Starting Afresh: Reformulating and Reconceptualising the Law of Estoppel

Joel Horsman*

Abstract—This article proposes a new way of formulating and conceptualising estoppel. The various shades of estoppel currently recognised are convoluted, unclear in principle, and conceptually discordant. As such, this article presses the reset button. It will propose a basic formulation for estoppel: 'an estoppel arises where it would be unconscionable for the representor to insist upon his strict legal rights'. This will provide a refined theoretical and practical view of promissory estoppel, proprietary estoppel, and estoppel by convention. This conceptualisation makes two points of contact with existing doctrine. Firstly, it sheds light on the sword/shield dichotomy, arguing that the dichotomy rests upon the nature of the representation in question. The analysis will re-orient estoppel along positive/negative lines; providing a framework for uncovering arbitrary gaps—what I will call lacunae—in existing

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doctrine. These are gaps that are unveiled when overlaying the model of estoppel advocated for in this article against the existing doctrine. Secondly, I will develop a rationale of the doctrine predicated on the representee's planning interest. When the rationale is married with the mode of relief, it will be seen that it provides a third perspective to the 'lively controversy' surrounding the expectation-detriment debate when determining the relief to which the representee is entitled. It will be argued that the planning rationale provides a more convincing normative account of the relief the courts have granted to claimants than both the expectation-based and detriment-based frameworks.

I. Conceptualising estoppel

A. Formulating estoppel

The task this article undertakes is to identify a formulation capable of explaining the various permutations of estoppel. This article's methodology is therefore interpretivist in nature: the formulation will seek to fit the existing scheme through providing an explanation of the circumstances under which an estoppel will arise and then will argue that such a formulation also justifies the doctrine through highlighting the normative significance of the formulation.[1] Where there is asymmetry between fit and justification, this article views the existing law as failing to emulate the justification in its entirety and therefore requires reform in comportment with its rationale.[2]

Estoppel by representation and by silence will not be considered discrete estoppels, but rather means by which estoppels may arise. The same is true of 'representation-', 'acquiescence-', and 'promissory-based' strands of proprietary

[1] Andrew Gold argues that the 'New Private Law' theorists have adopted a similar 'Interpretive Criteria':
Andre S. Gold, 'Internal and External Perspectives: On the New Private Law Methodology', in Andrew S. Gold, and others (eds), *The Oxford Handbook of the New Private Law* (OUP 2020) 10-16.
[2] This methodology reflects that adopted by Joseph Raz, 'Legal Positivism and the Sources of Law' in his *The authority of law: Essays on law and morality* (OUP 1979) 50.

estoppel.[3] This analysis will focus on 'promissory estoppel', 'proprietary estoppel', and 'estoppel by convention'.

The formulation I propose to explain and justify the doctrine is as follows:

> An estoppel arises where it would be unconscionable for the representor to insist upon his strict legal rights.

It is my position that the formulation both explains the existing law,[4] and highlights its normative base.[5] The existing estoppels cover a commendably broad range of factual scenarios from a promise not to collect the full sum of rent during wartime,[6] a mutual understanding as to how a guarantee will be interpreted and discharged,[7] to a promise to leave a farm in the representee's inheritance;[8] thus its breadth ought to be captured in the formulation at the risk of excluding morally significant cases.

Unconscionability serves as the underpinning principle that guides the raising of an estoppel;[9] where resiling on a

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[3] Ben McFarlane, *The Law of Proprietary Estoppel* (2nd edition, OUP 2020) 1.05-23. Though the author argues these are conceptually distinct strands, I will seek to unify them as subsets of the broader law of estoppel.

[4] The language of the formulation is indeed influenced by Denning LJ's formulation in *Combe v Combe* [1951] 2 KB 215 (CA), 219.

[5] It thus follows a Dworkinian kind of 'fit and justification'.

[6] *Central London Property v High Trees House* [1947] KB 130.

[7] *Amalgamated Investments v Texas Commerce Bank* [1982] QB 84.

[8] *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776; and *Gillett v Holt* [2001] Ch 210.

[9] *Davies v Davies* [2016] EWCA Civ 463, [2016] 2 P & CR 10 [38] (Lewison LJ): 'The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result'.

representation not unconscionable, no estoppel can arise.[10] As Elizabeth Cooke argues,[11] it is the representee's detrimental reliance that makes resiling unconscionable.[12] A broad conception of unconscionability also provides the flexibility to ensure justice towards the representor:[13] orienting unconscionability as the guiding principle allows for the malleability to achieve justice on the facts.[14]

A 'representor' implies the existence of a 'representation'. It is proposed a 'representation' has a sufficiently wide reach to include a failure to disabuse the representee of a belief generated through conduct and correspondence[15] as the representor in such a case is understood as undertaking responsibility for the promise.[16] The formulation covers a case wherein the representee labours under a mistake, for example, as to the pre-emption rights attached to his shares whereby the

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[10] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752, [92] (Lord Walker).

[11] Elizabeth Cooke, 'Would It Be Unconscionable …?' in her *The Modern Law of Estoppel* (OUP 2010) 86.

[12] *Gillett* (n 8) 229 (Robert Walker LJ).

[13] This argument is made also by B. McFarlane and P. Sales, 'Promises, detriment, and liability: lessons from proprietary estoppel' (2015) 131 LQR 610, 632 and 633.

