precedents which were based on that principle.[47] Similarly, in *Haughan* v *Rutledge*,[48] Blayney J expressly accepted the expectation limb, on the basis of an uncritical citation of an English textbook. However, the claim in that case failed, thus reducing the case's authority as a decisive proof of the applicability of the principle in Ireland. A number of family property cases[49] also provide indirect support for the principle. The cases in question were all disposed of on the basis of the law of trusts.[50] Nonetheless, the expectation limb of proprietary estoppel was clearly relevant and was discussed in some detail,[51] albeit without being named as such.[52]

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the circumstances, the son had "an equity" to insist on the completion of the gift. Although estoppel was not mentioned in *Dillwyn*, the case has subsequently been rationalised as an example of proprietary estoppel (see *eg* Gray note 5 *supra*, pp 316-317). Kenny J clearly accepted the principle of *Dillwyn* but did not appear to regard it as an example of estoppel.

45 [1993] ILRM 657.

46 *Ibid*. See also *Reidy* v *McGreevy* High Court, unreported, March 19 1993 where Barron J relied on *Re JR*.

47 *Greasley* v *Cooke* [1980] 1 WLR 1306; *Re Basham* note 35 *supra*. Note also that Costello J relied upon Judge Nugee QC's judgment in *Basham* for a definition of proprietary estoppel (see note 45 *supra*, 661).

48 [1988] IR 295.

49 *Heavey* v *Heavey* (1974) 111 ILTR 1; *W* v *W* [1981] ILRM 202; *NAD* v *TD* [1985] ILRM 153; *EN* v *RN* [1990] 1 IR 383 (High Court); [1992] 2 IR 116 (Supreme Court). *Cf McGill* v *S* [1979] IR 283, 293 *per* Gannon J, apparently disapproving of *Pascoe* v *Turner* [1979] 1 WLR 431 where (in a very generous application of the expectation limb) the Court of Appeal ordered a man to transfer the fee simple in a house to his former cohabiting partner.

50 See the discussion of the relevant cases in Mee "Trusts of the Family Home: Boiling Oil from the Ivory Tower" (1992) 14 DULJ (ns) 19.

51 See *Heavey* v *Heavey* note 49 *supra*, 3 *per* Kenny J, quoting with approval a passage from the speech of Lord Upjohn in *Pettitt* v *Pettitt* [1970] AC 777, 818 which discussed the expectation limb of proprietary estoppel. See also *W* v *W* note 49 *supra*, 205 *per* Finlay P; *NAD* v *TD* note 49 *supra*, 160-161 *per* Barron J; *EN* v *RN* note 49 *supra*, 386 *per* Barron J (High Court); *EN* v *RN* note 49 *supra*, 122 *per* Finlay CJ.

52 Unfortunately, in *Heavey* v *Heavey* note 49 *supra*, Kenny J failed properly to distinguish the rules governing estoppel from those governing resulting and constructive trusts. (See *ibid*, 3 where he chose as his "guiding principle" Lord Diplock's famous statement in *Gissing* v *Gissing* [1971] AC 886, 905C of the basis of resulting and constructive trusts). This confusion infected the later case of *NAD* v *TD* note 49 *supra*, 159-163 where Barron J made an unsuccessful attempt to distinguish between resulting and constructive trusts in relation to family property disputes. With all due respect, the doctrine which Barron J identified as the "constructive trust" is clearly the expectation limb of proprietary estoppel (as was confirmed in *EN* v *RN* note 49 *supra*, 386 where Barron J actually cited *Ramsden* v *Dyson*). Barron J's views on the distinction between resulting and constructive trusts have unfortunately been repeated in later cases. See *Reidy* v *McGreevy* note 46 *supra* (Barron J) p 5; *Dublin Corporation* v *Ancient Guild of Brick and Stone Layers* High

Even on the authorities mentioned above, one would have had to conclude that, given the tendency of our courts to look to their English counterparts, the expectation principle probably formed part of Irish law.[53] In any case, any lingering doubts have now been dispelled by the decision of Geoghegan J in *Smyth v Halpin*.[54] The plaintiff in that case had been told by his father that "after [his] mother's day" he would inherit the family home. On his father's suggestion, the plaintiff then built an extension onto the family home. The new construction "was in no real sense a separate house but rather a self-contained section of a house".[55] Geoghegan J felt that it would have been inconceivable for the plaintiff to have built in this manner unless he was ultimately to become the owner of the whole house.[56] When the father died, it emerged that he had gone back on his promise and had left the original family home[57] to the plaintiff's sister. Citing *inter alia Inwards* v *Baker*,[58] Geoghegan J held that the plaintiff's detrimental reliance on his father's representation had given rise to an equity in his favour. The learned judge decided to satisfy this equity by ordering a conveyance to the plaintiff of the remainder interest in the property. Thus, one sees in *Smyth v Halpin*[59] a long overdue application of the expectation limb in Ireland.

As to the status of the *probanda* in Ireland, it is interesting to note that they were quoted with approval in two modern cases, *Dunne* v *Molloy*[60] and *Smith* v *Ireland*.[61] Admittedly, the

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Court, unreported, March 6 1996 (Budd J) pp 34-36 (reversed by the Supreme Court *sub nom Dublin Corporation* v *Building and Allied Trade Union* [1996] 1 IR 468 without discussing this aspect of Budd J's reasoning).

53 This conclusion could also be supported by reference to the repeated citations in Irish cases (see note 170 *infra*) of Lord Denning MR's sweeping statement of a unified principle of estoppel in *Amalgamated Investment* v *Texas Commerce International Bank* note 30 *supra*, 122. If so broad a statement were actually taken seriously, it would clearly encompass the relatively conventional expectation limb of proprietary estoppel.

54 [1997] 2 ILRM 38. See Breen "Proprietary Estoppel: Equity's Aid to Those Left Behind" (1998) 18 ILT 133.

55 *Ibid*, 40.

56 *Ibid*.

57 It appears that the site of the extension had been transferred to the plaintiff to facilitate his getting a mortgage (*ibid*). Therefore, there was no question of the father's successors in title claiming possession of the extension itself.

58 [1965] 2 QB 29, discussed in the text following note 17 *supra*.

59 Note 54 *supra*.

60 [1976-77] ILRM 266.

probanda had no logical relevance to the facts of either case and were not relied upon as part of the actual decision in either case.[62] However, there has been no case in Ireland, along the lines of *Taylor Fashions*[63] in England, where the *probanda* have been expressly rejected. Thus, for the moment, it is still arguable that they form part of our law.

In strict logic, of course, the *probanda* are inconsistent with the expectation limb of proprietary estoppel, so that their continued currency might seem to call into question once more the status of that principle in Ireland. However, as has been seen in certain modern English cases, it is possible to distort the *probanda* so that they can accommodate both limbs of proprietary estoppel.[64] If the *probanda* survive in Ireland, it is likely that they would be applied in this loose manner. Of course, this kind of artificial reasoning is unsatisfactory and can lead to undesirable results in practice.[65] Therefore, it appears that the only acceptable way forward is for the Irish courts to accept fully the modern English position, rejecting the *probanda* in the process.

II PROMISSORY ESTOPPEL AND ITS RELATIONSHIP WITH PROPRIETARY ESTOPPEL

It is now necessary to consider the doctrine of promissory estoppel.[66] This equitable doctrine is an extension of the older common law doctrine of estoppel by representation.[67] Under the older doctrine, a person who made a representation of existing fact may be estopped from

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61 [1983] ILRM 300. See also *O'Sullivan* v *Cork County Council* High Court, unreported, December 18 1969 (Teevan J).

62 *Dunne* v *Molloy* note 60 *supra* was decided by Gannon J on the basis that the claimant had not acted to his detriment, while Finlay P based his decision in *Smith* v *Ireland* note 61 *supra* on the fact that the defendant Minister had not encouraged the claimant pig farmer to believe that the Minister would waive his strict rights.

63 Note 27 *supra*.

64 See text following note 32 *supra*.

65 For example, it would be possible for a judge to insist on a strict application of the *probanda* whenever he or she took a dislike to a particular claimant, while being willing to twist the requirements to fit the case of a more agreeable claimant.

66 See generally Clark *Contract Law in Ireland* 3rd ed (London: Sweet and Maxwell, 1992) pp 59-67; Friel *The Law of Contract* (Dublin: Round Hall Press, 1995) pp 117-126; Treitel *The Law of Contract* 9th ed (London: Sweet and Maxwell, 1995) pp 100-115; 120-124.

