SATISFYING THE MINIMUM EQUITY: EQUITABLE ESTOPPEL REMEDIES AFTER *VERWAYEN*

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[This article examines the way in which courts give effect to equitable estoppel and focuses on the impact of the High Court's adoption in Commonwealth v Verwayen *of a reliance based approach to determining equitable estoppel relief. The first part of the article traces the development of the reliance based approach up to the* Verwayen *decision, while the second part considers the way in which that approach has been implemented in the five years since the High Court's judgment was handed down. The two main points made by the article are: first, that the choice between a reliance based and an expectation based approach to the determination of relief is an important one, with significant consequences in particular cases; and, secondly, that the approach adopted in* Verwayen *needs to be applied more strictly, since it appears to have had no impact on the results of subsequent cases.]*

The High Court's landmark judgment in *Commonwealth v Verwayen*[1] has attracted considerable comment in the five years which have passed since it was handed down.[2] A significant development in that judgment which has attracted relatively little attention, however, was the adoption of a reliance based approach to giving effect to equitable estoppel. The aim of this article is to examine the development of that approach and the way in which it has been implemented since *Verwayen*. The article will consider why, despite the adoption of a reliance based approach in *Verwayen*, expectation relief has remained predominant in equitable estoppel cases.

In order to appreciate the impact of the *Verwayen* judgment on the determination of relief, it is necessary to consider the pre-existing state of the law. Accordingly, Part I of the article will examine the development of the approach to relief in the equitable estoppel cases leading up to *Verwayen* and the shift which occurred in *Verwayen* itself. That examination will show that both proprietary estoppel and promissory estoppel were originally conceived by the English courts as having an expectation based operation. The English and Australian courts gave effect to those doctrines in almost all of the early cases by holding representors to

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1 (1990) 170 CLR 394 (*'Verwayen'*).

2 See, eg, Mark Dorney, 'The New Estoppel' (1991) 7 *Australian Bar Review* 19; Alec Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) 7 *Australian Bar Review* 47; Linda Kirk, 'Confronting the Forms of Action: The Emergence of Substantive Estoppel' (1991) 13 *Adelaide Law Review* 225; Mark Lunney, 'Towards a Unified Estoppel — The Long and Winding Road' [1992] *The Conveyancer and Property Lawyer* 239; Kris Arjunan 'Waiver and Estoppel — A Distinction Without a Difference?' (1993) 21 *Australian Business Law Review* 86; L Priestley, 'Estoppel: Liability and Remedy?' in Donovan Waters (ed), *Equity, Fiduciaries and Trusts* (1993) 273.

the assumptions which they induced representees to adopt.[3] The courts occasionally departed from that approach by granting reliance based relief, but the basis for that departure was not clearly enunciated. The purpose to be pursued in granting relief, and the basis on which relief should be determined, were not examined in detail in England or Australia until Brennan J's judgment in *Waltons Stores (Interstate) Pty Ltd v Maher*.[4] The basis on which the courts should give effect to equitable estoppel was then comprehensively examined by the High Court in *Verwayen*.[5]

Part II of the article will examine the equitable estoppel cases decided since *Verwayen* to determine the extent to which, and the way in which, the reliance based approach adopted in *Verwayen* is being applied. That examination will show that, despite the shift in approach in *Verwayen*, expectation relief remains the norm. It will also show that, although a strict application of the reliance based approach will only occasionally yield a result different from that achieved by the traditional expectation based approach, there are cases in which the distinction is of great consequence. Accordingly, more attention should be paid to the approach laid down in *Verwayen*. The most interesting of the post-*Verwayen* judgments were those of the Victorian Full Court in *Commonwealth v Clark*,[6] a case decided on facts almost identical to those in *Verwayen*. In the course of their judgments in *Clark*, Marks and Ormiston JJ subjected the reliance based approach to searching analysis. The four challenges to that approach which emerge from *Clark* will be considered at the end of Part II.

The concepts of 'reliance based' and 'expectation based' approaches to relief used in this article draw on the reliance and expectation interests identified by Fuller and Purdue in their classical exposition of contract damages.[7] Fuller and Purdue identified three interests which the court protects in granting contract damages: the restitution interest, the reliance interest and the expectation interest. The court protects the restitution interest when it forces the defendant to disgorge a gain received at the expense of the plaintiff. The reliance interest is protected when the court awards damages to the plaintiff for the purpose of undoing the harm which the plaintiff's reliance on the defendant's promise has caused the plaintiff. In protecting the reliance interest, the court seeks to put the plaintiff in the position he or she would have occupied if the contract had not been entered into. The expectation interest is protected when the court gives the plaintiff the value of the expectancy which the promise created, putting the plaintiff in as

[3] The person claiming the benefit of an estoppel will be referred to in this article as the representee, and the person against whom an estoppel is claimed will be referred to as the representor. The expressions are intended to cover all types of conduct from which an equitable estoppel can arise, including acquiescence, encouragement and the making of promises.

[4] (1988) 164 CLR 387, 408 ('*Waltons Stores*').

[5] (1990) 170 CLR 394, 411-17 (Mason CJ); 428-31 (Brennan J); 441-51 (Deane J); 454, 461-3 (Dawson J); 475-6 (Toohey J); 487-8 (Gaudron J); 500-1, 504 (McHugh J).

[6] [1994] 2 VR 333 ('*Clark*').

[7] L Fuller and W Purdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46 *Yale Law Journal* 52.

good a position as he or she would have occupied if the defendant had performed his or her promise.[8]

That approach can usefully be applied in an analysis of remedies granted to give effect to equitable estoppel. Both common law and equitable estoppel provide relief to a party (the representee) who has acted on the basis of an assumption induced by the conduct of another (the representor) in such a way that the representee will suffer detriment if the representor is allowed to depart from the assumption.[9] Common law estoppel operates where the assumption is one of existing fact, whereas equitable estoppel operates where the assumption relates to the future conduct of the representor or the legal rights of the representee.[10]

In giving effect to an equitable estoppel the court exercises a wide discretion as to the nature of the remedy to be granted.[11] The focus of this article is on the considerations which guide a court of equity in exercising that discretion. In order to 'prevent unconscionable conduct and do justice between the parties',[12] a court can grant relief which protects the reliance interest or the expectation interest. The court protects the reliance interest, for example, when the court grants a lien or charge over property to the value of expenditure incurred by the representee in reliance on the relevant assumption.[13] The reliance interest is also protected when the court orders payment of compensation for detriment suffered by the representee in reliance on the relevant assumption.[14] The expectation interest, on the other hand, is protected when the court orders specific performance, or payment of damages in lieu of specific performance, of an unexecuted agreement which the representee promised would be executed.[15] It is also protected where the court refuses to allow the representor to depart from a representation as to future conduct,[16] orders the representor to transfer to the representee a promised or expected interest in land,[17] or orders the representor to pay compensation to the representee calculated by reference to the value of the expectancy.[18]

8 Ibid 53-4.

9 *Waltons Stores* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J).

10 Ibid 458 (Gaudron J).

11 Members of the High Court in *Verwayen* were unanimous in recognising the flexibility of the doctrine in this regard: (1990) 170 CLR 394, 411-12 (Mason CJ), 429 (Brennan J), 439, 442 (Deane J), 454 (Dawson J), 475 (Toohey J), 487 (Gaudron J), 501 (McHugh J).

12 Ibid 411 (Mason CJ).

13 See, eg, *The Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72; 53 ER 563; also *Morris v Morris* [1982] 1 NSWLR 61.

14 As proposed by Brennan and McHugh JJ in *Verwayen* (1990) 170 CLR 394, 431 (Brennan J), 504 (McHugh J).

15 See, eg, *Waltons Stores*.

16 See, eg, *Verwayen*.

17 See, eg, *Dillwyn v Llewelyn* (1862) 4 De G F& J 517; 45 ER 1285.

18 See, eg, *Baker v Baker* (1993) 25 HLR 408.

Although restitutionary remedies have occasionally been granted in promissory estoppel cases in the United States,[19] Australian courts have almost invariably fashioned relief with a view to protecting the representee's reliance or fulfilling his or her expectations, rather than with a view to disgorging gains made by the representor.[20] Although equitable estoppel, particularly proprietary estoppel, can have the effect of preventing unjust enrichment, doing so has not been seen as the purpose of equitable estoppel in England or Australia.[21]

The concepts of reliance and expectation can also be used to describe the approaches which a court can take in giving effect to an estoppel, indicating the interest which is given primacy in the determination of relief. Once an equitable estoppel has been made out, the court can approach the determination of relief on a reliance basis or an expectation basis.[22] Relief is determined on a reliance basis when the court seeks to provide a remedy which reverses any detriment suffered by the representee as a result of his or her reliance on the assumption induced by the representor.[23] Relief is determined on an expectation basis when the court sets out to make good the assumption adopted and acted upon by the representee. The interests are overlapping in that the granting of expectation relief will also ensure that no detriment is suffered as a result of the representee's reliance. Indeed, as Fuller and Purdue have observed, the value of the expectancy interest offers 'the measure of damages most likely to reimburse the plaintiff for the (often very numerous and difficult to prove) individual acts and forbearances which make up his total reliance on the contract.'[24]

The choice, therefore, is between the prevention of detriment and the fulfilment of the representee's expectation as the primary goal in the determination of relief. As this article will show, that choice is an important one. I have argued elsewhere that the reliance based approach is to be preferred, since it is more consistent with the fundamental purpose of all estoppels, which is to provide protection

19 L Fuller and W Purdue, 'The Reliance Interest in Contract Damages: 2' (1936) 46 *Yale Law Journal* 373, 405; Edward Yorio and Steve Thel, 'The Promissory Basis of Section 90' (1991) 101 *Yale Law Journal* 111, 132, fn 129.