[14] This broadness allows for the calibration to countervailing benefits: *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 8, [51] (Robert Walker LJ); or calibration to other equitable considerations: *Thorner* (n 8) [19] (Lord Hoffman).

[15] The formulation is hence intended to cover the conduct of BDO to HMRC in *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, [2022] AC 886 [51] (Lord Burrows).

[16] This formulation coheres with the 'assumption of responsibility' analysis propounded in *Revenue and Customs Commissioners v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All E.R. 174 [52] (Briggs J).

representor induces the representee to believe in a state of affairs in relation to his strict legal rights.[17] Where A makes a promise to B, he does so through representing to B that he intends to follow through on the promise. The promissory dimension of estoppel is hence explained by the fact that a promise is seen as a subset of a representation.[18]

With regards to an insistence upon one's rights, I propose two ways in which we can interpret an 'insistence': A can insist upon a contractual right against B that he had vowed not to enforce, yet A may also insist upon a right to dispose of a property right that he has promised to give B.[19] For an estoppel by convention, the right that the representor cannot insist upon is less evident. In *Tinkler v Revenue and Customs Commissioners,*[20] Mr Tinkler was estopped from denying that a valid enquiry under section 9A of the Taxes Management Act 1970 had been opened. The common assumption was not as to the rights of either party, but rather the combination of fact and law that gave rise to a valid enquiry under the Act.[21] Lord Denning M.R.'s solution in *Amalgamated Investments v Texas Commerce Bank*[22] was to pitch the assumption at a degree of generality such that the right the claimant bank could not insist upon was the 'strict interpretation

[17] *Blindley Heath Investments Ltd v Bass* [2015] EWCA Civ 1023, [2017] Ch. 389.
[18] 'Promise' and 'representation' will therefore be used as synonyms unless denoted otherwise.
[19] Such an estoppel restricts the 'customary freedom of disposition of the owner of the property': *Sutcliffe v Lloyd* [2008] EWHC 1329 (Ch), [2008] 6 WLUK 351 [4] (Norris J).
[20] *Tinkler* (n 15).
[21] ibid [57] (Lord Burrows) considers the assumption to arise through Mr Tinkler's representative's correspondence with HMRC.
[22] (*'Texas Bank'*) (n 7).

of the original terms of the contract'.[23] *Ex hypothesi*, the right that Mr Tinkler could not insist upon was the right accorded to parties to litigation to deny an assertion of fact where the estoppel restrains him from doing so.

B. Justifying estoppel

In his keynote Lecture at Modern Studies in Property Law Conference, Lord Justice Philip Sales sought to frame the rationale of proprietary estoppel in the context of the courts' equitable jurisdiction.[24] His Lordship argues that equity serves to inject a vector of moral sensitivity that supplements the common law's strict, rule-governed approach. His Lordship's conception of equity is thus intractably Aristotelian.[25] *Ex hypothesi*, the role of equity is to correct[26] the law when the law, strictly applied, has gone wrong.[27] Where the law goes wrong, on Aristotle's account, is where its universal nature serves to exact an injustice when applied to the facts of a given case; when such an injustice arises, equity intervenes to ensure that the law operates justly.[28]

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[23] *Texas Bank* (n 7), [121] (Lord Denning M.R.).
[24] P. Sales, 'Proprietary Estoppel: Great Expectations and Detrimental Reliance' (2022) Keynote Lecture: Modern Studies in Property Law Conference [12].
[25] ibid (n 24).
[26] Aristotle, 'Nicomachean Ethics (335 – 323 BC): Book V: 10.' in W. D. Ross and Lesley Brown (eds), *Oxford World's Classics: Aristotle: The Nicomachean Ethics* (Revised Edition, OUP 2009) 1137b 25.
[27] There has been recent support in the Supreme Court for this 'corrective view'. See: *Guest v Guest* [2022] UKSC 27, [2022] 3 WLR 911 [4]-[5] (Lord Briggs).
[28] Aristotle (n 26) at 1137b 30. The analysis is fortunately not complicated by remnants of Aristotle's natural law conception; his

It is submitted that this analysis is consonant with McFarlane and Stevens' analysis of the two-tiered formal structure of equity.[29] McFarlane and Stevens argue that most equitable rights are both explained and justified by controlling the acquisition and enforcement of common law rights.[30] This view, so the authors argue, is narrower than the Aristotelian view: on their view, equity's concern is not so much with correcting the rules of the common law, but rather controlling the enforcement or acquisition of common law rights.[31] Should the authors view the distinction as between common law rights and common law rules as persuasive, the distinction is unimportant for this article. This is so because the formulation can be viewed in terms of either account. On the Aristotelian view, the common law rule that a contract modification cannot be legally binding absent good consideration is corrected by the equitable rule that a representor cannot insist upon his strict legal rights when he has represented not to. On McFarlane and Stevens' view, the strict common law rights that the representor has under a contractual agreement are controlled by the equitable right the representee acquires in virtue of an estoppel.

Accepting this formal analysis along with the Aristotelian view requires one to consider the principle underlying equity's

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referring to a 'decree' in the cited passage evinces that he is speaking of positive law.

[29] McFarlane, Ben, and Robert Stevens, 'What's Special about Equity? Rights about Rights', in Dennis Klimchuk, Irit Samet, and Henry E. Smith (eds), *Philosophical Foundations of the Law of Equity* (OUP 2020).

[30] ibid 192.