67 See generally Spencer Bower and Turner *Estoppel by Representation* 3rd ed (London: Butterworths, 1977).

subsequently pleading that the facts were otherwise than as he had represented them. As was emphasised by the House of Lords in *Jordan* v *Money*,[68] a crucial feature of estoppel by representation is that it applies only to representations of existing fact and cannot extend to statements of intention or promises as to future conduct. However, in the famous *High Trees* case,[69] Denning J (as he then was) developed a new equitable principle which avoided the traditional limitation on the common law doctrine.

Denning J's doctrine, commonly described as promissory estoppel, was summarised by Costello J in *Re JR (A Ward of Court)*[70] in the following terms:

> [W]here by words or conduct a person makes an unambiguous representation as to his future conduct, intending that the representation will be relied on, and to affect the legal relations between the parties and the representee acts on it or alters his or her position to his or her detriment the representor will not be permitted to act inconsistently with it ....[71]

Obviously, there are some similarities between promissory and proprietary estoppel since both are creations of Equity and founded ultimately on the desire to avoid an unconscionable result. However, there are a number of important differences between the two doctrines.[72] The central features of promissory estoppel are best illustrated by an examination of these differences.[73]

The most significant differences between the two doctrines are as follows:

(1) *Use as a Cause of Action*: Promissory estoppel provides "a shield and not a sword" and "cannot create any new cause of action where none existed before".[74] Thus, promissory estoppel can only operate in a defensive manner, protecting a promisee from an attempt by the promisor

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[68] (1845) 5 HL Cas 185.

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

[70] Note 45 *supra*.

[71] *Ibid*, 660 citing Baker and Langan *Snell's Principles of Equity* 28th ed (London: Sweet and Maxwell, 1982) p 556.

[72] At a more subtle level, some of the differences in emphasis are attributable to the fact that promissory estoppel is perceived as a contractual doctrine and proprietary estoppel is generally classified as part of the law of equity. Understandably, the Contract writers show a greater concern for the fate of the doctrine of consideration.

[73] See generally Evans "Choosing the Right Estoppel" [1988] Conv 346; Treitel note 66 *supra*, pp 134-136.

[74] *Association of General Medical Practitioners Ltd* v *Minister for Health* [1995] 2 ILRM 481, 492 *per* O'Hanlon J; *Coombe* v *Coombe* [1951] 2 KB 215.

to enforce rights inconsistent with the promise.[75] On the other hand, proprietary estoppel is undoubtedly capable of providing a cause of action in itself.[76]

(2) *Remedies*: Once a proprietary estoppel has been established, the court has a wide discretion to decide which remedy is the appropriate method of "satisfying the equity" which has arisen in favour of a claimant. However, following from the principle that it is "a shield but not a sword", promissory estoppel does not afford a court the same remedial flexibility.[77][77] Instead, the court may simply restrain the promisor from resiling from his promise.

(3) *Suspensory Effect of Promissory Estoppel*: Unlike proprietary estoppel, promissory estoppel is suspensory in its effect. In relation to promissory estoppel, "the promisor can resile from his promise on giving reasonable notice (not necessarily formal notice) allowing the promisee a reasonable opportunity of resuming his position ...; the promise becomes final and irrevocable only if the promisee cannot resume his position."[78][78] In relation to proprietary estoppel, given the more sophisticated remedial options and the more overt concentration on unconscionability as a prerequisite for any remedy, there has been no need to create this sort of rule.

(4) *Subject Matter of Promise or Representation*: Promissory estoppel can apply in relation to any sort of promise, while proprietary estoppel is limited to representations which lead the claimant to expect that she has or will have some interest in *land*.[79][79] If proprietary estoppel

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[75] It is also possible for a plaintiff to use promissory estoppel to demolish a defence to his or her claim; in such a case, there is a separate cause of action and the defendant is simply estopped by his promise from asserting a particular defence to the claim against him. See for example the cases cited in note 118 *infra* (defendants estopped from pleading non-compliance with Statute of Limitations, 1957). See also Treitel note 66 *supra*, pp 108-109.

[76] See *eg Crabb* v *Arun District Council* [1976] 1 Ch 179, 187E *per* Lord Denning MR; *Zelmer* v *Victor Projects Ltd* (1997) 147 DLR (4th) 216 (BC CA).

[77] See *Chartered Trust Ireland Ltd* v *Healy* High Court, unreported, December 10 1985 (Barron J). Contrast the unorthodox approach of Costello J in *Re JR* note 45 *supra*, 664, discussed in the text following note 178 *infra*.

[78] *Association of General Practitioners Ltd* v *Minister for Health* note 14 *supra*, 492 *per* O'Hanlon J; *Ajayi* v *RT Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326.

[79] The better view is that proprietary estoppel applies *only* if the representation concerns an interest in land. This is the view taken by Gray note 5 *supra* p 327, citing *Western Fish Products Ltd* v *Penwith DC* [1981] 2 All ER 204 and by Davis "Proprietary Estoppel: Future Interests and Future Property" [1996] Conv 193, 195-196. See also *Layton* v *Martin* [1986] 2 FLR 277 (vague promises of financial security insufficient); *Lloyds Bank plc* v *Carrick* [1996] 4 All ER 630, 639-641 *per* Morritt LJ. It is sometimes suggested that the doctrine can apply in relation to other forms of property (see *eg* Delany note 5 *supra*, p 499). Davis argues to the contrary (*supra*, 195), suggesting that there is "little authority" for this assertion. Any uncertainty is attributable primarily to the anomalous decision of Judge Nugee QC in *Re Basham* note 35 *supra*. The representation in *Basham* (although primarily concerning a cottage) related to the residuary estate of the promisor. Judge Nugee QC relied on a sweeping analogy with the doctrine of constructive trusts to surmount the difficulty. The case has been widely criticised (see Martin "Estoppel and the Ubiquitous Constructive Trust" [1987]

(with its ability to provide a cause of action) could apply to all representations or promises, then that doctrine would entirely swallow up the more limited doctrine of promissory estoppel, with serious implications for the contractual doctrine of consideration.[80][80]

(5) *Nature of Promise or Representation*: A further difference lies in the nature of the representation or promise required to trigger the two forms of estoppel. In relation to promissory estoppel, one needs a clear and unambiguous statement of intention.[81] It appears that one is looking for something in the nature of a direct promise; although it need not be express, it probably must have "the same degree of certainty as would be needed to give it contractual effect if it were supported by consideration."[82] It is also required that the promise be intended to affect the legal relationship between the parties.[83]

In relation to proprietary estoppel, there is a subtle shift in terminology, with the word "representation" being generally preferred to "promise". It appears that this reflects a somewhat less strict test. Mere silence and inactivity, which will rarely suffice for promissory estoppel,[84] can be sufficient, as can acquiescence in a mistake by the claimant. Moreover, since proprietary

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Conv 211 and Hayton "By-passing Testamentary Formalities" (1987) 46 CLJ 215), not least because it threatens to complicate further the doctrine of proprietary estoppel by the unnecessary introduction of the complexities of constructive trust doctrine. *Cf Reidy* v *McGreevy* High Court, unreported, March 19 1993 (Barron J) p 5.

80 *Cf* Treitel note 66 *supra*, p 130. The restriction to land is admittedly capable of leading to arbitrary results. As is illustrated by *Layton* v *Martin* note 79 *supra*, it may be of decisive importance whether a person acts to her detriment in the expectation of gaining rights over a particular house (proprietary estoppel applicable) or on the basis of a general promise of financial security (proprietary estoppel unavailable and promissory estoppel unable to provide the necessary cause of action). A reaction against the arbitrariness of the limitations on the various estoppels has led to radical developments in Australia, discussed in the text to and following note 103 *infra*.

81 See *Dun and Bradstreet Software Services (England) Ltd* v *Provident Mutual Life Assurance Association* Court of Appeal, unreported, June 9 1997 (LEXIS); *Engineered Homes Ltd* v *Mason* (1983) 146 DLR (3d) 577 (SCC); *Marine Steel Ltd* v *The Ship "Steel Navigator"* [1992] 1 NZLR 77; *Rodney Aero Club Inc* v *Moore* [1998] 2 NZLR 192; Treitel note 66 *supra*, pp 100-102; Parkinson note 5 *supra*, p 255ff. For the Irish position, see Clark note 66 *supra*, p 63, citing *Keegan & Roberts Ltd* v *Comhairle Chontae Baile Atha Cliath* High Court, unreported, March 12 1981 (Ellis J). See also *Folens* v *Minister for Education* [1984] ILRM 265, 269-270 and *Industrial Yarns Ltd* v *Greene* [1984] ILRM 15, 23 (treated as a case on estoppel by representation); *Pesca Valentia Ltd* v *Minister for Fisheries (No 2)* [1990] 2 IR 305, 323. In *Bairead* v *McDonald* (1988-93) 4 Irish Tax Reports 475, Barron J appears to have been willing to spell out a promise from a course of conduct on the part of the Revenue. However, his judgments in the case are not clear on this point, nor is it obvious how the taxpayer could be said to have acted to his detriment on the basis of any promise. Perhaps the case is better classified as an example of the doctrine of legitimate expectation discussed in the text following note 144 *infra*.