20 Cf *Raffaele v Raffaele* [1962] WAR 29, 33, where damages for breach of a contract or 'notional contract' arising by way of proprietary estoppel were assessed on a restitutionary basis. It has been suggested that D'Arcy J erred in awarding damages on that basis and that damages should have been assessed on a reliance basis or an expectation basis: D Allan, 'An Equity to Perfect a Gift' (1963) 79 *Law Quarterly Review* 238, 239, fn 7.

21 See Joshua Getzler, 'Unconscionable Conduct and Unjust Enrichment as Grounds for Judicial Intervention' (1990) 16 *Monash University Law Review* 283, 305-314. For an examination of the various purposes of estoppel, see Andrew Robertson, *Towards a Unifying Purpose for Estoppel* (1996) 22 (1) *Monash University Law Review* 1 (forthcoming).

22 One commentator has also suggested that relief can be determined on the basis of the representor's conscience, or 'what, in the circumstances, it would be unconscionable for the possessor of the right to insist upon given the responsibility he bears in and for the other's actions': Paul Finn, 'Equitable Estoppel' in Paul Finn (ed), *Essays in Equity* (1985) 59, 92.

23 Detriment occasioned by reliance on the relevant assumption is sometimes referred to as 'relevant detriment', in order to distinguish it from the detriment which would result from the denial of the correctness of the assumption: *Verwayen* (1990) 170 CLR 394, 429 (Brennan J).

24 Fuller and Purdue, above n 7, 60. There are, however, rare cases such as *Baker v Baker* (1993) 25 HLR 408, in which the representee's detrimental reliance is of greater value than his or her expectancy.

against detriment resulting from reliance on the conduct of others.[25] This article will illustrate the importance, which one writer has recently denied,[26] of the distinction between the two approaches, and will show that the reliance based approach can withstand the challenges recently made to it by the Full Court of the Supreme Court of Victoria in *Clark*.

I HISTORY OF THE MINIMUM EQUITY PRINCIPLE

In *Waltons Stores*, the High Court recognised that proprietary estoppel and promissory estoppel were emanations of the same broad doctrine of equitable estoppel, the operation of which was described above. Prior to the decision in *Waltons Stores*, the doctrine of proprietary estoppel provided a cause of action where an owner of land denied that another person had rights in relation to the land in circumstances where the owner had 'encouraged or allowed that person to expect those rights and the latter [had] acted in some material way on that expectation.'[27] The doctrine of promissory estoppel, on the other hand, was purely defensive, being restricted to 'precluding departure from a representation by a person in a pre-existing contractual relationship that he will not enforce his strict contractual rights.'[28]

In *Waltons Stores*,[29] Brennan J articulated a reliance based approach to the determination of relief in cases of equitable estoppel, which was subsequently adopted by a majority of the High Court in *Verwayen*.[30] That approach requires courts, in determining relief, to give effect to the 'minimum equity' raised by the representor's conduct by seeking to prevent any detriment being suffered by the representee as a result of his or her reliance on the relevant assumption. The aim of this section is to trace the development of the courts' approach to relief from an original concern with the fulfilment of expectations, to a concern with satisfying equities, then to a concern with 'minimum equities'. This ultimately led to the adoption of a reliance based approach in *Verwayen*. Against that background, an examination of the approach taken to relief and the nature of the remedies granted in the post-*Verwayen* cases can be undertaken.

A *The Proprietary Estoppel Cases*

The proprietary estoppel cases cause considerable difficulty to anyone attempting to reconcile the various ways in which equitable estoppel remedies have been determined. Proprietary estoppel has a long history and the basis on which relief has been determined has rarely been clearly enunciated. Nevertheless, it is

25 Robertson, above n 21.
26 Priestley, above n 2, 290-1.
27 J Starke, N Seddon and M Ellinghaus, *Cheshire and Fifoot's Law of Contract* (6th Aust ed, 1992) 273.
28 *Legione v Hateley* (1983) 152 CLR 406, 432 (Mason and Deane JJ).
29 (1988) 164 CLR 387, 429.
30 (1990) 170 CLR 394, 415-17 (Mason CJ), 429-30 (Brennan J), 454 (Dawson J), 475 (Toohey J), 500-1 (McHugh J).

possible to trace the development of the minimum equity principle through the proprietary estoppel cases over the last 100 years.

The analysis which follows shows that the doctrine of proprietary estoppel was originally concerned with the fulfilment of expectations. That was at least partly a result of confusion as to the distinction between the developing doctrine of proprietary estoppel, the enforcement of contractual promises and the making good of representations through common law estoppel. The move towards a concern with fulfilment of equities, and towards flexibility in the fulfilment of an equity, began in the cases where the representor's assumptions or expectations were uncertain, and so expectation relief could not easily be determined.

It should be noted that the word 'equity' in this context is used to describe the right of a representee to obtain equitable relief against a representor, the determination of which is within the court's discretion.[31] Marcia Neave and Mark Weinberg have described the equity arising by way of estoppel as an 'undefined equity' on the basis that, where an equitable estoppel arises, the representee cannot assert his or her right to a particular remedy, but must persuade the court to fashion a remedy on the facts of the particular case.[32] Similarly, in *Pilling v Armitage*[33] the Master of the Rolls regarded facts which would today found a proprietary estoppel as giving rise to a 'general equity', rather than a specific one.

Although the early cases did describe proprietary estoppel as 'an equity' raised by the facts,[34] the concept of satisfying such an equity by means other than expectation relief first arose in cases where there was no clear promise which could be enforced, and it was not clear what interest the representee assumed he or she had or would receive. The concern with satisfying equities was then adopted in those cases where the representor's expectations were clear. The focus on the fulfilment of equities led, in turn, to the development of the minimum equity principle, which required the courts to grant a remedy which was the minimum necessary to satisfy the equity raised in favour of the representee.[35]

1 *Expectation Based Relief*

As two commentators have recently noted, in most of the nineteenth century cases and, indeed, several of the twentieth century cases, the equity raised by proprietary estoppel was simply treated as a basis for enforcing a gratuitous promise or fulfilling a relied-upon expectation.[36] The decision of Lord Westbury

[31] Marcia Neave and Mark Weinberg, 'The Nature and Function of Equities (Part 1)' (1978-1980) 6 *University of Tasmania Law Review* 24. See also Diane Skapinker, 'Equitable interests, mere equities and "personal equities" — distinctions with a difference' (1994) 68 *Australian Law Journal* 593.

[32] Neave and Weinberg, above n 31, 28.

[33] (1805) 12 Ves 79; 33 ER 31, 33.

[34] Ibid; also *The Duke of Beaufort v Patrick* (1853) 17 Beav 60; 51 ER 954, 959.

[35] The shift in the courts' approach from expectations to equities was noted in 1985 by Finn, above n 22, 68, but since he was writing some years before the articulation of a reliance based approach to relief, he was not able to trace the development of that approach. It is, therefore, worth revisiting the early cases in order to do so.

[36] Ibid 90-1; Patrick Parkinson, 'Equitable Estoppel: Developments after *Waltons Stores (Interstate) v Maher*' (1990) 3 *Journal of Contract Law* 50, 60.

LC in *Dillwyn v Llewelyn*[37] provides a good example. The plaintiff's father offered him a farm so that the plaintiff could build a house on it and live near his father. The plaintiff accepted the offer, and the father signed a memorandum 'presenting' the farm to the plaintiff. The plaintiff then took possession of the farm and expended a large sum of money in building a house on it. The land was not conveyed to the plaintiff and, on the father's death, passed under his will to others.

In those circumstances, the Master of the Rolls declared that the plaintiff was entitled to a life-estate in the land. On appeal, the Lord Chancellor held that 'the son's expenditure on the faith of the memorandum supplied a valuable consideration and created a binding obligation'[38] on the father to transfer the fee simple to the son in accordance with the memorandum. The effect of the estoppel was, therefore, to render the promise enforceable. Indeed, Lord Westbury LC suggested that the case was analogous to that of a verbal agreement which became binding by virtue of subsequent part performance.[39] Despite that analogy, the Lord Chancellor held that the extent of the plaintiff's interest in the land depended, not on the terms of the memorandum, but on the acts done by the plaintiff.[40]

Lord Kingsdown took a similar approach to relief in *Ramsden v Dyson*.[41] His Lordship held that where a person expends money on the faith of a promised or expected interest in land then 'a Court of equity will compel the landlord to give effect to such promise or expectation.'[42]

When an expectation based approach is taken to relief in proprietary estoppel, the operation of the doctrine is closely analogous to the operation of common law estoppel or the enforcement of a contract. An expectation based equitable estoppel resembles common law estoppel when representations are made good,[43] and contract when promises are enforced. It is, therefore, necessary to consider the doctrinal basis of the early proprietary estoppel cases, and the extent to which the expectation based approach adopted in those cases can be attributed to the then undeveloped distinctions between equitable and common law estoppel and between equitable estoppel and contract.