[31] ibid 194: 'A focus on rights that relate to other rights is narrower than a focus on rules that relate to other rules'.

intervention. It has often been proposed that this principle is unconscionability *simpliciter*.[32] However, this view is too broad to justify the formulation: estoppel ought not to be a catch-all for unconscionable conduct.[33] It is tempting to ground the formulation in the norm that 'representations ought to be adhered to'. However, this solution is unsatisfactory for two reasons. Firstly, an unqualified promissory basis would unduly expand the domain for promise-enforcement, transgressing the law of contract. Secondly, the principle fails to capture the normative significance of the proviso 'insist upon his strict legal rights' as it is too broad to explain why the formulation is so refined.

The normative significance emanating from a representation in relation to one's strict legal rights is that of planning and consistency. A representation in relation to one's legal rights attaches greater normative significance than a representation without such attachment because the subjects of a legal system regard their rights and obligations as reasons for action.[34] It is in this sense that we can distinguish equity's intervention in a promise not to collect on one's rent obligations from a promise not to eat the last biscuit.[35] The basis for this distinction is as follows: A's obligation to φ, in respect of B, is a reason for A to φ.[36] B promising not to enforce the obligation to

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[32] *Guest* (n 27) [94] (Lord Briggs)
[33] This point is reiterated in *Cobbe* (n 10) [16] (Lord Scott).
[34] Joseph Raz, 'Reasons for Action, Decisions and Norms' (1975) 84(336) *Mind* 481–99 <http://www.jstor.org/stable/2253635> accessed 4 May 2024.
[35] The former being of the kind in *High Trees* (n 6).
[36] This conceives of the obligation to φ as an exclusionary reason: Joseph Raz, 'Normative systems' in his *Practical Reason and Norms* (OUP

φ removes A's reason to φ. A thus plans his affairs absent of his reason to φ; B seeking to enforce the obligation to φ hence fatally disrupts A's plan. A thus cannot reliably plan his affairs in relation to his obligation to φ and equity intervenes to provide him certainty through vindicating his plan. This justifies why the approach taken in estoppel focuses on what the representor has indicated that he will do with his legal rights.

Estoppel has often been divided along common law and equitable lines where common law estoppel functions as a rule of evidence[37] whereas equitable estoppel arose as an extension of the law of waiver which sought to modify a common law right.[38] Some modern commentators have doubted the accuracy and utility of such a distinction.[39] It is submitted that we ought to excise the law of the distinction and categorise all estoppel as equitable: though McFarlane and Stevens' analysis admits of no logical categorisation of equitable/legal rights,[40] it helps to elucidate important general features of equitable rights. Given that this article seeks to reconceptualise the law of estoppel, it carries with it the freedom to make such categorisations and

1999) 143 where Raz regards 'legal obligations' *simpliciter* as an exclusionary reason regardless of whether the obligation is statutory or contractual.

[37] *Avon C.C. v. Howlett* [1983] 1 W.L.R. 605, 622 (Slade LJ) considered 'estoppel by representation' as a rule of evidence.

[38] Robert Stevens 'Improvements' in *The Laws of Restitution* (OUP 2023).

[39] Elise Bant, Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel', (2015) 35(3) Oxford Journal of Legal Studies 427–452, 450; Elizabeth Cooke 'A New Framework for Estoppel' in *The Modern Law of Estoppel* (OUP 2010) 58-60.

[40] McFarlane and Stevens (n 29) 193 - this is evident in that the authors note not all equitable rights fall into this structure.

distinctions as is necessary to fine-tune the doctrine. Categorising all estoppel as equitable helps ensure coherence with the two features of equitable rights which this article seeks to identify: (i) equitable rights are generally secondary and (ii) equitable rights intervene to avert an injustice. It is trite that the right conferred by an estoppel is secondary; as argued, even the typically 'common law' estoppel by convention has the feature of controlling the rights of litigants. Moreover, the basis for intervention, that the representee's planning interest is protected, lends itself to the conclusion that an injustice would ensue should equity fail to protect such interests. It would be an affront to justice if individuals could induce others into planning their lives around a representation as to one's legal rights without equity protecting the position of the representee. Classifying all such rights as equitable helps enunciate the key point that estoppel is parasitic on existing strict legal rights and exists to restrain the acquisition or enforcement of such rights where the planning interest of the representee so necessitates.

C. Sword or shield?

Now the principle underlying equity's intervention can be discerned, it is necessary to consider how equity intervenes. The argument I intend to advance is that much of the confusion about the defensive nature of promissory estoppel and the offensive nature of proprietary estoppel is due to the elliptical discussion of the nature of the representation in question.[41] It has frequently

[41] For an example of this, see: M.P. Thompson, 'From Representation to Expectation: Estoppel as a Cause of Action' (1983) 42(2) The Cambridge Law Journal 257-278, 260 where the author conceives of the doctrine as promise-enforcement absent of consideration.

been reiterated that promissory estoppel operates as a shield[42] and that proprietary estoppel's anomalous feature is its capacity to act as a sword.[43] The terms 'sword' and 'shield' are not legal terms; their usage obscures our understanding of the mechanisms at play. To translate the nomenclature into legal terms, it is necessary to analyse their use in judicial reasoning.[44] I will refer to the party raising the estoppel as A and the estopped party as B.