82 Treitel note 66 *supra*, p 103.

83 *Ibid*, p 100. See also *Traveller's Indemnity Co of Canada* v *Maracle* (1991) 80 DLR (4th) 653 (SCC).

84 *Ibid*, p 104.

estoppel does not originate in the rigid context of contract law, courts have sometimes been willing to accept representations of a rather vague nature, or indeed mere shared assumptions,[85] as sufficient to trigger this doctrine.

(6) *Requirement of Detriment*: While detrimental reliance is an essential feature of proprietary estoppel,[86][86] there has been a suggestion in the English case law that promissory estoppel does not require that the claimant have acted to her detriment.[87] However, this may be simply a semantic point since the promissory estoppel authorities require at least that the claimant have "altered her position"[88][88] so that it would be inequitable for the promise to be withdrawn. If one interprets acting to one's "detriment" to mean conduct which would make it unconscionable for the representor to withdraw the representation,[89] then this difference seems to disappear.[90]

(7) *Relationship Between the Parties*: Proprietary estoppel can apply irrespective of the relationship between the representor and the representee. However, for promissory estoppel to operate, there was traditionally a requirement of a pre-existing contractual relationship between the parties. This reflects the origin of the doctrine in *High Trees*[91] in the context of a waiver of

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85 See *Re Sharpe* [1980] 1 WLR 219 (relying, however, on questionable authorities such as *Errington* v *Errington* [1952] 1 All ER 149 and *Tanner* v *Tanner* [1975] 3 All ER 776).

86 In the early case of *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674-675, Dixon J made the basic point that the requisite conduct need not be detrimental or disadvantageous to the claimant in itself; it is only necessary that detriment would arise if the representation were not fulfilled. Consider a case where a landlord assures his tenant that her lease, which is shortly due to expire, will be renewed. In reliance on this representation, the tenant decides to renovate her apartment at great expense. In one sense, the tenant's conduct in improving her living space is not "detrimental". Nonetheless, if the assumption on the basis of which she acted were removed, she would have acted to her "detriment", since she would lose all the benefit of the expenditure when the lease expired.

87 *Brikom Investments* v *Carr* [1979] QB 467, 482-483 *per* Lord Denning MR. Note, however, that in the proprietary estoppel case of *Greasley* v *Cooke* [1980] 1 WLR 1306, 1311 Lord Denning MR cited his views in *Brikom* and apparently regarded the position in relation to detriment as identical in both promissory and proprietary estoppel. It appears that Lord Denning did not intend to deny the need for detriment (in a wide sense: see note 86 *supra*) and may simply have intended to suggest that a presumption of detrimental reliance should be raised in certain circumstances. *Cf* Parkinson note 5 *supra*, p 245; Hillman "Questioning the 'New Consensus' on Promissory Estoppel: An Empirical and Theoretical Study" (1998) 98 Col Law Rev 580 (both stressing the need for detriment).

88 See *eg* Treitel note 66 *supra*, p 103.

89 See note 86 *supra*.

90 Note also that many Irish cases assume the need for detriment in relation to promissory estoppel. See Clark note 66 *supra*, p 62, citing *McCambridge* v *Winters* High Court, unreported, August 28 1984; *Industrial Yarns Ltd* v *Greene* note 81 *supra*. See also the formulation favoured by Costello J in *Re JR* note 45 *supra*, quoted as text to note 71 *supra*, which also requires detriment.

91 Note 69 *supra*.

rights under an existing contract. This restriction, if taken seriously, would provide a significant limitation on promissory estoppel and would prevent an estoppel resulting from a simple promise made outside the context of any previous contract with the promisee.

The requirement under discussion has been diluted to some extent in the case law.[92] Treitel[93] takes the view that, while it is necessary that there be "a relationship giving rise to rights and duties" between the parties, it is not necessary that this relationship be contractual.[94] It appears that, in principle, the requirement of an existing legal relationship between the parties merely reflects the distinct requirement that the promise in question must be *to refrain from enforcing strict legal rights* (which in turn is linked to the principle that promissory estoppel cannot provide a cause of action). It is only if the parties are in a pre-existing relationship giving rise to rights and duties that one party has, and therefore can promise not to enforce, strict legal rights against the other.[95]

PART TWO
TOWARDS A UNIFIED DOCTRINE OF ESTOPPEL?

I DEVELOPMENTS IN ENGLAND AND AUSTRALIA

(i) England

The previous section explored the traditional differences between proprietary and promissory

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92 The leading Irish case is *Revenue Commissioners* v *Moroney* [1972] IR 372 where Kenny J held that it would be sufficient if it were intended that a contract would come into existence between the parties in the future. (See Brady "A Case of Promissory Estoppel in Ireland" (1970) V Ir Jur (ns) 296). On appeal in *Moroney*, the Supreme Court did not find it necessary to address the issue. See generally Coughlan "Equity: Swords, Shields and Estoppel Licences" (1993) 15 DULJ (ns) 188, 198-201. For the English position, see Treitel note 66 *supra*, pp 101-102, discussing *inter alia* *Durham Fancy Goods Ltd* v *Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839; *The Henrik Sif* [1982] 1 Lloyds Rep 456. See also *Daulat Investments Inc* v *Ceci's Home for Children* (1991) 85 DLR (4th) 248 (Ont Ct of Justice); *Reclamation Systems Inc* v *Rae* (1996) 27 OR (3d) 419 (Ont Ct of Justice); *Burbery Mortgage Finance & Savings Ltd* v *Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (NZ CA).

93 Note 66 *supra*, p 100.

94 For cases where the doctrine was applied in the context of a family relationship, see *Cullen* v *Cullen* [1962] IR 268; *Re JR* note 45 *supra*; *Maharaj* v *Chand* [1986] AC 898 (Privy Council).

95 See generally Finn note 29 *supra*.

estoppel. These differences were left untouched by the minor revolution effected in England by *Taylor Fashions*.[96] As was noted earlier, that case freed proprietary estoppel from the shackles of the *probanda*, demonstrating that (in accordance with Lord Kingsdown's formulation in *Ramsden* v *Dyson*) an estoppel could flow from detrimental reliance on an expectation encouraged by a landowner. However, even after *Taylor Fashions*, the crucial limitation remained that proprietary estoppel was confined to situations where the claimant was led to expect an interest in land.[97] Equally, promissory estoppel was unaffected by *Taylor Fashions*, so that all the restrictions on that doctrine (discussed in the previous section) remained in place.

Not all judges (often an indirect method of referring to Lord Denning) have been satisfied with this position. As early as 1982, in *Amalgamated Investment & Property Co Ltd* v *Texas Commerce International Bank*[98] Lord Denning MR expressed the view that all the separate forms of estoppel could now "be seen to merge into one general principle shorn of limitations".[99] He continued with a statement of this principle:

> When the parties to a transaction proceed on the basis of an underlying assumption - either of law or of fact - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.[100]

Characteristically, Lord Denning MR preferred not to encumber his statement of principle with any reference to supporting authority.[101]

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96 Note 27 *supra.*

97 See note 79 *supra*.

98 [1982] QB 84. Note also the earlier case of *Crabb* v *Arun DC* [1976] 1 Ch 179, 193 where Scarman LJ commented that "he did not find helpful the distinction between promissory and proprietary estoppel".

99 *Ibid,* 122.

100 *Ibid.*

101 Nor was Lord Denning MR burdened with the support of his colleagues in the Court of Appeal, who decided the case on the basis of estoppel by convention (a form of common law estoppel) and who evinced no support for his broad approach. See in particular the comment of Eveleigh LJ *ibid*, 126G. It is interesting to note that, although Lord Denning MR prefaced his formulation with an assertion that all the forms of estoppel had merged, his statement of principle is not as wide-ranging as might have been expected. In fact, it bears a surprising resemblance to the orthodox statement of the narrow doctrine of estoppel by convention contained in Spencer Bower and Turner *Estoppel by Representation* 3rd ed

This statement was quoted uncritically in a later decision of the Privy Council[102] (although not relied upon directly) and therefore cannot be dismissed out of hand. However, it is fair to say that subsequent English cases have not delivered on the promise of Lord Denning MR's sweeping statement. There has, as yet, been no further move in the case law to assimilate the different estoppels or to examine the consequences of so doing.