Paul Finn has examined in some detail the doctrinal basis of equity's jurisdiction to make good representations.[44] His analysis of the cases shows that the basis of the jurisdiction was quite unclear in the mid-nineteenth century. Indeed, the adoption of the language of contract in many of the cases reveals considerable

[37] (1862) 4 De G F& J 517; 45 ER 1285 ('*Dillwyn*').
[38] Ibid 1287.
[39] Ibid 1286.
[40] Ibid 1286-7.
[41] (1866) LR 1 HL 129.
[42] Ibid 170.
[43] Common law estoppel, sometimes called estoppel *in pais*, operates where a representation of existing fact is relied upon to the detriment of the representee. Its effect is often described as evidentiary; it is to hold the representor to the truth of the representation and, therefore, to establish the state of affairs by reference to which the legal relationship between the parties is then ascertained: *Waltons Stores* (1988) 164 CLR 387, 413-14 (Brennan J).
[44] Finn, above n 22, 62-71.

uncertainty in the minds of some of the judges as to the relationship of equitable principle to that of the common law.[45] A good example of that confusion is the Lord Chancellor's finding in *Dillwyn* that, although the original promise was a gift, the promisee's expenditure on the faith of it 'supplied a valuable consideration and created a binding obligation.'[46] Later, in 1931, the Privy Council suggested that the foundation of equity's intervention in proprietary estoppel cases was 'either contract or the existence of some fact which the legal owner is estopped from denying.'[47]

Confusion as to the boundary between proprietary estoppel and contract appears to have existed as recently as 10 years ago when, in *Beaton v McDivitt*,[48] Young J found that the parties had entered into a '*Dillwyn* type contract.'[49] The case was concerned with an unusual arrangement. The defendants expected their land to be rezoned in a way which would greatly increase the rates payable by them. Accordingly, they proposed to the plaintiff that, if he would work part of their land, they would transfer that part to him when the land was rezoned and subdivided. The plaintiff took possession of the land and worked it for some years, but neither the rezoning nor the transfer eventuated.

On those facts, it was clear that, under the bargain theory of consideration laid down by the High Court in *Australian Woollen Mills Pty Ltd v The Commonwealth*,[50] the plaintiff had provided no consideration. That is, there was no detriment suffered by the plaintiff, or benefit conferred on the defendant, which could properly be regarded as the agreed price of the promise. The required relation of *quid pro quo* between the plaintiff's acts and the promise did not exist. Nevertheless, Young J found that the line of cases which have followed *Dillwyn* represented 'an exception to the modern requirement that a contract should be a bargain supported by consideration in the nature of a quid pro quo.'[51] On that basis, the plaintiff's reliance on the promise to his detriment provided *ex facto* consideration for the promise and gave rise to a contract between the parties.[52]

On appeal from the decision of Young J, a majority of the New South Wales Court of Appeal refused to extend the bargain theory of consideration laid down by the High Court.[53] Kirby P rejected the attempt to found an exception to the bargain concept of consideration based on *Dillwyn* as 'unconceptual and unhis-

[45] Ibid 63-4.

[46] (1862) 4 De G F&J 517; 45 ER 1285, 1287.

[47] *Canadian Pacific Railway Co v The King* [1931] AC 414, 429.

[48] (1985) 13 NSWLR 134.

[49] Ibid 152.

[50] (1954) 92 CLR 424, 456-7 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ) ('*Australian Woollen Mills*').

[51] *Beaton v McDivitt* (1987) 13 NSWLR 162, 170 (Kirby P in the Court of Appeal).

[52] *Beaton v McDivitt* (1985) 13 NSWLR 134, 152.

[53] (1987) 13 NSWLR 162, 170 (Kirby P), 182 (McHugh JA). In the subsequent decision of the High Court in *Waltons Stores*, Mason CJ and Wilson J appeared to give their approval to a strict interpretation of the *Australian Woollen Mills* decision when they suggested that it 'may be doubted whether our conception of consideration is substantially broader than the bargain theory' developed in the United States: (1988) 164 CLR 387, 402.

torical.'[54] Close analysis of the judgment in *Dillwyn*, as Kirby P pointed out, suggests that the basis of the decision was proprietary estoppel, rather than contract.[55] The decision of the Court of Appeal, therefore, clearly delineates the boundary between contract and equitable estoppel. A strict application of the bargain theory of consideration leaves equitable estoppel with exclusive application to gratuitous promises which have been relied upon to the promisee's detriment.[56]

2 *Uncertain Expectation*

The expectation based approach applied in the early proprietary estoppel cases caused difficulties in those cases where there was uncertainty as to the nature of the promised or expected interest in the subject land. The court could not simply fulfil a representee's expectations, for example, where the representee had acted on the assumption that the subject land would one day be theirs or that they would be entitled to remain on the land indefinitely. Two approaches have been adopted by the courts to deal with the situation of an uncertain expectation. The first is to grant reliance based relief; that is, relief which reverses the detriment suffered by the representee in reliance on the relevant promise or representation. The second approach is to grant relief which, in the court's view, best accommodates the representor's uncertain expectations or, in other words, best satisfies the equity arising in favour of the representee.

(a) Reliance Based Relief

In *Ramsden v Dyson*, Lord Kingsdown contemplated the grant of a reliance based remedy where the promised or expected interest was uncertain.[57] Although his Lordship stated the general rule of proprietary estoppel in terms of the court fulfilling the relevant promise or expectation,[58] he went on to say that if there is uncertainty as to the particular terms of the contract, then a court of equity would grant relief 'either in the form of a specific interest in the land, or in the shape of compensation for the expenditure'.[59]

A reliance based remedy was granted by Sir John Romilly MR in *The Unity Joint Stock Mutual Banking Association v King*.[60] In that case, King allowed his sons to erect certain buildings on land which he intended to transfer to them at some time in the future. On that basis, the Master of the Rolls held that the father

54 Ibid 170.

55 Similarly, McHugh JA held that '[t]he jurisprudential basis of cases such as *Dillwyn v Llewelyn*, in my opinion, is that Equity will not allow a person to insist upon his strict rights when it is unconscionable to do so': ibid 182. *Contra* Patrick Atiyah, *Essays on Contract* (1986), 211-12; cf Allan, above n 20, 243-6.

56 In *Waltons Stores* (1988) 164 CLR 387, 402, Mason CJ and Wilson J suggested that 'there is an obvious interrelationship between the doctrines of consideration and promissory estoppel, promissory estoppel tending to occupy ground left vacant due to the constraints affecting consideration'. See also Andrew Burrows, 'Contract, Tort and Restitution — A Satisfactory Division or Not?' (1983) 99 *Law Quarterly Review* 217, 241.

57 (1866) LR 1 HL 129, 171.

58 Ibid 170.

59 Ibid 171.

60 (1858) 25 Beav 72; 53 ER 563.

could not have retaken possession of the land 'without allowing to his sons the amount of the money they had laid out upon it' and he therefore held that 'the money laid out by the sons was a lien and charge upon it, as against the father.'[61]

The effect of granting the lien was to reverse the detriment which the sons suffered in reliance on the assumption that they would be granted a proprietary interest in the land in the future. The Master of the Rolls did not indicate why he granted a reliance based remedy, but there was uncertainty as to the nature of the expectation: it was not clear what interest would be granted to the sons, or when it would be granted to them.

That decision was followed by Cox J of the South Australian Supreme Court in a dissenting judgment in *Jackson v Crosby (No 2)*.[62] The respondent in that case built a house on land owned by the appellant in the expectation that they would be married and he would live with her in the house. When the relationship broke down, the respondent was held to be entitled to relief on the basis of proprietary estoppel. The trial judge found that the terms of the agreement between the parties were sufficiently certain that it could be concluded that the respondent was to receive a half interest in the property, and accordingly he was held to be entitled to such an interest. At his request the respondent was granted damages in lieu of such proprietary relief.[63] On appeal, that determination of relief was upheld by a majority of the Full Court.[64]

On the other hand, the third member of the Full Court, Cox J, considered that the case was not one of the *Dillwyn* kind, where there was a complete agreement between the parties, and so that form of remedy was inappropriate.[65] Since there was no agreement as to the basis upon which a joint interest in the property would be transferred to the respondent, the proper order was 'a declaration or award in favour of the respondent reflecting the respondent's expenditure of labour and skill upon the house'.[66] His Honour said that:

> The principles of equitable estoppel are sufficiently flexible, in my opinion, to allow the relief to be assessed, in a suitable case, on a quantum meruit basis — technically, as compensation for an equitable lien on the appellant's property for the value of the work done by the respondent (see, for example, *Unity Joint Stock Mutual Banking Association v King*); and in my view that is the proper course to take here. [67]