Where A evinces the elements of a proprietary estoppel claim, an equity arises which it is the court's duty to satisfy.[45] In Hohfeldian terms, A's power to apply to the court to satisfy the equity serves as a meta-right that has the capacity to alter the relations between A and B.[46] Where an equity in favour of A arises, B is under a liability to have his relation against A changed. The power, so exercised, can impose a duty upon B to, for example, grant an easement to A.[47] As such, where the equity arises, the exercise of A's power, subject to the court's discretion, will create a new right as against B.

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[42] *Combe* (n 4) 224 (Birkett LJ)
[43] *Crabb v Arun D.C.* [1976] Ch 179, 187 (Lord Denning M.R.)
[44] A Hohfeldian analysis is pertinent to view the matter in strictly legal terms and to understand the mechanisms at play when one refers to estoppel as either a 'sword' or a 'shield'.
[45] *Jennings* (n 14) [36].
[46] Conceiving of the category of incidents: 'powers, liabilities, disabilities, immunities' as meta-rights is influenced by Duarte d'Almeida, 'Fundamental Legal Concepts: The Hohfeldian Framework' (2016) 11 Philosophy Compass 554–569 particularly at 558 and 559 where he groups these classes into 'families' with the 'meta-rights' being labelled 'higher-order'.
[47] As was the position of the District Council in *Crabb* (n 43). This correlates with the claimant's claim-right to be granted an easement.

Promissory estoppel differs in the meta-right that is accorded to A. To conceive how the Hohfeldian framework applies to promissory estoppel, the way in which Hohfeld's framework applies to contractual claims must be elucidated. Where a party to a contract commits a breach thereof, the innocent party has a power to sue for breach of contract.[48] This power has the capacity to alter the legal relations between the parties to the contract. Should the court decide in the claimant's favour, the defendant will be under a secondary duty to the claimant to make good on the breach.[49] The claimant thus acquires a claim-right as against the defendant for the secondary obligation to be fulfilled.

Where a claimant brings an action in respect of an alleged breach of contract, the defendant raising a promissory estoppel has the effect of negating this power. In Hohfeldian terms, the negation of a power is a disability; that is, B is disabled from applying to the court to impose a secondary duty upon A for a breach of contract in relation to the estopped right. In *Collier v Wright*,[50] the agreement between the parties from which an estoppel arose disabled the claimant from imposing a duty upon the defendant to discharge joint liability incurred by he and his business partners. The effect of the estoppel was hence to confer an immunity upon the defendant that prevented the debt from being enforced against him.

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[48] This power turns on the nature of the breach in question. For example, in a repudiatory breach, the power is to accept the breach. There is, however, no general requirement to exercise this power: see *White & Carter v McGregor* [1962] AC 413.

[49] The nature of the secondary duty is contingent, again, on the nature of the breach and may range from damages to specific performance.

[50] *Sutcliffe* (n 19).

The way in which I propose to explain the difference in the nature of the rights each kind of representation creates is through an analysis of the nature of the representation in question. If one starts from the premise that estoppel is concerned with remedying the unconscionability that flows from defaulting on a representation,[51] the appropriate remedy is to compel the representor to abide by his representation. There may be reasons for giving effect to the representation in a way that falls short of specific performance.[52] The matter of giving effect to a representation must have regard to the nature of the representation in question; the course of action a court takes, for example, in response to a father promising his son that he would inherit his farm[53] is not and ought not to be the same as the response in regard to a promise not to enforce a repair covenant whilst negotiations for sale were pending.[54]

This is so because the representations are different in their nature. In the latter case, the negative nature of the representation merely requires imposing a disability on the representor such that he cannot create a secondary duty for the representee to perform a bargain on which the representor has

[51] This point is independent of whether one takes a reliance-based, expectation-based, or planning-based rationale. This is so because each account is merely a means of explaining the source of unconscionability rather than contesting the presence of unconscionability.
[52] *Guest* (n 27) [94] (Lord Briggs). This matter also arises in the public law doctrine of legitimate expectations: see Sales, Philip, and Karen Steyn. 'Legitimate Expectations in English Public Law: An Analysis' [2004] Public law 564–593, 579.
[53] *Spencer v Spencer* [2023] EWHC 2050 (Ch), [2023] 8 WLUK 38.
[54] *Hughes v Metropolitan Rly* (1877) 2 App Cas 439.

indicated forbearance. However, in the former case, fidelity to the representation requires imposing fresh duties upon the representor. What is required is that the representor must take an affirmative step to make good on his representation. Equity bites upon the fact that a plan has been erected around a positive representation. In classic cases of promises to confer an interest in a family farm, imposing upon the representor a disability fails to capture the normative significance of the representation in question: that the representee has planned his affairs around a promise that an interest in the farm will be conferred upon him.[55] The only way in which this interest can be vindicated is through conferring a right in the farm (or an equivalent measure the court views as equitable).

Framed in this way, it is clear that estoppel operates as a sword when it confers a power upon the representee to assert a claim-right and it operates as a shield when it confers an immunity upon the representee. I will refer to those power-conferring estoppels as 'positive estoppels' and those immunity-conferring estoppels as 'negative estoppels'. This positive/negative framework will now be transposed onto current doctrine to unveil the lacunae of the existing framework.

II. The lacunae of the existing framework

The confinement of positive estoppels to interests in land exacts injustice upon representees who plan around normatively

[55] For example: *Thorner* (n 8).

equivalent representations outside of a land law context. These injustices are a product of lacunae which will now be spelled out through the following examples.