(ii) Australia

Despite its muted reception in England, Lord Denning MR's idea of a unified theory of estoppel has found acceptance in Australia. The landmark case was the decision of the High Court of Australia in *Waltons Stores (Interstate) v Maher*,[103] a decision of the High Court of Australia which was clarified by the same court in *Commonwealth of Australia v Verwayen*.[104] Although the various judges of the High Court of Australia took differing views, strong support emerges from these cases for the view that the different forms of estoppel have been dissolved in Australian law and one form of equitable estoppel has been recognised based on a broad principle of unconscionability. As the matter was explained in the joint judgment of Mason CJ and Wilson J in *Waltons Stores*:

> One may ... discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it"[105] .... Equity comes to the relief of such a plaintiff on the

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(London: Butterworths, 1977) p 157 which was quoted by the other judges of the Court of Appeal in *Amalgamated Investment ibid*, 130-131 *per* Brandon LJ; 126 *per* Eveleigh LJ. One important difference between the two formulations appears to be Lord Denning's view that the estoppel raised an equity which could be satisfied at the court's discretion. *Cf Dun and Bradstreet Software Services* v *Provident Mutual Life Assurance Association* note 81 *supra*, p 38 where Peter Gibson LJ regarded Lord Denning's remarks as applicable only in the context of estoppel by convention.

[102] *AG of Hong Kong* v *Humphreys Estate (Queen's Gardens) Ltd* [1987] 1 AC 114, 124.

[103] (1988) 164 CLR 387. See generally Kirk "Confronting the Forms of Action: The Emergence of Substantive Estoppel" (1991) 13 Adel LR 227; Bagot "Equitable Estoppel and Contractual Obligations in the Light of *Waltons* v *Maher*" (1988) 62 ALJ 926; Clark "The Sword-Bearer has Arrived: Promissory Estoppel and *Waltons Stores (Interstate)* v *Maher*" (1987-89) 9 U of Tasm LR 68.

[104] (1990) 170 CLR 394.

[105] *Per* Dixon J in *Grundt* v *Great Boulder Pty Gold Mines Ltd* note 86 *supra*, 675.

footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.[106]

This Australian development goes far beyond *Taylor Fashions*[107] and appears to merge the estoppels.[108] It makes no difference whether one regards an expanded promissory estoppel as having swallowed proprietary estoppel or vice versa; the net result is that one is left with a form of equitable estoppel which can be used as a cause of action, can operate irrespective of whether the representation or promise concerns land and which allows the court a range of remedial options with which to satisfy the equity which has arisen in favour of the claimant.[109]

The practical operation of the new Australian doctrine may be illustrated by reference to the facts of the leading case of *Waltons Stores v Maher*.[110] The case concerned a putative agreement whereby Maher was to lease certain land to Waltons Stores. Pursuant to the leasing arrangement, Maher was to demolish an existing building on his land and erect a new structure to Waltons Stores' specifications. Although there had been no formal exchange of contracts, Waltons Stores led Maher to believe that the exchange was only a formality and would take place in due course. Maher therefore began to demolish the building. About a week later, Waltons Stores began to have doubts about the transaction and instructed their solicitors to delay in finalising the contract. More than two months later, Waltons Stores informed Maher that they did not intend to proceed with the agreement. By this time, to Waltons Stores' knowledge, Maher had completed the demolition of his building and made substantial progress on the construction of the new building. Maher then issued proceedings, seeking to hold Waltons Stores to the intended agreement.

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106 Note 103 *supra*, 404.

107 Note 27 *supra*. Somewhat confusingly, the much more limited revolution launched in *Taylor Fashions* also waved the banner of unconscionability.

108 It is unclear whether Australia's unified doctrine of equitable estoppel subsumes the common law doctrine of estoppel by representation. For discussion, see Parkinson note 5 *supra*, pp 223-229.

109 *Cf Silvoi Pty Ltd* v *Barbaro* (1988) 13 NSWLR 466, 472 where Priestly JA, with the concurrence of the other members of the New South Wales Court of Appeal, put forward a seven point summary of the principles to be derived from *Waltons Stores* note 103 *supra*. Note also Priestly JA's modification of one of his propositions in *Austotel Ltd* v *Franklins Ltd* (1989) 16 NSWLR 582. See further *Foran* v *Wright* (1989) 168 CLR 385; Parkinson "Equitable Estoppel: Developments after Waltons Stores (Interstate) Ltd v Maher" (1990) 3 Journal of Contract Law 50.

110 Note 103 *supra*.

Despite the questionable nature of Waltons Stores' conduct, it was clear that the traditional categories of estoppel could provide no remedy for Maher. Proprietary estoppel was unavailable because Maher had not been led to believe that he would obtain an interest in land belonging to another; promissory estoppel, being "a shield and not a sword", could not be relied upon by Maher as a cause of action enabling him to hold Waltons Stores to the agreement. Nonetheless, the High Court of Australia, applying its new unified doctrine of equitable estoppel, held that Waltons Stores was estopped from denying that it was bound by the agreement.

The Australian developments have obvious implications for the doctrine of consideration in contract law.[111] For this reason, the Australian cases have not been greeted with great enthusiasm in England.[112] Despite the encouragement of the Australian cases, it appears that the various forms of estoppel will remain stubbornly distinct in English law for the foreseeable future. Canadian courts have adopted "a flexible test for estoppel"[113] but do not yet appear to have explicitly adopted the Australian position of a unified doctrine of estoppel.[114] Finally, in

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111 Note the view of Judge Weeks QC in *Taylor* v *Dickens* [1998] 1 FLR 806, 824: "In my judgment there is no equitable jurisdiction to hold a person to a promise simply because the court thinks it unfair, unconscionable or morally objectionable for him to go back on it. If there were such a jurisdiction, one might as well forget the law of contract and issue every civil judge with a portable palm tree." See also Finn note 29 *supra*, pp 83-84 arguing that any wide-ranging reform of the law of contract (possibly along the lines of Art 90(1) of the United States' Second Restatement of the Law of Contracts) requires careful consideration on its own terms and should not be accomplished by a side-wind. In the defence of their estoppel doctrine, the Australian courts have argued that its function is not to "enforce" promises (thus undermining the law of contract) but rather to compensate for detriment. Thus, the Australian courts emphasise that the remedy under estoppel should reflect the detriment suffered by the claimant rather than the expectation created by the defendant's representation. See *Commonwealth of Australia* v *Verwayen* note 104 *supra*, 413 *per* Mason CJ; 429 *per* Brennan J; 501 *per* McHugh J. See also Gray note 5 *supra*, pp 345-348; Robertson "Satisfying the Minimum Equity: Equitable Remedies After *Verwayen*" (1996) 20 Melb Univ LR 805; Cooke "Estoppel and the Protection of Expectations" (1997) 17 Legal Studies 258; Hillman note 87 *supra*.

112 Note the views of Peter Gibson LJ in *Dun and Bradstreet Software Services* v *Provident Mutual Life Assurance Association* note 81 *supra*. See also Treitel note 66 *supra* who does not even discuss the Australian cases but rejects (*ibid*, p 130) any suggestion that proprietary estoppel could be extended beyond the context of promises related to specific property. Note, however, that in *Sledgemore* v *Dalby* (1996) 72 P & CR 196, 208-209, Hobhouse LJ quoted with approval a number of "illuminating passages" from the judgments in *Commonwealth* v *Verwayen* note 104 *supra*. See Pawlowski "Proprietary Estoppel - Satisfying the Equity" (1997) 113 LQR 232. See generally Lunney "Towards a Unified Estoppel: The Long and Winding Road" [1993] Conv 239.

113 *Welch* v *O'Brian Financial Corp* (1991) 86 DLR (4th) 155, 168 *per* Legg JA (BC CA).

114 *Welch* note 113 *supra* appears to be the only Canadian case where *Waltons Stores* note 103 *supra* was considered. Note also *Litwin Construction (1973) Ltd* v *Pan Ltd* (1988) 52 DLR (4th) 459 (BC CA); *Revell* v *Litwin Construction (1973) Ltd* (1991) 86 DLR (4th) 169 (BC CA); *Reclamation Systems Inc* v *Rae* (1996) 27 OR (3d) 419 (Ont Ct of Justice). It is possible that the impetus to expand equitable estoppel in Canada may have been diminished by the development in that jurisdiction, following *Pettkus* v *Becker* [1980] 2 SCR 834, of a broad doctrine of unjust enrichment. See the comment of Waters "The Nature of the Remedial Constructive Trust", Chapter 13 in Birks (ed) *The Frontiers of Liability* (Oxford: Oxford University Press, 1994) Vol 2, p 170. See also *Clarkson* v *McCrossen Estate* (1995) 122 DLR

New Zealand, the courts have taken on board the modern English developments but, once more, have not explicitly taken the further step of fusing proprietary and promissory estoppel.[115]

II THE IRISH POSITION

Given that it has only recently been confirmed that the expectation limb of proprietary estoppel forms part of Irish law,[116] it would be surprising if our courts had taken the far more drastic step of merging all forms of equitable estoppel into one doctrine. However, logic does not always determine the development of the law in Ireland. Although none of the Australian decisions appears to have been considered by an Irish court, there has been a small number of Irish decisions which seem to blur the boundaries between the estoppels by allowing promissory estoppel to be used as a sword.[117] The most notable cases[118] are *Webb v Ireland*,[119] *Kenny* v *Kelly*[120] and *Re JR (A Ward of Court)*.[121] These authorities come at the matter from the promissory estoppel side. However, it is also necessary to consider *McMahon* v *Kerry County Council*[122] where, long before *Waltons Stores*[123] was decided, Finlay P[124] stretched the limits of

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(4th) 239 (BC CA); *Single* v *Macharski Estate* (1996) 11 Estates and Trusts Reports (2d) 1 (Man CA) (unjust enrichment doctrine trespassing on the territory of estoppel).