The approach of Cox J seemed to be that expectancy relief was only to be granted where there was a complete agreement between the parties. Where there was a clear agreement that a particular interest would be transferred to the representee then, as in *Dillwyn*, the appropriate relief was to order the representor to transfer that interest to the representee. Where there was no clear agreement

61 Ibid 565.
62 (1979) 21 SASR 280. See also *Hamilton v Gerahty* (1901) 1 SR (NSW) (Eq) 81.
63 Ibid 288 (Bright J).
64 Ibid 302 (Zelling J), 310 (Mohr J).
65 Ibid 307.
66 Ibid.
67 Ibid.

and, therefore, no clear expectation which could be fulfilled, the court should grant reliance relief by way of compensation or a lien for the value of work done by the representee.[68]

(b) Satisfying the Equity

A lack of certainty in the expectation did not, however, lead the Privy Council to grant a reliance based remedy in *Plimmer v Wellington Corporation*.[69] The appellants in *Plimmer* had incurred considerable expenditure on improvements to Crown land, in circumstances creating a reasonable expectation that their occupation would not be disturbed. They could not, however, point to any specific promise or expectation of an interest in the land. Sir Arthur Hobhouse, giving judgment on behalf of the Privy Council, observed that there had been a difference of opinion amongst great judges as to the nature of the relief to be granted in such cases, but there was no doubt that relief would be granted, 'either in the form of a specific interest in the land, or in the shape of compensation for the expenditure'.[70] The Privy Council held that 'the Court must look at the circumstances in each case to decide in what way the equity can be satisfied.'[71] Their Lordships explained the remedies granted in *The Duke of Beaufort v Patrick*,[72] *Dillwyn* and *Unity Bank v King*, on the basis that, in each case, the remedy granted satisfied the equity raised.[73] Their Lordships did not explain, however, how the equity differed from case to case or how the circumstances of each case helped to determine the most appropriate way in which to satisfy the equity. In *Plimmer* itself, the equity was satisfied by granting to the appellants a perpetual licence to use the subject property.

The *Plimmer* approach has been followed in a number of cases where the representee's expectation has been uncertain.[74] The approach also came to be applied in cases where the expectation was clear, such as *ER Ives Investments Ltd v High*,[75] where the English Court of Appeal found that fulfilment of the defendant's expectations (by grant of a perpetual right of access) was the only way in which the equity could be satisfied. The decision in *Plimmer* can, therefore, be seen as an important staging post in the development of the minimum equity principle. Although the judgment did not provide any framework for determining relief, it did recognise the fact that the court was faced with alternatives in the

68 It should be noted that reliance based relief has also been granted in cases where the expectancy could not be fulfilled, such as *Morris v Morris* [1982] 1 NSWLR 61, where the representee was granted an equitable charge over the subject property in circumstances where his expectation of an indefinite right of residence in the property could not be fulfilled.

69 (1884) 9 App Cas 699 ('*Plimmer*').

70 Ibid 710-11.

71 Ibid 714.

72 (1853) 17 Beav 60; 51 ER 954.

73 (1884) 9 App Cas 699, 713-14.

74 Notably *Inwards v Baker* [1965] 2 QB 29; *Holiday Inns v Broadhead* (1974) 232 EG 951; *Riches v Hogben* (1986)1 Qd R 315, 327 (Macrossan J); *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 604-11 (Priestley JA dissenting).

75 [1967] 2 QB 379.

granting of relief and was afforded a wide discretion in satisfying the equity in each case.

3 Development of the Minimum Equity Approach

Prior to the decision of the English Court of Appeal in *Crabb v Arun District Council*,[76] the court's purpose in determining relief, following *Plimmer* and *Inwards v Baker*, was simply to fashion a remedy which fitted the circumstances of the case. In most cases, that simply meant granting the interest which the representee expected to receive. In *Crabb*, Scarman LJ introduced the concept of the 'minimum equity'. Lord Justice Scarman observed that it was well settled law that:

> the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First, is there an equity established? Secondly, what is the extent of the equity, if one is established? And, thirdly, what is the relief appropriate to satisfy the equity?[77]

Having established that an equity arose in favour of the plaintiff in the circumstances, Scarman LJ said that he 'would analyse the *minimum equity* to do justice to the plaintiff as a right either to an easement or to a licence upon terms to be agreed'.[78] The reference to the 'minimum equity' could be construed as a reference to the minimum relief necessary to prevent the representee suffering detriment as a result of his or her reliance,[79] or as the minimum relief necessary to fulfil the representee's expectation (such as declaring the representee to be entitled to a right of way over the representee's land, rather than a conveyance of the fee simple).[80]

The 'minimum equity' approach to relief was taken up by a unanimous Court of Appeal in *Pascoe v Turner*.[81] The case was concerned with a dwelling house owned by the plaintiff. The defendant lived with the plaintiff in his house for several years until the plaintiff terminated the relationship and went to live elsewhere. The defendant continued to live in the house, was later told by the plaintiff that the house and its contents were hers and subsequently expended a sum of money on repairs, improvements and redecorations to the house.

Having established that, on those facts, an equity arose in favour of the defendant, Cumming-Bruce LJ, giving judgment on behalf of the Court of Appeal, discussed the question of whether the equity should be satisfied by granting a licence to the defendant to occupy the house for her lifetime or whether there

[76] [1976] 1 Ch 179 ('*Crabb*').

[77] Ibid 192-3.

[78] Ibid 198 (emphasis added).

[79] The expression was construed in that way in 1982 by J Heydon, W Gummow and R Austin, *Cases and Materials on Equity and Trusts* (2nd ed, 1982) 307 and subsequently by Brennan J in *Waltons Stores* (1988) 164 CLR 387, 19-27 and Priestley JA in *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466, 472.

[80] It should be noted that, on the facts of *Crabb*, the detriment suffered by the representee as a result of his reliance on the representation probably exceeded the value of the expectation, justifying the grant of expectation relief even on a reliance based approach: J Heydon, W Gummow and R Austin, *Cases and Materials on Equity and Trusts* (4th ed, 1993) 421.

[81] [1979] 2 All ER 945.

should be a transfer to her of the fee simple. Ultimately, the Court of Appeal determined that the only way to give effect to the defendant's equity was 'by compelling the plaintiff to give effect to his promise and her expectations' by conveying the fee simple to her.[82]

Since *Pascoe v Turner*, the English courts have not attempted to define the minimum equity concept any further, although in *Baker v Baker* the Court of Appeal did give some guidance as to the factors to be taken into account in giving effect to the minimum equity.[83] Although one English commentator has recently suggested that '[t]he doctrine of proprietary estoppel is traditionally understood to give rise to a reliance based remedy, rather than an expectation based one',[84] the minimum equity concept has not been interpreted in that way in the English courts. Indeed, it seems the minimum equity concept itself is not uniformly applied by the English courts in the determination of equitable estoppel remedies. In *Wayling v Jones*,[85] the Court of Appeal granted expectation relief to give effect to proprietary estoppel, without raising any question of what was the equity or minimum equity raised by the representor's conduct.[86] In *Baker v Baker*,[87] on the other hand, all three members of the Court of Appeal referred with apparent approval to Scarman LJ's minimum equity principle, but did not see it as requiring the court to grant reliance based relief.

B *Promissory Estoppel*

Promissory estoppel is generally acknowledged to have its origins in the following statement of Lord Cairns LC in *Hughes v Metropolitan Railway Company:*

> [I]t is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.[88]

[82] Ibid 951.

[83] (1993) 25 HLR 408, 412-14 (Dillon LJ), 415-17 (Beldam LJ), 418-20 (Roch LJ).

[84] Christine Davis, 'Estoppel — Reliance and Remedy' [1995] *The Conveyancer and Property Lawyer* 409, 415. A similar claim is made by Atiyah, above n 55, 55-6.

[85] (1995) 69 P & C R 170.

[86] It should be noted, however, that the representee in *Wayling v Jones* had relied on the relevant assumption for a considerable period and suffered substantial and irreversible detriment as a result, justifying expectation relief even on a reliance based approach: *Verwayen* (1990) 170 CLR 394, 416 (Mason CJ).

[87] (1993) 25 HLR 408, 412 (Dillon LJ), 415 (Beldam LJ), 418 (Roch LJ).

[88] (1877) 2 App Cas 439, 448. George Spencer Bower and Sir Alexander Turner, *Estoppel by Representation* (3rd ed, 1977) 370, note that Lord Cairns LC cited no authority for the proposition and that there appears not to have been any.

Lord Cairns' statement assumes that the equitable principle operates in much the same way as common law estoppel, by holding a person to the supposition which they have caused another person to adopt. In other words, the effect of the estoppel (as it later came to be known) was that, to the extent that the representee expected that the representor would not enforce certain rights, the representee's expectations would be fulfilled.