(1)(a): A assures B that B has a 50% beneficial interest in Blackacre

(1)(b): A assures B that B has a right of first refusal regarding A's shares in X Corp

In both cases, A makes a representation to B about his existing rights; the difference consists in the fact (1)(a) relates to an interest in land and (1)(b) relates to an interest in a company. This difference is a tenuous basis upon which to draw a distinction, yet that is the apparent position of the law.

The harshness of the distinction can be uncovered when comparing the application of the doctrine to the facts of the following two cases. In *Sutcliffe v Lloyd*[56], the Chancery Division of the High Court awarded Mr Sutcliffe £25,000 as a 'personal guarantee'[57] in relation to a profit-sharing agreement that the parties had made under a joint venture to renovate two development sites. When Mr Lloyd 'unconscionably resiled'[58] from this agreement, an equity arose in favour of Mr Sutcliffe whose claim was put on the grounds of proprietary estoppel despite the sought remedy's tenuous relationship with his interest in land. Mr Justice Norris, however, regarded this as no hurdle to Mr Sutcliffe's claim. By contrast, in *Brewer Street Investments Ltd v*

[56] *Sutcliffe* (n 19).
[57] ibid [18] (Norris J).
[58] ibid [8] (Norris J).

Barclays Woollen Co Ltd[59] the claimant landlord sought remuneration for expenditure incurred under an agreement in principle whereby the defendant had requested renovations for which they had agreed to cover the costs. When negotiations between the parties broke down, the claimant stopped the renovations and sought remuneration for cost expended. McFarlane and Sales argue that this factual paradigm falls within the ambit of the 'promise-detriment principle'[60], yet Denning LJ saw great difficulty in morphing the claimant's submission into the framework of any equitable doctrine.[61] The harshness of the distinction was mitigated on the facts through the application of a risk-based analysis, but it is easy to envision a lacuna that may open on an alteration of the facts. Denning LJ's reasoning placed weight on the fact that the renovations were of no benefit to the claimant,[62] yet it is simple to conceive of a case wherein the benefit and risk is not so easily apportionable, and the claimant is unable to place his claim under any established doctrine due to the illogical narrowness of a power-conferring estoppel.

(2)(a) A assures B that B will be granted an easement; B gives no consideration

(2)(b) A assures B that A will give B a valuable artwork; B gives no consideration

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[59] *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428.
[60] McFarlane and Sales (n 13) at 626; the authors argue that the principle justifies the use of estoppel as a cause of action where the representee has relied on a promise as to the representor's future conduct.
[61] *Brewer Street* (n 59), 435-436 (Denning LJ).
[62] ibid 437 (Denning LJ).

The distinction between (2)(a) and (b) is elusive. (2)(a) clearly accords B a power-conferring estoppel.[63] The authorities point in the opposite direction with regards to (2)(b); disallowing a positive estoppel from glueing together a contract void for want of consideration.[64] The position is more refined in Australia. This derives from the seminal decision in *Waltons Stores (Interstate) Ltd v Maher*[65] where the High Court of Australia imposed a duty upon the defendant to enter into the lease agreement notwithstanding non-compliance with section 54A(1) of the Conveyancing Act 1919. Though this may be explained as an instance of proprietary estoppel,[66] subsequent commentary and application has rendered an Australian doctrine of promissory estoppel capable of conferring a Hohfeldian power.[67] The court provided two discrete reasons why this expansion does not transgress the doctrine of consideration: (i) the rationale of the doctrine sits upon a different basis to contract enforcement and accordingly the doctrine of consideration represents no bar to enforcement upon such a basis;[68] (ii) a broader concept of estoppel helps supplement consideration in 'special circumstances' where the doctrine exacts an injustice through preserving its operation in

[63] *Crabb* (n 43) 185-186 noted explicit absence of consideration for the easement.
[64] *Combe* (n 4) 220 (Lord Denning) .
[65] *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
[66] The claim certainly fits into the paradigm of an agreement void for non-compliance with section 2 of the LP(MP)A 1989 as noted by Micheal Barnes, 'Promissory Estoppel' in *The Law of Estoppel* (OUP 2020) Chapter 6.18.
[67] For example, see Eugene Clark, 'The Swordbearer Has Arrived: Promissory Estoppel and Walton Stores (Interstate) Ltd v. Maher', (1987) 9 U Tas L Rev 68.
[68] *Waltons Stores* (n 65), 423-24 (Brennan J).

central cases.[69] Though the decision results in a more expansive class of promises capable of attaching legal obligations,[70] it can be justified in two ways. Firstly, the expansion accords with the conception of equity drawn in this article: estoppel can correct or control the common law doctrine of consideration where a strict adherence to it exacts an injustice. Secondly, the rationale of a positive estoppel ought not to restrict its domain of operation as narrowly as existing doctrine; a representee's planning interest is liable to be injured regardless of whether the representation is as to one's rights in land or over a chattel.

However, consider (2)(a) against:

> (3): A agrees to sell his freehold to Blackacre to B; B gives valuable consideration, but the parties fail to make a valid contract under section 2(1) of the LP(MP)A 1989

The analysis incorporates considerations of whether the law should consider the cause of failure. In the run up to the enactment of the 1989 Act, the Law Commission seemed to think so.[71] The Law Commission advanced what I will call the 'margin for error' argument: that the law ought to accord lay parties a degree of leniency when failing to comport with strict formalities requirements.[72] The margin for error argument would insist upon according (3) greater leniency than (2)(a), yet this is not the approach the law takes.