115 See, in addition to the authorities cited in note 38 *supra*, *Prudential Building and Investment Society of Canterbury* v *Hankins* [1997] 1 NZLR 114, 121-122 *per* Hammond J; *Rodney Aero Club Inc* v *Moore* [1998] 2 NZLR 192, 197-198 *per* Hammond J.

116 See *Smyth* v *Halpin* note 54 *supra*.

117 *Cf* O'Dell "Contract - Estoppel and *Ultra Vires* Contracts" (1992) 14 DULJ (ns) 123, 133-138 discussing *In re PMPA Garage (Longmile) Ltd* [1992] ILRM 337 and detecting a trend in the Irish cases towards the recognition of a unified doctrine of estoppel.

118 O'Dell note 117 *supra*, 134 also cites a number of Irish cases where a defendant was estopped by his representation from pleading the Statute of Limitations, 1957. See *O'Reilly* v *Granville* [1971] IR 90; *Doran* v *Thompson* [1978] IR 223; *Traynor* v *Fegan* [1985] IR 586. However, in these cases the plaintiff had an independent cause of action and the estoppel operated only to remove a possible defence to the main action (see note 75 *supra*). Therefore, they provide no support for the suggestion that the Irish courts are moving towards a unified estoppel. See also *O'C (C)* v *D (E)* (1996) 5 Fam LJ 87 (Circuit Ct).

119 [1988] IR 353.

120 [1988] IR 457.

121 [1993] ILRM 657.

122 (1976) [1981] ILRM 419.

proprietary estoppel in the name of "unconscionability". It will be convenient to analyse these four Irish cases in chronological order, beginning with *McMahon*.

(i) McMahon v Kerry County Council

In *McMahon*,[125] Finlay P took a very broad view of the *Ramsden* v *Dyson*[126] principle. The case concerned a plot of land which the plaintiffs had purchased from the defendant County Council with a view to building a school for the locality. Eventually that plan was abandoned and the site, which had neither been marked nor fenced off, was left undeveloped. In 1968, the plaintiffs visited the site and discovered that employees of the County Council were preparing to build on it. The plaintiffs complained and the work stopped. Subsequently, in 1972, the County Council proceeded to build two houses on the site and put tenants into occupation. In 1973, the plaintiffs discovered the buildings and took action to recover possession of the land. The defendant Council relied on the mistake limb of proprietary estoppel. Finlay P held in their favour, ordering that they were entitled to remain in possession of the disputed site on condition that they pay the McMahons the sum of £2,000 to enable them to buy a similar empty site in the area.

Finlay P began his legal analysis by referring to the "locus classicus", *Ramsden* v *Dyson*, which was "still cited with approval where it applies".[127] Finlay P quoted the famous passage of Lord Cranworth which deals with a landowner who knowingly stands by while a stranger mistakenly improves the landowner's property.[128] Having explained the general principle, Lord Cranworth had added the following clarification (which concludes the passage quoted by Finlay P):

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123 Note 103 *supra*.

124 As he then was.

125 [1981] ILRM 419. Judgment was delivered on July 24 1976. See Pearce "The Mistaken Improver of Land" (1985) 79 ILS Gazette 179 and Brady "Judicial Pragmatism and the Search for Justice *Inter Partes*" (1986) XXI Ir Jur (ns) 46 (the latter taking a very different view of *McMahon* to that of the present author).

126 (1866) LR 1 HL 129.

127 Note 125 *supra*, 420.

128 The first paragraph of this passage is quoted as text to note 14 *supra*.

> But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.[129]

Finlay P was satisfied that the case before him fell "into neither of the categories or propositions contained in the passage which I have just quoted".[130] It is not readily apparent from Lord Cranworth's speech that it identifies two categories or contains two propositions. However, upon an inspection of the rest of Finlay P's speech, it becomes clear that the categories envisaged by Finlay P were as follows: (i) cases where a landowner remains wilfully passive knowing that a stranger is mistakenly improving his land (estoppel available) and (ii) cases where a stranger builds on another's land knowing that it does not belong to him (estoppel not available). Finlay P believed that the case before him fell into neither category since although the McMahons did not knowingly stand by neither did the Council knowingly build on another's land.[131]

Finlay P then explained that:

> It seems to me that the principles of equity stated in [the passage from Lord Cranworth's speech] depend not exclusively on the action or inaction of the [landowner] or on the state of his knowledge but have regard also to the action of the [estoppel claimant]. In the first case where he is protected it is of course essential that he was innocent and in the second case where he is deprived of the buildings he has made it seems to be an essential constituent that he put them on the land of another knowing it was the land of another and therefore acting either fraudulently or at least with knowledge of the risk he was

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129 (1866) LR 1 HL 129, 141 quoted by Finlay P note 125 *supra*, 420.

130 Note 125 *supra*, 420.

131 Finlay P held that the County Council did not have knowledge of the fact that the land did not belong to them. He reached this conclusion despite the fact that (i) the County Council itself had sold the land to the McMahons and (ii) the McMahons had objected to a previous attempt by the Council to build on the land in question. One is tempted to inquire as to how a County Council can acquire knowledge of any matter except through its servants, some of whom had been involved in selling the land and some of whom had been informed explicitly by the McMahons that the land did not belong to the Council. Finlay P set the standard of knowledge required by the landowner at a high level, believing (*ibid*, 421) that the type of knowledge envisaged by Lord Cranworth was "real knowledge which would involve a wilful act on the part of the party who has done the building."

running.[132][132]

Thus, Finlay P's argument was that, for Lord Cranworth, the landowner's recovery of the land was dependent on the stranger being aware that he was building on the land of another.[133] With all due respect, Finlay P's interpretation of Lord Cranworth's speech is untenable. Lord Cranworth stated clearly, in the passage quoted by Finlay P, that "*two* things are required"[134] to raise an estoppel preventing the landowner from recovering his land. First, the claimant must suppose himself to be building on his own land (the point upon which Finlay P focused) and, second, the landowner must be aware that the land being improved belongs to him (the point which Finlay P ignored). As Lord Cranworth explained, in the passage quoted by Finlay P, the equity against the landowner is based on his dishonesty in remaining "wilfully passive" in order to profit from another's mistake. On the facts of *McMahon*, as Finlay P conceded,[135] the landowners were entirely unaware of the building and by no stretch of the imagination could they have been described as having been "dishonest" in failing to assert their title.[136][136]

In addition to considering the conduct of both the landowner and the estoppel claimant,

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132 *Ibid*, 421.

133 Finlay P (*ibid*) explained that Lord Cranworth's example "of the case where the person may recover his land with the value of the building clearly provides 'if the stranger builds on my land *knowing* it to be mine.'" (Finlay P's emphasis). Note also Finlay P's reiteration (*ibid*) of his view that "[i]f a court applying equitable principles is truly to act as a court of conscience then it seems to me unavoidable that it should consider not only conduct on the part of the [landowner] with particular regard to whether it is wrong or wilful but also conduct on the part of the [estoppel claimant] ...."

134 Emphasis supplied.

135 Note 125 *supra*, 420-421.

136 It is interesting to contrast *McMahon* with the little known case of *O'Sullivan* v *Cork County Council* High Court, unreported, December 18 1969 (Teevan J). The building of Cork Airport in 1960 had led the defendant County Council to carry out major road alterations. The County Council later built a house on a vacant piece of land through which the old road had passed. Unfortunately, the agents of the County Council failed to realise that the old road was on land belonging to the plaintiffs, who at all times had held it subject to the public right of passage along the highway. Once the new highway had been built, and the old road blocked by the house, the public right of way was extinguished and the full ownership of the land reverted to the plaintiffs. When, subsequent to the construction of the house, the plaintiffs realised that they owned the land, they successfully claimed possession of the relevant plot of land along with the house standing upon it. The case for an estoppel in *O'Sullivan* was, in principle, stronger than in *McMahon* because the landowners in *O'Sullivan* had at least been aware of the building while it was taking place. Moreover, one might argue that the mistake made by Cork County Council (which turned to some extent on a misunderstanding of the law) was more forgivable than the simple oversight of their Kerry counterparts. Nonetheless, Teevan J rejected Cork County Council's plea of estoppel while Finlay P (without the benefit of considering the earlier case) took a more lenient line with Kerry County Council. See also note 141 *infra*.