The decision of the House of Lords in *Hughes* was followed by the English Court of Appeal in *Birmingham & District Land Company v London & North Western Railway Company,*[89] again with the effect that the representor was prevented from departing from the relevant assumption. Lord Justice Bowen stated the relevant principle in broader terms than Lord Cairns, and with a slightly different approach to relief:

> if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before.[90]

Lord Justice Bowen's reference to 'placing the parties in the same position as they were before' seems to point to an obligation on the part of the representor to make good any detriment suffered as a result of the induced belief. It is not clear, however, whether his Lordship intended that a court would grant relief having that effect, or whether he simply intended that a representor could avoid an estoppel arising by taking steps which had that effect.[91]

The doctrine of promissory estoppel was 'established, or revived,'[92] when those statements were taken up by Denning J in *obiter* in *Central London Property Trust Ltd v High Trees House Ltd.*[93] The principle enunciated by Denning J operated by holding parties to the promises they had made. Once the estoppel was raised, the court was to give effect to it by means of expectation relief, without reference to the detriment suffered by the promisee as a result of the promise. His Lordship held that 'a promise intended to be binding, intended to be acted upon and in fact acted upon, is binding so far as its terms properly apply'.[94] That doctrine, of course, had a limited operation: it only applied to a promise not to enforce existing legal rights, and did not 'go so far as to give a cause of action in damages for breach of such a promise', but operated defensively to prevent 'the party making it [from acting] inconsistently with it.'[95]

89 (1889) 40 Ch D 268.
90 Ibid 286.
91 The latter approach was recently applied by Drummond J in *Re Neal; ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659. This case is discussed in the second part of this article.
92 Starke, Seddon and Ellinghaus, above n 27, 153.
93 [1947] 1 KB 130.
94 Ibid 136.
95 Ibid 134.

That approach was followed in a number of English cases,[96] and was applied by the South Australian Supreme Court in *Je Maintiendrai Pty Ltd v Quaglia*.[97] Having determined that the respondent tenant had acted to his detriment in reliance on the appellant landlord's representation that a reduced rent would be accepted, a majority of the Court held that the landlord was 'estopped from claiming'[98] the difference. The doctrine applied in *Je Maintiendrai* had an operation similar to that of common law estoppel, differing only in that the representation which the court made good was a representation as to rights, rather than one as to existing fact. There was no reference in any of the judgments to any flexibility available to the court in satisfying the equity. The effect of the estoppel was simply to prevent the promisor from acting inconsistently with its promise. The doctrine of promissory estoppel which Gibbs CJ and Murphy J would have upheld in their dissenting judgment in *Legione v Hateley*[99] had a similar preclusionary operation, preventing the representors from asserting rights which they had represented would not be exercised. The purchasers in that case acted to their detriment, by failing to tender the purchase price within the time specified in the vendors' notice of rescission, on the faith of a representation made on behalf of the vendors that an extension of time would be granted. Accordingly, Gibbs CJ and Murphy J held that '[t]he vendors were estopped from treating the contract as rescinded'[100] by the purchasers and the purchasers were entitled to specific performance.

C *Equitable Estoppel*

Having considered the approach to relief in the early proprietary estoppel cases and the early promissory estoppel cases, the next step is to consider the approach taken to relief in those cases decided after the two doctrines were recognised as emanations of a unified equitable estoppel. As Mason CJ and Wilson J noted in *Waltons Stores*, the Court of Appeal in *Crabb* 'treated promissory estoppel and proprietary estoppel ... as mere facets of the same general principle'.[101] That notion of a generic equitable estoppel appeared to be accepted by the House of Lords in its recent decision in *Roebuck v Mungovin*.[102] In Australia, it was the High Court's judgment in *Waltons Stores* which established the existence of a unified doctrine of equitable estoppel encompassing both proprietary estoppel and promissory estoppel.[103]

A consequence of the recognition of a unity of principle between promissory and proprietary estoppels was that the flexible 'equities' based approach to relief

[96] Notably *Robertson v Minister of Pensions* [1949] 1 KB 227; *Combe v Combe* [1951] 2 KB 215; *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 (Goff J at first instance).

[97] (1980) 26 SASR 101 ('*Je Maintiendrai*').

[98] Ibid 116 (White J).

[99] (1983) 152 CLR 406.

[100] Ibid 423.

[101] (1988) 164 CLR 387, 403.

[102] [1994] 2 AC 224.

[103] *Silovi v Barbaro* (1988) 13 NSWLR 466, 472 (Priestley JA).

in proprietary estoppel cases came to be applied in promissory estoppel cases. Although promissory estoppel had previously had a purely preclusionary operation in Australia, the 'minimum equity' approach emerging from the judgment of Scarman LJ in *Crabb* was held in *Waltons Stores* to be applicable to all types of equitable estoppel. The adoption of the minimum equity principle in *Waltons Stores* and its refinement in *Verwayen* will be examined below.

Although the minimum equity principle has been taken up enthusiastically by the Australian courts, the English courts do not seem to have moved beyond the flexible 'minimum equity' approach adopted by the Court of Appeal in *Pascoe v Turner*. Finn observed in 1985 that, although it became the court's function to divine the 'minimum equity to do justice to the plaintiff', the judgments in *Crabb* and *Pascoe v Turner* left unexplained the precise signification of the word 'minimum'.[104] Since *Pascoe v Turner*, however, the English courts have not treated the minimum equity concept as anything more than a guiding principle in the exercise of the court's discretion and, indeed, have often ignored it.[105] In its recent decision in *Roebuck v Mungovin*, the House of Lords held that '[i]f an equitable estoppel is raised the court's function is to determine what, if anything, is necessary to satisfy the equity in all the circumstances of the case.'[106] Their Lordships did not refer to the 'minimum equity' concept and did not articulate the basis on which the court might determine what was necessary to satisfy the equity in a particular case.

1 *The Approaches to Relief in* Waltons Stores

Although the approach articulated by Scarman LJ in *Crabb* was adopted by four members of the High Court in *Waltons Stores*,[107] only Brennan J took the opportunity to explore in detail the nature of the 'minimum equity' identified by Scarman LJ. In fact, an examination of the judgments shows that very little consideration was given to what was the minimum equity necessary to do justice to the representee in that case, presumably because that was not an issue argued before the Court. The effect of the equitable estoppel which arose in that case was essentially preclusionary: it was to prevent Waltons from denying the existence of rights which the Mahers were induced to believe they had or would have.[108]

The facts of the case are well known, but can be briefly summarised for the purposes of the present discussion, which is confined to the High Court's approach to relief. Waltons had negotiated to lease land from Mr and Mrs Maher, on terms which required the Mahers to demolish the existing building and construct a new building on the land. A majority of the High Court found that, as a result of Waltons' conduct, an assumption was adopted by the Mahers that

104 Finn, above n 22, 91.

105 See, eg, *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133; *Re Basham* [1986] 1 WLR 1498 and *Wayling v Jones* (1995) 69 P & C R 170.

106 [1994] 2 AC 224, 235.

107 (1988) 164 CLR 387, 404 (Mason CJ and Wilson J), 425 (Brennan J), 460 (Gaudron J).

108 Cf ibid 431-3 (Brennan J).

Waltons would enter into the lease.[109] On the faith of that assumption, the Mahers, who had been told by Waltons that the new building was needed urgently, demolished the existing building on the property and began to construct the building required by Waltons. Waltons then refused to execute the lease. In those circumstances the High Court held unanimously that an estoppel arose against Waltons, which prevented it from retreating from its implied promise to complete the contract.

Although Mason CJ and Wilson J cited with approval Scarman LJ's 'minimum equity' approach to relief,[110] they did not discuss how best to satisfy the equity arising in favour of the Mahers. Their Honours simply held that Waltons was 'estopped in all the circumstances from retreating from its implied promise to complete the contract.'[111] In accordance with his interpretation of the facts, Deane J found that the estoppel which arose against Waltons precluded Waltons from 'denying the existence of a binding contract' and provided 'the factual foundations for an ordinary action for enforcement of that "contract".'[112] Similarly, Gaudron J found that Waltons was estopped from denying that exchange had taken place and, accordingly, the rights and liabilities of the parties were to be determined on the basis that it had in fact taken place.[113]

While the other judgments are notable for the lack of attention paid to the nature of the relief to be granted, Brennan J gave detailed consideration in his judgment to the court's object in determining relief. Brennan J's refinement of the concept of a 'minimum equity' marks a turning point in the development of equitable estoppel remedies since his Honour articulated, for the first time, a reliance based approach to the determination of relief:

> An equitable estoppel is binding in conscience on the party estopped, and is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the assumption or expectation which he has been induced to adopt. Perhaps equitable estoppel is more accurately described as an equity created by estoppel.[114]

Central to Brennan J's approach to relief is the notion that equitable estoppel operates as a source of legal obligation, rather than operating, like common law estoppel, as a means for establishing a state of affairs by reference to which the legal relationship between the parties is to be established.[115] On that basis, the object of equitable estoppel is to prevent the detriment flowing from reliance on

[109] Ibid 397-8 (Mason CJ and Wilson J), 417-18 (Brennan J); cf 439-40 (Deane J), 458-60 (Gaudron J) who held the relevant assumption to be that a binding agreement had been made.
[110] Ibid 404.
[111] Ibid 408.
[112] Ibid 445.
[113] Ibid 464.
[114] Ibid 416.
[115] Ibid. *Contra Verwayen* (1990) 170 CLR 394, 439, 443 (Deane J).

promises, rather than to enforce those promises,[116] and relief is determined accordingly.[117]