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[69] ibid 453 (Deane J).
[70] Argued by Eugene Clark (n 67) especially at 76.
[71] Law Commission, *Formalities for Contracts for Sale of Land* (Law Com No. 164, 1987).
[72] ibid particularly at part 5, para 5. See also Cooke (n 39) at pages 127-128: 'the formalities problem'.

The resolution to (3) turns on matters of fact it is silent on. In *Cobbe v Yeoman's Row Management Ltd*,[73] the House of Lords rejected Mr Cobbe's proprietary estoppel claim because, *inter alia*, proprietary estoppel could not be invoked to 'render enforceable an agreement that statute has declared to be void'.[74] However, *Thandi v Saggu*,[75] a recent High Court decision, seeks to vindicate the representee's loss in a different way. Mrs Thandi agreed to sell one of her properties to Mr Saggu for £270,000, but the parties failed to create a contract that was valid for the purposes of section 2(1) of the LP(MP)A 1989.[76] Hugh Sims KC, sitting as a Deputy Judge of the High Court, acknowledged the constraint that he could not order enforcement of a contract rendered void by statute.[77] However, he was at pains to distinguish the equitable remedy under consideration from enforcement of the void agreement. This permitted the awarding of 'lesser relief in the form of a relief of some detriment', namely the legal costs incurred flowing from Mrs Thandi erroneously representing that she was committed to the agreement.[78] Contrary to the margin for error argument, the law is harsher to B in (2)(a) than in (3).[79]

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[73] *Cobbe* (n 10).
[74] ibid [29] (Lord Scott).
[75] *Thandi v Saggu* [2023] EWHC 2631 (Ch), [2023] 10 WLUK 231.
[76] ibid [105] (Hugh Sims KC) - In his conclusion on this matter, placed weight on the proviso 'incorporating all the terms which the parties have expressly agreed in one document'.
[77] ibid [138] and [139] (Hugh Sims KC).
[78] ibid [145] (Hugh Sims KC).
[79] Whether this requires a change in approach to either (2)(a) or (3) is beyond the scope of this article, yet I incline to argue that the approach in (2)(a) ought to be adopted for its coherence with the rationale of a power-conferring estoppel.

One may also ask: why can we not apply this line of reasoning to contractual cases? Consider (3) against:

> (4) A and B fail to create a contract giving A's car to B; B suffers detriment by instructing solicitors to assist him on the transaction

Applying the analysis in *Thandi* to both cases, B would be entitled to recover his solicitors' fees.[80] The margin for error argument would postulate that the cause of failure in (4) would be due to absence of consideration, uncertainty, or absence of intention to create legal relations: given the relatively lenient requirements to form a contract,[81] B ought not to be treated with the same sympathy in equity relative to a case such as (3). The margin for error argument therefore supports the analysis taken in cases regarding failure of consideration, intention, and certainty, but impugns the validity of the analysis taken in cases of non-compliance with section 2(1) of the LP(MP)A 1989.

The above analysis reveals that:
(i) an estoppel can confer a Hohfeldian power where the estoppel exists in relation to an interest in land, but not otherwise
(ii) a positive estoppel can supply an exception to the doctrine of consideration in relation to an interest in land, but not otherwise

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[80] *Guest* (n 27) [4] (Lord Briggs): His Lordship notes that 'proprietary' denotes an interest in land and is doubtful as to whether it can bear a broader meaning. See A. Waghorn, 'Promises in Equity and at Law: Proprietary Estoppel after Guest v Guest' (2023) 86(6) M.L.R 1504, 1514.

[81] The courts have, for example, typically been lenient to cases of uncertainty: *Openwork v Forte* [2018] EWCA Civ 783, [2018] 4 WLUK 245 [25] (Simon LJ).

(iii) the courts treat non-compliance with section 2 of the LP(MP)A 1989 as a greater bar to relief than absence of consideration[82]
(iv) proprietary estoppel claims predicated on void contracts entitle the claimant to some relief reflecting his detriment, but such claims are confined to interests in land.

It is intended that the positive/negative estoppel conceptualisation advanced in this article provides a point of reference for identifying the lacunae and inconsistencies, and accordingly provides a framework for resolving them. This article will now address the issue of how the equity ought to be satisfied once raised.

III. Satisfying the equity

Lord Justice Sales calls for the law of estoppel to 'marry up the relief granted with the grounds for applying the doctrine in the first place'.[83] The planning-rationale identified in this article must thus be configured into the remedy awarded. The first section of this article has discussed the normative strength of such a rationale and hence provides the case for its integration into the

[82] Whether this can be justified is beyond the scope of this article. Bevan, 'Liberating Minerva's Owl: the (ir)relevance of the LP(MP)A 1989 s.2 to estoppel claims' [2021] Conv. 381 is one view of the common academic opinion that Section 2 ought not to effect the operation of proprietary estoppel.
[83] Sales LJ (n 24), para 68.

law, but this section will also argue that the relief courts have granted is best explained by the planning rationale.[84]

A. Promissory estoppel

It is a logical consequence of the factual matrix attached to a negative estoppel that it can only be used in defence.[85] The relief that equity grants is the controlling of the right in question. The only questions that can arise are whether the rights are suspended or extinguished and, in the case of the latter, for how long? In *D and C Builders v Rees*, Lord Denning M.R was willing to acknowledge the extinguishing effect of promissory estoppel,[86] but this is far from a universal effect.[87] It is submitted that the courts ought to, and indeed do, have regard to unconscionability and planning to adjudicate the effect of the estoppel. In *Ajayi v Briscoe*,[88] the Privy Council argued that promissory estoppel extinguishes a right where the representee cannot resume his position upon reasonable notice.[89] It is submitted that this approach is best explained as allowing revocation only when it is possible for the representee to re-plan his affairs.