Finlay P believed that "a court of conscience" should also look to "the consequences both from the point of view of the plaintiff and the defendant" of the application of equitable principles.[137] The learned judge then proceeded to examine a series of factors which he felt were material to the application of the relevant equitable principle.[138] Finlay P felt that these factors and considerations, "many and possibly in their combination unique",[139] "forced" and "drove" him to the conclusion that the McMahons would be estopped from recovering possession of their land. The opposite conclusion would be "truly unconscionable".[140]

In attempting to assess the general significance of *McMahon*, one faces the difficulty that it is, with all due respect, a clear example of "the classic fault", which Finlay P was able to identify but not avoid, "of creating bad law through the consideration of a hard case".[141] On the one hand, it might be thought that *McMahon*, where traditional rules were ignored in the name of unconscionability, offers general support to the modern project of unifying the estoppels. However, the preceding analysis of the case shows that Finlay P was willing to recognise an estoppel in the absence of any real unconscionability on the part of the legal owner. Not even the Australian courts would recognise an estoppel where there had been no representation, encouragement or acquiescence on the part of the legal owner. In the end, the extreme nature of Finlay P's approach detracts from its authority. It seems that the best approach (which is hinted at in Finlay P's judgment) is simply to confine the decision in *McMahon* to its own unusual facts.

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137 Note 125 *supra*, 421.

138 *Ibid*, 421-423. The relevant factors were (i) that the McMahons had originally been sold the land on the basis that a school would be constructed on it; (ii) that the McMahons had failed to mark out their land clearly; (iii) that the site had no intrinsic value for the McMahons; (iv) that the County Council's mistake had been (on Finlay P's rather generous interpretation) "entirely excusable"; (v) that the result of a decree of possession would be a huge windfall for the McMahons and (vi) that the houses were now occupied by local authority tenants in genuine need.

139 *Ibid*, 423.

140 *Ibid.*

141 *Ibid*. Contrast the approach in *Brand* v *Chris Building Co Ltd* [1957] VR 625 (Sup Ct of Victoria). The defendant had, on the basis of a mistake of fact, built a house on the plaintiff's land. The plaintiff was unaware that the building was taking place but, as soon as he discovered the trespass, took steps to vindicate his rights. Hudson J held that the *Ramsden* v *Dyson* principle had no application in the circumstances and granted an injunction preventing the defendant from further entry on the plaintiff's land. Hudson J explained (*ibid*, 629) that: "On the face of it, the result of the case seems very hard on the defendant and he may well feel that the decision is unjust; but he must realise that the Court must be guided in its decision by principles of law." For further discussion of the problem under discussion, see Sutton "What Should be Done for Mistaken Improvers?", Chapter 8 in Finn (ed) *Essays on Restitution* (Sydney: Law Book Company, 1990). *Cf* note 136 *supra.*

(b) Webb v Ireland

The famous case of *Webb v Ireland*[142] was concerned with the ownership of the Derrynaflan Hoard, a collection of archaeological objects which was discovered by Mr Webb and his son. The Webbs handed over the hoard to the National Museum along with a letter from their solicitor stating that the articles were being delivered "pending determination of the legal ownership or status thereof; and also, of course, subject to any rights to payment or reward which [the Webbs] might have."[143] The Webbs were then assured by the Director of the National Museum that they would receive "honourable treatment". After a number of months, when there was no sign of the return of the hoard or the payment of an acceptable reward, the Webbs took legal action to regain possession of the treasure.

When the case ultimately reached the Supreme Court, it was held, on a number of grounds, that the State was entitled to the hoard.[144] However, the Supreme Court accepted the claim of the Webbs that the reward of £10,000 which had been offered to them by the State was inadequate and that, in the circumstances of the case, they had a "legitimate expectation" of a higher reward. Finlay CJ (with the concurrence of his brethren in the Supreme Court) held that the Webbs were entitled to a reward of £50,000.

Finlay CJ commented that the doctrine of legitimate expectation[145] had not "in those terms been the subject matter of any decision of our courts."[146] However, Finlay CJ believed that the doctrine was "but an aspect of the well-recognised equitable concept of promissory estoppel

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142 [1988] IR 353.

143 *Ibid*, 358.

144 For discussion of the wider aspects of the case, see Kelly "Hidden Treasure and the Constitution" (1988) 10 DULJ (ns) 5.

145 See generally Delany "The Doctrine of Legitimate Expectation in Irish Law" (1990) 12 DULJ (ns) 1; Brady "Aspiring Students, Retiring Professors and the Doctrine of Legitimate Expectation" (1996) XXXI Ir Jur (ns) 133; Delany "The Future of the Doctrine of Legitimate Expectations in Irish Administrative Law" (1997) XXXII Ir Jur (ns) 217; Hogan and Morgan *Administrative Law in Ireland* 3rd ed (Dublin: Round Hall Sweet and Maxwell, 1998) pp 858-904.

146 Note 142 *supra*, 384. In fact, the doctrine had been discussed in a number of previous cases, the earliest being *Smith* v *Ireland* [1983] ILRM 300.

(which has been frequently applied in our courts), whereby a promise or representation as to intention may in certain circumstances be held binding on the representor or promisor."[147] The learned Chief Justice went on to explain, in a passage which has been quoted repeatedly in the subsequent Irish case law,[148] that:

> The nature and extent of that doctrine [*ie* promissory estoppel] in circumstances such as those of this case has been expressed as follows by Lord Denning MR in *Amalgamated Property Co* v *Texas Bank* [1982] QB 84, 122:-
>
> > "When the parties to a transaction proceed on the basis of an underlying assumption - either of law or of fact - whether due to misrepresentation or mistake makes no difference - on which they have conducted the dealings between them - neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."[149]

Having commented that he regarded Lord Denning's views as being in "accord with fundamental equitable principles",[150] Finlay CJ went on to hold that "the unqualified assurance" that the Webbs would be honourably treated was "an integral part of the transaction under which the hoard was deposited in the Museum and accepted on behalf of the State".[151] Therefore, the State could not go back on that assurance. It was necessary to give effect to that assurance "in the form of a monetary award of an amount which is reasonable in the light of all the relevant circumstances."[152] Finlay CJ therefore held that the Webbs should be paid £50,000 to be divided between them.

An unfortunate aspect of Finlay CJ's legal reasoning is the manner in which he

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147 *Ibid.*

148 See note 170 *infra*.

149 Note 142 *supra*, 384. See text following note 98 *supra* for discussion of the relevant *dictum* of Lord Denning MR.

150 *Ibid.* It is noteworthy that the Irish courts often invoke "fundamental" principles of equity, thus allowing them to ignore completely the more detailed principles which have been worked out over the centuries by previous generations of Irish and English judges. Compare the comments of O'Flaherty J in a different context in *Lynch* v *Burke* [1996] 2 IR 159, 168 concerning his desire to restore "equity to the high ground which it should properly occupy to ameliorate the harshness of common law rules on occasion". Sadly, the high ground occupied by equity in Ireland often lies far above such concerns as consistency, certainty and predictability.

151 Note 142 *supra*, 384.

152 *Ibid.*

confounded two distinct doctrines: that of promissory estoppel and that of legitimate expectation. The latter doctrine had been recognised prior to *Webb* in both English[153] and European Community Law.[154][154] The doctrine of legitimate expectation appears to have made its first appearance in English law in 1969 in the judgment of (inevitably) Lord Denning in *Schmidt* v *Secretary of State for Home Affairs*.[155] The doctrine arose in the context of the demands of natural justice in relation to decisions by administrative authorities. As Costello J explained in *Tara Prospecting Ltd* v *Minister for Energy*,[156] the English case law "has established that a duty to afford a hearing may be imposed when such expectations are created by public authorities".[157] Costello J argued that any rights which may arise under the doctrine are purely procedural in nature.[158] This view of Irish law on the matter has recently been supported by Delany,[159] who (although herself favouring a somewhat less restrictive approach) concedes that "there is little sign of judicial acceptance of the notion of substantive legitimate expectations in this jurisdiction".[160]

Given the obvious differences between the doctrine of legitimate expectation and that of promissory estoppel, it is not surprising that later Irish cases have questioned Finlay CJ's view that the former was merely an aspect of the latter. In subsequent Supreme Court cases, O'Flaherty J has twice qualified Finlay CJ's views in *Webb*, pointing out that they held true

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153 See text to note 155 *infra.*

154 For discussion in an Irish context of the European version of the doctrine of respect for legitimate expectations (which differs somewhat from its Anglo-Irish counterpart), see *Carbery Milk Products Ltd* v *Minister for Agriculture* (1988-1993) 4 Irish Tax Reports 492. See also *Mulder* v *Minister van Landbouw en Visserij* [1988] ECR 2321.