Applying those principles to the facts, Brennan J found that an equity was raised against Waltons, which was to be satisfied by treating Waltons 'as though it had done what it induced Mr Maher to expect that it would do, namely by treating Waltons as though it had executed and delivered the original lease.'[118] His Honour went on to say that:

> It would not be appropriate to order specific performance if only for the reason that the detriment can be avoided by compensation. The equity is fully satisfied by ordering damages in lieu of specific performance.[119]

Certainly, the Mahers' equity was fully satisfied, but one must ask whether an award of expectation damages represented the minimum equity.[120] Justice Brennan himself said that 'the equity is to be satisfied by avoiding a detriment suffered in reliance on an induced assumption.'[121] The detriment which the Mahers suffered was the wasted expenditure in demolishing the existing building and constructing the building required by Waltons, along with any fall in value of the land which was caused by the demolition. It is possible that an award of compensation (representing the cost of the demolition and building works, and any diminution in value of the land) may have represented the minimum equity, but evidence of the quantum of the Mahers' loss does not appear to have been before the Court.[122]

2 *The Approaches to Relief in* Verwayen

(a) The Facts

Justice Brennan's reliance based approach to relief in *Waltons Stores* was taken up by a majority of the High Court in *Verwayen*. If the judgments in *Waltons Stores* were notable for the lack of attention given to relief, the judgments in *Verwayen* were characterised by a focus on the nature of the relief to be granted. Again, the facts can be briefly summarised for present purposes. Mr Verwayen was injured in 1964 in the collision between HMAS Voyager and HMAS Melbourne. He instituted proceedings against the Commonwealth in 1984, claiming damages for negligence. The Commonwealth did not plead the limitations defence which was open to it, and nor did it deny that it owed a duty to Mr

116 *Waltons Stores* (1988) 164 CLR 387, 426.

117 Ibid 427.

118 Ibid 430.

119 Ibid.

120 Damages awarded in lieu of specific performance under Lord Cairns' Act provisions must be calculated on an expectation basis since they are required to 'constitute a true substitute for specific performance': *Wroth v Tyler* [1974] Ch 30, 58. See also *Johnson v Agnew* [1980] AC 367, 400 (Lord Wilberforce) and the discussion of equitable damages as an estoppel remedy in Part II of this article.

121 *Waltons Stores* (1988) 164 CLR 387, 433.

122 As Priestley suggests, above n 2, 293, the granting of expectation relief in *Waltons Stores* may be explicable on the basis that the nature of the relief to be granted was not argued before the court.

Verwayen. Representations were made on behalf of the Commonwealth that a policy decision had been made not to plead those defences in any actions brought by survivors of the collision. In reliance on those representations, Mr Verwayen continued to prosecute his action against the Commonwealth until 1986, when the Commonwealth sought leave to amend its defence to plead those defences. The extent of the detriment which Mr Verwayen would suffer if the Commonwealth were allowed to depart from its representations was not quantified with precision because of the way in which the matter came before the Court.[123] It included at least wasted expense and inconvenience in prosecuting the action, and may also have included increased stress, anxiety and ill health.[124]

(b) The Relief Granted

Although a majority of the Court supported a reliance based approach to determining relief in cases of equitable estoppel,[125] the remedy granted to Mr Verwayen did have the effect of fulfilling his expectation that the Commonwealth would not take advantage of the relevant defences. Justices Toohey and Gaudron based their decisions on waiver, rather than estoppel, holding that the Commonwealth had irrevocably waived its right to take advantage of the relevant defences.[126] The other members of the majority, Deane and Dawson JJ, granted Mr Verwayen expectation based relief on the basis of estoppel.

Unlike the majority of the Court, Deane J adopted an expectation based approach to relief in estoppel, although it is notable that he was applying a doctrine of estoppel by conduct, which operates both at law and in equity:

> Prima facie, the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of that assumed state of affairs would be inequitably harsh, that some lesser form of relief should be awarded.[127]

Justice Deane found that Mr Verwayen had suffered detriment consisting of stress, anxiety and ill health, which would be rendered futile if the Commonwealth were allowed to depart from its assumption.[128] The relevant detriment would extend far beyond any question of legal costs and was of such a nature and extent that it was not unjust to hold the Commonwealth 'to the assumed state of affairs upon the basis of which it deliberately induced Mr Verwayen to act.'[129] While Dawson J approved the reliance based approach to relief articulated by Brennan J in *Waltons Stores*,[130] his Honour did not pursue that approach in the

123 *Verwayen* (1990) 170 CLR 394, 416 (Mason CJ), 449 (Deane J).
124 Ibid 448-9 (Deane J).
125 Ibid 415-17 (Mason CJ), 429-30 (Brennan J), 454 (Dawson J), 475 (Toohey J), 500-1 (McHugh J).
126 Ibid 475 (Toohey J), 487 (Gaudron J).
127 Ibid 443. Although in the passage extracted Deane J was describing the operation of estoppel by conduct, which operates at common law and in equity, it is clear that his Honour considered that equitable principle also entitled a party to relief framed on that basis: ibid 439.
128 Ibid 448.
129 Ibid 449.
130 Ibid 454.

present case. Justice Dawson held that the Commonwealth was 'estopped from insisting upon the statute of limitations' and observed that 'the equity raised by the appellant's conduct was such ... that it could only be accounted for by the fulfilment of the assumption upon which the respondent's actions were based'.[131]

Of the three dissentients, Brennan J found that an equitable estoppel did arise, but would have ordered an inquiry into Verwayen's out of pocket costs in order to determine what relief was appropriate.[132] Chief Justice Mason and McHugh J held that there was no evidence of any non-financial loss. Since an order for costs would have been sufficient recompense for the detriment suffered by Verwayen, no estoppel arose.[133]

(c) Support for a Reliance Based Approach to Relief

Although the Court was divided on the question of whether Mr Verwayen had established that he had suffered material detriment on the faith of the assumption which the Commonwealth's conduct induced him to adopt, there was clear majority support for a reliance based approach to relief. Although Mason CJ was referring to a doctrine of estoppel which operates at common law as well as in equity, the Chief Justice held that the court:

> may do what is required, but not more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs ... which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of that doctrine is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid.[134]

Justice Brennan affirmed and applied the reliance based approach which he articulated in *Waltons Stores*, finding that 'to hold the Commonwealth to its promise to admit liability in negligence would be to go beyond the minimum equity' needed to avoid the relevant detriment.[135] Justice Dawson quoted with apparent approval a statement from the judgment of Brennan J in *Waltons Stores* that the equity raised by estoppel is to avoid the detriment suffered as a result of reliance, rather than to entitle the party to the full benefit of the assumption which he or she relied upon.[136] Although Toohey J's remarks on estoppel were purely by way of *obiter dicta*, his Honour's interpretation was that:

> on the present state of the authorities, the consequence of any promissory estoppel is that the court should enforce the promise only as a means of avoiding detriment and to the extent necessary to achieve that end.[137]

131 Ibid 462.
132 Ibid 430.
133 Ibid 416-17 (Mason CJ), 504 (McHugh J).
134 Ibid 413.
135 Ibid 430.
136 Ibid 454.
137 Ibid 475.

Finally, McHugh J approved the statement of Priestley JA in *Silovi Pty Ltd v Barbaro*[138] that '[t]he remedy granted to satisfy the equity ... will be what is necessary to prevent detriment resulting from the unconscionable conduct.'[139]

Two members of the Court, Deane and Gaudron JJ, favoured an expectation based approach to relief, holding that the representee has a *prima facie* right to have a relied-upon expectation made good. According to Deane J, the relevant assumption should be made good unless to do so would 'exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party.'[140] Just as Brennan J's reliance based approach to relief follows from his belief that estoppel operates as a source of legal obligation, Deane J's expectation based approach follows from his view of estoppel by conduct as an evidentiary principle, rather than a substantive doctrine. Justice Deane's view is that estoppel by conduct 'does not of itself constitute an independent cause of action', but simply operates 'to fashion an assumed state of affairs' which may be relied upon defensively or aggressively 'as the factual foundation of an action arising under ordinary principles with the entitlement to ultimate relief being determined on the basis of the existence of that fact or state of affairs.'[141]

Justice Gaudron, on the other hand, was somewhat more concerned with reliance, suggesting that 'it may be that an assumption should be made good unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy.'[142] Two different expectation based approaches, therefore, emerged from *Verwayen*. On the approach of Deane J, the representee's assumption should be made good unless that would cause injustice to the representor and, on the approach of Gaudron J, the representee's assumption should be made good unless it is clear that some other remedy will prevent any detriment being suffered. Under both approaches the representee has a *prima facie* right to expectation relief; the approaches differ only as to the circumstances in which that *prima facie* right would be displaced.

(d) Granting Expectation Based Relief

A clear majority of the High Court in *Verwayen*, though, favoured a reliance based approach to the determination of relief in equitable estoppel. The approach adopted by the majority requires a court to seek to provide relief which prevents or reverses the detriment which would be suffered by the representee, as a result of action taken in reliance on the relevant assumption, if the representor was allowed to depart from that assumption. The question which arises then is when, in accordance with that approach, a court should grant expectation based relief.