B. Rationalising positive estoppels

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[84] Once again a 'fit and justification' analysis is employed.
[85] It does not necessarily follow that a claimant cannot raise a negative estoppel; this turns on matters of procedure as noted: *Texas Commerce Bank* (n 7) 121 (Brandon LJ).
[86] *D and C Builders v Rees* [1966] 2 QB 617, 624 (Lord Denning M.R.).
[87] The suspensory character of the estoppel is most evident in *High Trees* (n 6).
[88] *Ajayi v Briscoe* [1964] 1 WLR 1326.
[89] ibid 1330 (Lord Hodson). This analysis also explains the conclusion reached in *Foster v Robinson* [1951] 1 K.B. 149.

Where a positive estoppel arises, the fact that the court can impose a duty upon the representor widens the scope of available relief. The most recent Supreme Court authority on the matter endorsed an amorphous configuration of both reliance and expectation interest.[90] The majority noted that the starting assumption[91] is to enforce the promise *in specie* unless such enforcement is 'out of all proportion to the detriment'.[92] This framework is underpinned by the majority's conception of estoppel as ensuring 'the prevention or undoing of unconscionable conduct'.[93] For the reasons given in section I, this rationale does not work as it only begs the question of what constitutes unconscionable conduct.[94] The majority does, however, signal their approval of an expectation-based framework, inter alia, on the grounds that the 'relevant harm' is the repudiation of expectation, not the reliance placed thereon.[95]

However, the planning-rationale gives credence to both the reliance and expectation paradigms; the planning-rationale does not choose a side in the debate, but rather fashions a middle ground. We can apply the practical reasoning framework outlined in Section I to demonstrate this: Andrew Guest, believing that he would inherit the farm, considered his inheritance a *reason* to incur

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[90] *Guest* (n 27).
[91] ibid [75] (Lord Briggs).
[92] ibid [68] (Lord Briggs).
[93] ibid [94] (Lord Briggs).
[94] Waghorn (n 80) 1511 - argues that the majority's answer 'reformulates' the question it seeks to address. Lord Leggatt notes this point in dissent in *Guest* (n 27), [160].
[95] ibid [53]. Lord Briggs provides many reasons supporting this rationale, yet the one highlighted here is the most convincing.

the detriment. Because he acted upon this reason[96] he planned his life and affairs around the promise.[97] When his parents derogated from their promise, they ensured that the reason for which he incurred the detriment ceased to operate. Andrew's plan, predicated on the promise of inheritance, was thus torn apart. As demonstrated in Section I, this gives rise to his equity and thus guides how the equity ought to be satisfied.[98]

C. Planning v Expectation

As a general principle, given that Andrew has planned his life around the representation, the appropriate remedy should be to vindicate his plan. According to the planning-rationale, he should be awarded such remedy as is necessary for him to recalibrate his plans. In some circumstances, however, there may be no possibility of him re-planning his life.[99] In such circumstances, the most appropriate measure is to estop the representor from

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[96] ibid – Through incurring the relevant detriment: see [1] (Lord Briggs).

[97] *Guest* [2020] EWCA Civ 387, [2020] 1 WLR 3480 [11]-[41] Andrew's plan entailed enrolling in agriculture-related education courses and assuming responsibility for managing the farm on a basic wage in the knowledge that David Guest planned on leaving the farm to pass to the children. This rules out the pursuit of other life goals and choices that Andrew might have reasonably made; see *Winter v Winter* [2023] EWHC 2393 (Ch), [2023] 9 WLUK 287, [133].

[98] Mere months before *Guest* was decided, Lord Justice Sales cautioned against divorcing the reason for which equity intervenes with how equity intervenes: see Sales (n 24), para 68.

[99] These are cases where the detriment suffered is over decades and thus conditions the life choices the representee made. See for example *Gillett* (n 8) 215 where the representee dropped out of school at 16 in order to work on the promised farm.

disrupting the plan; that is, enforcement *in specie* of the representation that constituted the plan.[100] Where a substitute plan can be devised, the representor is to be awarded a remedy that facilitates this goal. On the facts of *Guest*, then, this approach diverges from the majority's only in its journey.[101] However, the planning framework can be of further use when other factual *indicia* of detriment are present. In *Jennings v Rice*[102] the Court of Appeal diverted from a specific enforcement remedy;[103] awarding Mr Jennings £200,000; £235,000 less than expectation.[104] In reaching this conclusion, both Alduous LJ[105] and Robert Walker LJ[106] acknowledged the remedy to be bound by proportionality, yet there seems little justification for the proportionality test that can be fashioned out of the expectation rationale.[107]

On the majority's reasoning in *Guest*, very little can be said to support this proportionality test. If one reasons, as the majority does, that the basis of the doctrine is to protect one's expectations, the imposition of a proportionality test appears