155 [1969] 2 Ch 149.

156 [1993] ILRM 771.

157 *Ibid*, 783.

158 For a neat illustration of the use of the doctrine to ensure fair procedures, see *Sherlock* v *Governor of Mountjoy Prison* [1991] 1 IR 451.

159 "The Future of the Doctrine of Legitimate Expectations" note 145 *supra*.

160 *Ibid*, 225. Delany's detailed review of the authorities shows that the courts in Canada, Australia and New Zealand see legitimate expectations in essentially procedural terms. Some uncertainty surrounds the law in England but (*ibid*) it "still seems far from clear that the courts in England are prepared to accept that a promise or representation may give rise to a substantive entitlement."

"certainly in the circumstances of that case".[161] More directly, O'Hanlon J in *Association of General Medical Practitioners Ltd* v *Minister for Health*[162] has drawn attention to the differences between the two doctrines. One of the most important distinctions appears to be that detrimental reliance is essential under promissory estoppel but not under legitimate expectation.[163] Therefore, Finlay CJ's blurring of the doctrines has led to two related problems: the unnecessary introduction of a requirement of detriment into the doctrine of legitimate expectations[164] and the weakening of the requirement of detriment in relation to promissory estoppel.[165]

Although Finlay CJ's brief treatment of the issue has given rise to a deluge of cases on "legitimate expectation", the better view is that his own decision was simply "a generous application of the doctrine of promissory estoppel".[166] However, if this is so, then Finlay CJ clearly used promissory estoppel as "a sword not a shield", in other words as an independent cause of action entitling the Webbs to the reward promised. Finlay CJ made no attempt to address this difficulty,[167] beyond his citation (without discussion) of Lord Denning MR's *dictum*

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[161] *Wiley* v *Revenue Commissioners* [1993] ILRM 482, 492; *In Re La Lavia* [1996] 1 ILRM 194, 199. See also *Truck and Machinery Sales Ltd* v *Marubeni Komatsu Ltd* [1996] 1 IR 12, 29 *per* Keane J (High Court) (approach in *Webb* "not dissimilar" to promissory estoppel); *Abrahamson* v *Law Society of Ireland* [1996] 2 ILRM 481, 494-495 *per* McCracken J ("legitimate expectation is similar to and probably founded upon" promissory estoppel but has "been extended well beyond the bounds of that doctrine"); *Galvin* v *Chief Appeals Officer* High Court, unreported, June 27 1997 (Costello P) p 22 ("legitimate expectation ... is closely connected to the doctrine of estoppel but it is not identical with it"); *Hinde Livestock Exports Ltd* v *Pandoro Ltd* High Court, unreported, August 1 1997 (Costello P) p 5 (legitimate expectation "a variation, if not a synonym, for the concept of promissory estoppel.")

[162] [1995] 2 ILRM 481, 491-492.

[163] It would also appear that legitimate expectation is only applicable in cases having a public law dimension, although the "public" nature of a dispute is to be judged on a reasonably broad test. See the judgment of Shanley J in *Eoghan* v *University College Dublin* [1996] 1 IR 390. For further discussion of the differences between promissory estoppel and legitimate expectation, see Hogan and Morgan note 145 *supra*, pp 896-900.

[164] See *Garda Representative Association* v *Ireland* [1989] ILRM 1, 12 *per* Murphy J; *Nolan* v *Minister for the Environment* [1989] IR 357, 366 *per* Costello J; *Cosgrove* v *Legal Aid Board* [1991] 2 IR 43, 55 *per* Gannon J. Contrast *Fakih* v *Minister for Justice* [1993] 2 IR 406, 423-424 *per* O'Hanlon J; *Abrahamson* v *Law Society of Ireland* [1996] 2 ILRM 481, 499; *Galvin* v *Chief Appeals Officer* High Court, unreported, June 27 1997 (Costello P) p 22. *Cf* Hogan and Morgan note 145 *supra*, pp 881-882; 897-898.

[165] An example is provided by the *Webb* case itself. Could it really be argued that by refraining from misappropriating the find the Webbs were acting to their detriment? In any case, the promise of honourable treatment had been made *after* the Webbs had, on the advice of their solicitor, delivered the hoard to the Museum for safekeeping. It was probably to address this difficulty that Finlay CJ resorted to the unsupported assertion (note 142 *supra*, 385) that the assurance was "an integral part of the transaction under which the hoard was deposited".

[166] See Hogan and Morgan note 145 *supra*, p 867.

[167] The problem was partly camouflaged by Finlay CJ's use of the less familiar language of "legitimate expectation".

in *Amalgamated Investment*.[168] Lord Denning MR's *dictum*,[169] if taken seriously, would certainly seem to suggest that the creation of a promissory (or any other kind of) estoppel raises an "equity" in favour of the claimant which the court has a discretion to satisfy as it sees fit. In other words, it appears to provide a licence to use promissory estoppel as a cause of action.

It therefore becomes necessary to consider whether Finlay CJ's reliance on *Amalgamated Investment* means that promissory estoppel may now be used to provide a cause of action in Ireland. The answer must surely be that the *Webb* case cannot have such a drastic implication. Could the entire Irish law of estoppel really be revolutionised in a single paragraph, without analysis or consideration of the consequences, through the citation of a *dictum* from an English case which apparently was not raised by counsel, a *dictum* which moreover represented the views of only one of three judges in the case and which may fairly be regarded as the most extreme expression of opinion to be found in the entire corpus of English case law on estoppel? It is submitted that, given the casual nature of Finlay CJ's approach, for the moment one must consign *Webb* to the sprawling scrapheap of Irish cases which turn on their own facts. However, it cannot be denied that *Webb* represents at least a possible starting point for future developments. If there ever were to be serious consideration given in an Irish court to changing the relationship between the various estoppels, *Webb* certainly provides encouragement for a radical approach.[170]

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168 [1982] QB 84, 122.

169 For discussion, see text following note 98 *supra*.

170 *Webb* has led to a curious phenomenon in the subsequent Irish case law on the administrative law doctrine of legitimate expectation. One sees in the Irish cases, over and over again, Lord Denning MR's radical *dictum* on the unity of the estoppels quoted from Finlay CJ's judgment in *Webb*. The *dictum* sits there in at least eighteen cases, hopelessly unsuitable as a definition of the doctrine of legitimate expectation, completely unanalysed and undigested, a grim reproach to those who advocate doing justice *inter partes* whatever the cost in terms of legal doctrine. (Naturally, one must not dismiss the possibility that, having endlessly repeated Lord Denning's *dictum* out of its context, our judges may begin to believe it). The cases in which Lord Denning's *dictum* has been quoted are as follows: *Egan* v *Minister for Defence* High Court, unreported, November 24 1988 (Barr J); *Nolan* v *Minister for the Environment* [1989] IR 357; *Devitt* v *Minister for Education* [1989] ILRM 639; *Duggan* v *An Taoiseach* [1989] LRM 710; *Conroy* v *Commissioner of An Garda Siochana* [1989] IR 140; *Pesca Valentia Ltd* v *Minister for Fisheries* note 81 *supra*; *Cannon* v *Minister for the Marine* [1991] ILRM 261; *Phillips* v *The Medical Council* [1991] 2 IR 115; *Cosgrove* v *Legal Aid Board* note 164 *supra*; *Fakih* v *Minster for Justice* note 164 *supra*; *Tara Prospecting* v *Minister for Energy* note 156 *supra*; *Carbery Milk Products Ltd* v *Minister for Agriculture* note 154 *supra*; *McCarthy* v *Garda Commissioner* [1993] 1 IR 489; *Dempsey* v *Minister for Justice* [1994] 1 ILRM 401; *Greaney Ltd* v *Dublin Corporation* High Court, unreported, March 7 1994 (Morris J); *Abrahamson* v *Law Society of Ireland* [1996] 2 ILRM 481; *Mulhern* v *Bundoran UDC* High Court, unreported, January 30 1998 (Kelly J); *O'Leary* v *Minister for Finance* High Court, unreported, July 3 1998 (Quirke J).