Chief Justice Mason suggested that there are three situations which might justify a court in making an assumption good.[143] The first is where there has been

[138] (1988) 13 NSWLR 466, 472.
[139] *Verwayen* (1990) 170 CLR 394, 501.
[140] Ibid 445-6.
[141] Ibid 445.
[142] Ibid 487.
[143] Ibid 416.

reliance on an assumption for an extended period, the second is where the representee has suffered substantial and irreversible detriment in reliance on the assumption and the third is where detriment cannot satisfactorily be compensated or remedied. It is arguable that the first two of those situations are encompassed by the third and that the court should only grant expectation relief where the nature or extent of the detriment suffered by the representee is such that it cannot satisfactorily be compensated.

The result in *Verwayen* can be accommodated within that approach. The principal difference between the majority and the minority judges was whether there was adequate proof that Mr Verwayen had suffered increased stress, anxiety and ill health as a result of his reliance on the assumption that the Commonwealth would not dispute liability. If one accepts that the evidence was adequate, then clearly such detriment could not be prevented, reversed or adequately compensated. Although common law courts routinely calculate damages to compensate for such loss, such damages do not have the effect of reversing or preventing the detriment suffered, but are merely designed to make good the plaintiff's loss 'so far as money can do.'[144] An analogy might be drawn between the grant of expectation based relief in an estoppel case such as *Verwayen* and relief *in specie* elsewhere in equity. A court of equity will make an order for 'specific performance instead of damages, only when it can by that means do more perfect and complete justice'.[145] Similarly, it could be said that, where a person would suffer substantial physical or mental pain as a result of reliance on a representation if the representor were allowed to resile from it, then the relevant assumption should be fulfilled in order to do more complete justice than an order for monetary compensation would provide.[146]

A further reason for granting expectation relief which was not discussed in *Verwayen* has been advanced by Heydon, Gummow and Austin. Modern English authority, according to Heydon *et al*, suggests that 'the remedy should be designed to reverse the plaintiff's detriment rather than make good his expectation, unless his expectation is of less value than his detriment'.[147] That interpretation is borne out by the recent case of *Baker v Baker*,[148] in which the Court of Appeal substituted an expectation based remedy for the reliance based relief granted by the trial judge, on the basis that the expectancy was of less value than the representee's detrimental reliance.

144 *Todorovic v Waller* (1981) 150 CLR 402, 412 (Gibbs CJ and Wilson J).

145 *Wilson v Northampton and Banbury Junction Railway Company* (1874) LR 9 Ch App 279, 284; cited with approval in *Dougan v Ley* (1946) 71 CLR 142, 150 (Dixon J).

146 Justice McHugh, though, said in *Verwayen* that 'even if the plaintiff had sought to make out a case along these lines [based on worry and stress suffered as a result of reliance on the representation], his equity would be satisfied by an award of compensation for that additional worry and stress' (1990) 170 CLR 394, 504.

147 Heydon, Gummow and Austin, above n 80, 421.

148 (1993) 25 HLR 408.

(e) Is There any Difference?

Justice Priestley, writing extra-judicially, recently suggested that 'there may not in the end be any great difference'[149] between the reliance based approach to relief adopted by Mason CJ and the expectation based approach favoured by Deane J in *Verwayen*. Indeed, he suggested that he could not then construct any plausible situation in which a court would reach a different result, depending on whether it adopted the view of Mason CJ or Deane J.[150] Perhaps I could be so bold as to suggest one, similar to the facts of *Jackson v Crosby (No 2)*.[151] Assume A and B are in a relationship and planning to move into a house owned by A, which is then worth $150,000. A gratuitously promises to transfer to B a half interest in the land. In reasonable reliance on that gratuitous promise, and with A's knowledge, B expends $50,000 on improvements to the property, increasing its value to $200,000. A and B then part company and A refuses to transfer the promised interest to B.

According to Deane J's approach, the *prima facie* position is that B's expectations should be fulfilled unless that would cause injustice to A. The court should, therefore, order A to transfer the half interest to B or order payment of equivalent damages or compensation in the sum of $100,000.[152] The only question is whether that would be unjust to A. It is difficult to see why that would be so, unless it were regarded as unjust to provide an expectation remedy when a reliance remedy is available, which would seem to be inconsistent with the tenor of Deane J's judgment. It should be noted, though, that B's *prima facie* right to expectation relief, under Gaudron J's approach, would be lost on the basis that 'it is clear that no detriment will be suffered other than that which can be compensated by some other remedy.'[153]

According to the reliance based approach, on the other hand, the court should seek to provide relief which reverses the detriment suffered by B in reliance on the assumption that A would transfer the half interest to him. The court can do that by requiring A to pay compensation to B, or by granting a lien in favour of B, for the value of the work done, namely $50,000.[154] The reliance and expectation based approaches would, on those facts, seem to produce quite different results. Indeed, reliance and expectation approaches should produce different results every time a representee has suffered quantifiable, purely financial detriment in reliance on a promise or expectation of rights, be they contractual, proprietary or otherwise, which are of greater value than the detriment. In such cases, the choice between a reliance based approach and an expectation based approach is a choice with significant consequences for the parties involved.

149 Priestley, above n 2, 290.

150 Ibid.

151 (1979) 21 SASR 280.

152 As a majority of the Full Court ordered in *Jackson v Crosby (No 2)*: ibid 302 (Zelling J), 310 (Mohr J).

153 *Verwayen* (1990) 170 CLR 394, 487.

154 As Cox J would have ordered in *Jackson v Crosby (No 2)* (1979) 21 SASR 280, 307, but only because on the facts of that case the promise was unclear.

II APPLICATION OF THE PRINCIPLE SINCE *VERWAYEN*

The first part of this article traced the development of the courts' approach to equitable estoppel remedies from an expectation based approach to one which is now concerned primarily with protecting against detrimental reliance. The approach adopted by a majority in *Verwayen* requires a court, in giving effect to an equitable estoppel, to satisfy the minimum equity. That means the court is required to grant relief which does no more than is necessary to prevent detriment being suffered by the representee as a result of his or her reliance on the representor's conduct. The court should provide expectation relief only when detriment cannot be avoided by another means. This part of the article will consider the way in which that approach has been carried into effect in the five years since *Verwayen*.

Similar studies have been carried out in relation to promissory estoppel in the United States under s 90 of the Second Restatement of Contracts, most recently by Edward Yorio and Steve Thel.[155] Yorio and Thel's examination of the US cases shows that, despite the fact that most commentators consider that the objective of s 90 is to protect promisees against loss caused by reliance on a promise, the courts routinely grant expectation relief in promissory estoppel cases.[156] A number of surveys cited by Yorio and Thel show that the remedies routinely granted under s 90 are specific performance and expectation damages, with negative injunctions being granted in cases where a promisor undertakes to refrain from acting in a particular way.[157] Reliance damages are awarded only rarely, according to Yorio and Thel, 'but then only if no promise is made or proven or if expectation damages are difficult to determine. Otherwise, the courts grant expectancy relief.'[158] An examination of the recent Australian cases reveals a surprisingly similar tendency towards expectation relief, although in Australia it seems that is more a consequence of giving equitable estoppel an evidentiary operation than a contractual one.[159]

Suggestions that equitable estoppel is frequently, if not too frequently, being pleaded,[160] are perhaps borne out by the fact that there have been at least 26

[155] Yorio and Thel, above n 19.

[156] A number of US commentators drew that conclusion before Yorio and Thel: Jay Feinman, 'Promissory Estoppel and Judicial Method' (1984) 97 *Harvard Law Review* 678, 687-8, suggested that 'the typical damage remedy applied in promissory estoppel cases is measured by the interest'; Daniel Farber and John Matheson, 'Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"' (1985) 52 *University of Chicago Law Review* 903, 909, observed that 'reliance plays little role in the determination of remedies'; Mary Becker, 'Promissory Estoppel Damages' (1987) 16 *Hofstra Law Review*, 131, 135, concluded that the courts 'routinely award expectation damages'; David Slawson, 'The Role of Reliance in Contract Damages' (1990) 76 *Cornell Law Review* 197, 202, noted that '[o]f the possibly hundreds of reported decisions applying promissory estoppel since 1932, only three have been widely read as holding that damages in a promissory estoppel case are limited to the reliance measure.'

[157] Yorio and Thel, above n 19, 131-3.

[158] Ibid 151.

[159] The contractual nature of promissory estoppel in the United States was discussed by Mason CJ and Wilson J in *Waltons Stores* (1988) 164 CLR 387, 401-2.