[100] *Spencer* (n 53) [33] (Rajah J).
[101] Lord Leggatt's dissent also notes the value of awarding specific performance on a reliance view: *Guest* (n 27), [192]-[193] (Lord Leggatt).
[102] *Jennings* (n 14)
[103] This formulation is to be preferred over the conceptually dubious formulation of 'expectation-based remedy'. The above analysis demonstrates that specific enforcement of the promise is not inherently an expectation-measure.
[104] *Jennings* (n 14), [2]: this is on the assumption that Mr Jennings' expectation was to inherit the house.
[105] ibid [18].
[106] ibid [50].
[107] ibid - It was argued by Alduous LJ at [18] that the rules arise as a consideration of justice, yet this reasoning is far too nebulous to give credence to the expectation rationale.

unprincipled. If we accept the proposition that the unconscionability arising from the default of a relevant representation flows from the fact that the claimant expected the promise to be fulfilled, then non-fulfilment of this expectation requires justification that the majority cannot provide. If non-fulfilment is justified when such an award would be 'out of all proportion to the detriment'.[108] then one must question what the majority means by 'detriment'. They cannot be referring to expectation detriment because the argument would be tautological: it would amount to claiming that 'the expectation is out of all proportion to the expectation'. If they are referring to detrimental reliance, it is unclear why such considerations are important if the doctrine is underpinned by expectation. By contrast, the planning rationale provides a more convincing normative account of this paradigm: in *Guest*-type cases, the only way in which the claimant's plan can be vindicated is through ordering specific performance of the promise, but in *Jennings*-type cases, the award of damages is such that it enables the claimant to devise a substitute plan. The proportionality analysis hence turns on whether a monetary sum is sufficient to vindicate the claimant's plans or whether enforcement *in specie* is necessary.

D. Planning v Reliance

If one assumes the minority position in *Guest*, that the equity should be satisfied in view of the claimant's reliance,[109] the

[108] *Guest* (n 27), [68] (Lord Briggs).
[109] A proponent of this view can be found in Andrew Robertson, 'The reliance basis of proprietary estoppel remedies' (2008) 4 Conv. 295, 296.

planning rationale remains more convincing. Robertson[110] argues that since reliance is a necessary precondition for raising an estoppel, it ought to ground the award of relief[111] However, this argument overstates the role of detrimental reliance in raising an estoppel. Detrimental reliance will almost always be considered a necessary condition,[112] but is ultimately subject to the overarching analysis of unconscionability noted in section I. If we are to equate detrimental reliance with unconscionability in the manner Robertson does, then we presuppose that the source of unconscionability is detrimental reliance which is the very conclusion he is trying to advance.

The planning rationale also provides a more compelling explanation of *Jennings* than the reliance rationale. The Court of Appeal awarded Mr Jennings £200,000, £150,000 of which was adjudged necessary for him to buy a new house.[113] This is best explained by the planning view: the Court of Appeal did not award Jennings a sum representing the extent of his reliance, rather a sum that facilitated the creation of a substitute plan. In *Habberfield v Habberfield,*[114] Lucy Haberfield's detrimental reliance on a farm inheritance promise was found to be £220,000[115] whereas Woodrow farm's value was£2.5 million.[116] Mr Justice Birss noted that the reliance metric was not exhaustive of Lucy's

[110] Andrew Robertson, 'Unconscionability and Proprietary Estoppel Remedies' in *Exploring Private Law* (CUP 2010) 402–426
[111] ibid 422.
[112] *Gillett* (n 8) 229 (Robert Walker LJ).
[113] *Jennings* (n 14), [15] (Aldous LJ).
[114] *Habberfield v Habberfield* [2018] EWHC 317 (Ch), [2018] 2 WLUK 566.
[115] ibid [246].
[116] ibid [2].

detriment:[117] her life plan was predicated upon the fact that she 'expected to receive a viable dairy farm'.[118] Mr Justice Birss, seeking to give effect to this plan, awarded Lucy £1,170,000, representing the sum necessary to sustain a farm of an equivalent scale.[119] The best way to explain this reasoning is through the invocation of the planning rationale. The sum was calibrated to ensure Lucy could re-plan her life by awarding her the money necessary to do so. Lawyers and judges are more than capable of thinking in planning-terms, in large part because they already do. It is submitted that a court ought to, and, in some instances do, take the following steps in satisfying the equity:

(1) Once an equity has arisen, consider the extent to which the representee has planned their life around it
(2) Consider what is necessary for this plan to be vindicated[120]
(3) Enforcement *in specie* is the most natural way in which a plan may be vindicated, but it may also go further than what is necessary
(4) If a plan may be vindicated through the awarding of a monetary sum, then the court is to order such a sum
(5) If there is no prospect of a plan being vindicated through the awarding of relief less than *in specie* enforcement, then the court is to grant *in specie* enforcement

[117] ibid [225] (Mr Justice Birss).
[118] ibid [226] (Mr Justice Birss).
[119] ibid [251] (Mr Justice Birss).
[120] It is submitted that this is where the 'minimum equity' analysis is to take place: see *Sutcliffe* (n 19) [4] (Mr Justice Norris).

IV. Conclusion

This article has sought to provide a reconceptualisation of the law of estoppel through identifying a formulation that explains and justifies the estoppels. It has developed a theory of when estoppel can found a cause of action, identifying logical and normative gaps in existing doctrine that appear when contrasting the framework advanced here to the existing law. This article has also propounded a normative account of the purpose of estoppel and thus identified how the remedial approach of the rationale helps explain features of existing doctrine more adequately than the two dominant modes of rationalising relief.