(c) Kenny v Kelly

Most of the cases following *Webb* have concerned disputes with State authorities and have dealt only in passing with the principles of estoppel.[171] None of these cases appear to stretch the conventional boundaries of promissory estoppel. However, the decision of *Kenny* v *Kelly*[172] is worthy of particular note. The plaintiff had been offered a place at University College Dublin for 1986. However, she wished to defer her place until the following year. Her father called to the admissions office to arrange the deferral. Apparently because of a misunderstanding between the officials in that office, the father was informed that a deferral would be granted but that his daughter would have to supply her reasons in writing. She did so but received no formal notice of her deferral. When her father pursued the matter on her behalf, the university wrote a letter to the effect that it had decided to reject her request for a deferral.

The plaintiff relied on the doctrine of legitimate expectation, invoking the *Webb* case. Barron J treated *Webb* as an example of the application of promissory estoppel, a doctrine which he found equally applicable in the case before him. He found that a promise had been made to the plaintiff that she would be allowed to register in 1987. As required by the *High Trees*[173] decision, this was "a promise intended to be binding, intended to be acted upon and in fact acted upon."[174]

It is clear that at least some of the traditional requirements of promissory estoppel were present in *Kenny*. The essential requirement of detriment was established, as Barron J explained, on the basis that the plaintiff had foregone her opportunity to accept her university place in 1986 and, if denied her place in 1987, would also forfeit her deposit. Furthermore, given that the plaintiff had already paid a deposit to the University, it seems clear that the parties were in a pre-existing contractual relationship. The main problem with the case appears to be the fact that Barron J used promissory estoppel as a cause of action, allowing the plaintiff to enforce the

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171 See the cases listed in the previous footnote.

172 [1988] IR 457.

173 [1947] KB 130.

174 Note 172 *supra*, 463.

promise that she would be given a place in 1987.[175]

Unfortunately, Barron J did not consider this issue and so, once more, any support the case gives to the notion of a unified estoppel doctrine is purely by default. The decision in the case itself can be defended on an independent ground mentioned by Barron J. It could be argued that there was consideration for the grant of the deferral, thus "giving it contractual status".[176] Given that Barron J apparently accepted the contractual argument, it is unfortunate that he found it necessary to use promissory estoppel in an unorthodox manner.[177]

(d) Re JR (A Ward of Court)

The final case to be considered, *Re JR (A Ward of Court)*,[178] involved an elderly man who began to suffer from dementia, was admitted to a psychiatric hospital and was made a ward of Court. The issue was whether or not the claimant, a woman with whom the ward had been living, was entitled to remain in a house belonging to him. She claimed that, when she had gone to live with him, the ward had represented to her "that he would look after her, and that she would be sure of a home for the rest of her life."[179] Although he discussed both promissory and proprietary estoppel, Costello J ultimately held that a promissory estoppel had arisen in favour of the claimant which entitled her to reside in the ward's house rent-free for the rest of her life. Since

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[175] Barron J himself (*ibid*, 463), quoting a passage from Bowen LJ in *Birmingham and District Land Company* v *London and North Western Railway Co* (1888) 40 Ch D 268, 286, appears to have regarded his decision as a standard example of the enforcement of a promise "to delay the enforcement of legal rights". Yet it is difficult on the facts of the case to see how one could conceptualise the university's being required to grant a place to the defendant in 1987 as a mere suspension or delay of their legal rights.

[176] *Ibid*, 463. The argument is that the promise of the deferral was a unilateral offer, which the plaintiff took up by refraining from cancelling her acceptance and obtaining a return of her deposit. It would appear that if this argument were not accepted, one would be forced into the undesirable conclusion that a person who had been granted a *formal* deferral by the university would have no contractual right to enforce that deferral against the university. Another way of framing the argument might therefore be to suggest that the doctrine of estoppel by representation (see text following note 67 *supra*) operated against the university; they had represented to the plaintiff's father that a deferral had already been granted and were estopped from denying the truth of this statement. Thus, one would see the university official's representation as one of existing fact, rather than as a promise that a formal deferral would be granted in the future.

[177] It might also be possible to rationalise the decision on the basis of the doctrine of legitimate expectation (which was actually the doctrine relied upon by the claimant). See text following note 144 *supra* and also note 163 *supra*.

[178] [1993] ILRM 657. See generally Coughlan note 92 *supra*.

[179] *Ibid*, 660 *per* Costello J.

the ward's house was in extremely bad repair and there were insufficient resources to repair it, Costello J ordered that a new smaller house should be purchased in the name of the ward. The claimant would be allowed to live in that house until the ward died, at which point she would almost certainly inherit the property under the ward's will.

In discussing the question of remedies, Costello J commented that "[i]n cases such as this the court must (a) ascertain the nature of the equity to which a representee is entitled and (b) decide in what way the equity may be satisfied ...."[180] The case on which Costello J relied, *Greasley* v *Cooke*,[181] is an authority on proprietary estoppel, a fact which Costello himself had expressly recognised two pages earlier in his judgment.[182] Costello J proceeded to hold that, in the "special circumstances" of the case before him, it would not be sufficient simply to prevent the eviction of the claimant. Instead, Costello J held that "in order to satisfy the equity" the house should be sold and a new house purchased to suit her accommodation needs. Costello J did not address in his judgment the problem of using promissory estoppel to generate an affirmative remedy,[183] nor did he recognise that the process of "satisfying the equity" is appropriate to proprietary and not to promissory estoppel.

It is not readily apparent why Costello J chose to rest his decision on promissory estoppel rather than proprietary estoppel.[184] However, the learned judge was seemingly unaware that he was doing anything controversial and clearly did not intend to revolutionise the law of estoppel

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180 *Ibid*, 664.

181 [1980] 1 WLR 1306, 1312 *per* Lord Denning MR.

182 Note 179 *supra*, 662.

183 Under promissory estoppel, the most that could have been done was to prevent the eviction of the claimant. An order to this effect might have been combined with a suggestion to the committee of the ward that they come to an agreement with the claimant concerning the purchase of a new house, thereby perhaps generating a practical outcome similar to the one actually achieved by Costello J.

184 One may speculate that Costello J realised that he was on doubtful ground in holding that, in the circumstances of the case, the claimant (who probably had not given up a secure home) could be said to have acted to her detriment by moving in with the ward. The only authority cited to him which suggested that giving up a home could constitute detriment was *Maharaj* v *Chand* [1986] AC 898. In *Maharaj*, there was the special feature that the disputed property could not be subject to any proprietary dealing without a statutory consent. Because of a desire to emphasise that the remedy they were affording to the plaintiff was purely personal and did not infringe the statute, the Privy Council took the unusual step of choosing promissory rather than proprietary estoppel. Although the special factor which explained *Maharaj* was lacking in *Re JR*, it is possible that a desire to mimic *Maharaj* explains why Costello J chose promissory estoppel. Note also that in one of the few previous Irish cases involving estoppel and residential property, *Cullen* v *Cullen* [1962] IR 268, Kenny J also relied on promissory estoppel (although this was explicable on the basis of Kenny J's failure to recognise the existence of the expectation limb of proprietary estoppel).

in Ireland. One must conclude, therefore, that *Re JR* was simply another example of an Irish judge reaching a conclusion which he regarded as just without paying much attention to strict legal doctrine. Thus, *Re JR* provides no real support for the view that the Irish courts are moving towards a unified doctrine of estoppel.

PART THREE
CONCLUSION

The preceding analysis suggests that there has been nothing resembling a carefully considered (or even conscious) decision to merge the estoppels in Ireland.[185] At most, there have been a few decisions where the Irish courts have attempted to do justice *inter partes* without concerning themselves with the niceties of legal doctrine.[186] Therefore, the present position in Ireland appears to be that proprietary and promissory estoppel retain their separate identities and limitations (albeit that those limitations are occasionally ignored in our courts). However, while not yet embracing a merger of the estoppels, it does appear that our courts have accepted the more modest changes brought by *Taylor Fashions*[187] in terms of loosening the grip of the *probanda* on proprietary estoppel.[188]

It is beyond the scope of the present article to canvass the arguments for and against a change to an Australian-style unified conception of estoppel. However, any development which does take place must be preceded by a careful examination of the consequences for our law of contract[189] as well as our law of equity. It is hoped that, by its attempt to locate the present position of Irish law, this article may make it a little easier to decide which way to move in the future.

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185 Note also Coughlan's apparent scepticism (note 92 *supra*, 191) concerning a move towards a unified doctrine of estoppel.

186 *Cf* Mee "Taking Precedent Seriously" (1993) 13 ILT 245, 245.

187 [1982] QB 133n.

188 It would, of course, be helpful if this were confirmed explicitly in our courts.

189 See note 111 *supra*.