[160] Leopold, above n 2, 47. It has also been suggested that estoppel is 'more often cited than applied, and more often applied than understood': Geoffrey Cheshire and Cecil Fifoot, 'Central London Property Trust Ltd v High Trees House Ltd' (1947) 63 *Law Quarterly Review* 283, 286.

reported decisions since *Verwayen* in which pleas of equitable estoppel have been upheld.[161] In two of those cases the nature of the relief granted to give effect to the estoppel does not appear in the report,[162] but in each of the other 24 cases expectation relief was granted.[163] In none of those cases did the court provide

[161] I have attempted to cover all successful equitable estoppel cases decided after the High Court handed down its judgment in *Verwayen* in September 1990, and reported by the end of 1995. Cases such as *Ditford v Temby* (1990) 26 FCR 72, in which it was held without discussion that an estoppel would have arisen had other rights not been available, have been left out of consideration. I have also left out of consideration cases in which findings of equitable estoppel were overturned on appeal, such as *Territory Insurance Office v Adlington* (1992) 84 NTR 7 and *Trippe Investments Pty Ltd v Henderson Investments Pty Ltd* (1992) 106 FLR 214. Although French J's decision in *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 46 FCR 342 was overturned by the Court of Appeal (*Commonwealth v Newcrest Mining (WA) Ltd* (1995) 130 ALR 193) the relevant findings on estoppel were not challenged.

[162] *Lee Gleeson Pty Ltd v Sterling Estates Pty Ltd* (1991) 23 NSWLR 571; *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146.

[163] *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324 (declaration that defendant entitled to possession of land under invalid lease assumed valid); *Australian Workers Union (NSW Branch) v Minister for Natural Resources* (1991) 43 IR 158 (union estopped from challenging exemption after conducting proceedings on basis of its validity); *Kintominas v Secretary, Dept of Social Security* (1991) 30 FCR 475 (promisor's assets for purpose of aged pension valued exclusive of property promised to son); *Quach v Marrickville Municipal Council [No 1]* (1991) 22 NSWLR 55 (declaration confirming the priority of plaintiffs' title as represented by defendant); *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 (discharged guarantee enforced on basis of assumption that it would remain binding); *Tasita Pty Ltd v Papua New Guinea* (1991) 34 NSWLR 691 (landlord estopped from denying determination of lease after representing that it would accept surrender); *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (1992) 26 NSWLR 524 (specific performance of contract on basis of assumed variation as to essentiality of time); *FAI Leasing Pty Ltd v Nyst* (1992) 5 BPR 11,673 (purchaser allowed to rescind contract entered into on basis of vendor's representation that cooling off period applied); *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580 (representor estopped from asserting a constructive trust after inducing representee to assume it would obtain a paramount interest in the trust property); *Spedley Securities Ltd (in liq) v Bank of New Zealand* (1992) 7 ACSR 70 (liquidator estopped from asserting that transaction was a loan after parties had acted on the assumption that it was a sale); *CSR Ltd v The New Zealand Insurance Co Ltd* (1993) Aust Contract Reports 90-034 (insurer estopped from denying that insurance policy extended to cover subsidiary of insured); *DTR Securities Pty Ltd v Sutherland Shire* Council (1993) 79 LGERA 88 (landowner estopped from denying obligation to dedicate land to council as promised); *Re Ferdinando; ex parte Australia and New Zealand Banking Group Ltd v The Official Trustee in Bankruptcy (as Trustee of the bankrupt estate of Maurice Christie Ferdinando)* (1993) 42 FCR 243 ('*Re Ferdinando*') (declaration of liability under mortgage refused after mortgagee induced assumption that liability was not secured by mortgage); *Leda Commercial Properties Pty Ltd v DHK Retailers Pty Ltd* (1993) ANZ ConvR 163 (lessee estopped from denying validity of determination of lease after creating assumption that it was abandoning premises); *Lee v Ferno Holdings Pty Ltd* (1993) 33 NSWLR 404 (specific performance of invalid sublease assumed valid); *Re Neal; ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659 (bankruptcy notice set aside after creditor induced assumption that debt not due); *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 46 FCR 342 (Commonwealth precluded from asserting that transfer of leases ineffective after parties proceeded on common assumption that transfer effective); *Commonwealth v Clark* [1994] 2 VR 333 (defendant prevented from pleading defences which it represented would not be pleaded); *Drummoyne District Rugby Club Inc v NSW Rugby Union Ltd* (1994) Aust Contract Reports 90-039 (representor ordered to invite representee to participate in rugby competition as representee expected); *S&E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 (specific performance of new term for sublease after sublessor induced assumption that notice of exercise of option for renewal not necessary); *Sharp v Anderson* (1994) 6 BPR 13,801 (representor estopped from relying on Statute of Frauds in relation to verbal testamentary promise to leave land to son); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 8 ANZ Insurance Cases 61-232 (club estopped from asserting continuance of contract of insurance after representing that cancellation was accepted); *Morris v FAI General Insurance Co Ltd* (1995) 8 ANZ Insurance Cases 75,881 (insurer prevented from departing from representation that it

limited relief which simply reversed the detriment suffered by the representee, without fulfilling his or her expectations. The apparently overwhelming preference for expectation relief gives rise to two important questions. First, are the courts determining relief in accordance with the reliance based approach adopted in *Verwayen*? Secondly, is there a flaw in the reliance based approach which prevents reliance relief from being granted? These questions will be addressed under the two headings below.

A *Adherence to the* Verwayen *Approach*

In order to comply with the *Verwayen* approach in determining relief, a court should first consider what is the minimum remedy needed to avoid the detriment suffered by the representee as a result of reliance on the relevant assumption. Expectation relief should be granted only if there is no other way to prevent the representee from suffering detriment. In only 10 of the successful equitable estoppel cases decided since *Verwayen*, though, did the reported judgment contain any reference to the need to determine relief in accordance with the concepts of proportionality, relieving detriment or satisfying the minimum equity.[164] It could be argued that, since *Verwayen*, it is no longer satisfactory simply to say that, an equitable estoppel having arisen, the representor is 'estopped' from resiling from the assumption he or she has created. Rather, the court should consider in every case what is the minimum relief necessary to do justice between the parties. Despite the apparent lack of attention paid to the minimum equity requirement, in only three of the cases can it be argued that the relief granted went further than satisfying the minimum equity. In other words, only in those cases can it be argued that the detriment suffered by the representee in reliance on the relevant assumption could have been avoided by the granting of lesser relief. The approach to relief in each of those cases will be discussed below.

1 *Reliance Relief as the Minimum Equity*

The unusual way in which estoppel was raised in *Kintominas v Secretary, Dept of Social Security*[165] to some extent clouded the issue of relief. The matter came

would not contest liability); *Sunpost Pty Ltd v Alsons Pty Ltd* (1995) ANZ ConvR 575 (sublessor ordered to renew sublease as promised).

164 *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324, 346; *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370, 389 (Kirby P); *Kintominas v Secretary, Dept of Social Security* (1991) 30 FCR 475, 484-5; *FAI Leasing Pty Ltd v Nyst* (1992) 5 BPR 11,673, 11,676; *DTR Securities Pty Ltd v Sutherland Shire Council* (1993) 79 LGERA 88, 98; *Re Neal; ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659, 669; *Commonwealth v Clark* [1994] 2 VR 333, 338-44 (Marks J), 381-4 (Ormiston J); *Drummoyne District Rugby Club Inc v NSW Rugby Union Ltd* (1994) Aust Contract Reports 90-039, 89,948; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 8 ANZ Insurance Cases 61-232, 75,594 (Powell JA); *Sunpost Pty Ltd v Alsons Pty Ltd* (1995) ANZ ConvR 575, 578. It should be noted that in at least two of the other cases there was no need to discuss the minimum equity principle because the parties had accepted that expectation relief was appropriate if liability was established: *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (1992) 26 NSWLR 524, 538; *S&E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637, 651.

165 (1991) 30 FCR 475.

before Einfeld J as an appeal from a decision of the Administrative Appeals Tribunal relating to the valuation of the applicant's assets for the purpose of the 'assets test' for aged pensioners. The relevant issue was whether, for the purposes of that valuation, the applicant had any subsisting interest in a house property of which she was the registered proprietor. The applicant had promised her son that she would leave the house to him in her will and would allow him to reside in the house until her death. In reliance on that promise, the son expended a sum of money on improving the property. It appeared to be common ground between the parties that those circumstances gave rise to an equity in favour of the son by way of proprietary estoppel. The dispute concerned the way in which a court would give effect to that equity.

The respondent argued that the son had only a charge over the property to the extent of the sum expended on it. Although Einfeld J was 'mindful of' the minimum equity requirement, he nevertheless found that the house was beneficially owned by the son.[166] Accordingly, he ordered that the valuation of the applicant's assets should not include any amount in respect of the property in question. The effect of that order was that a court of equity would fulfil the son's expectations of an irrevocable life tenancy and eventual ownership of the property. Justice Einfeld did not make entirely clear why reliance relief, in the form of a lien or an award of equitable compensation, was not appropriate. It seems from the report that the expenditure incurred in reliance on the relevant assumption was able to be quantified and at the time it was incurred amounted to 'about half the then value of the house.'[167] There appeared, therefore, to be a lack of 'proportionality between the remedy and the detriment which is its purpose to avoid'.[168] The only possible explanation is that the extended period (some 15 years) during which the son relied on the relevant assumption justified the court in granting of expectation relief.[169]

It also appears that reliance based relief may have satisfied the minimum equity in *Leda Commercial Properties Pty Ltd v DHK Retailers Pty Ltd.*[170] There, a lessee by its conduct created the impression that it was abandoning the leased premises. The lessor 'acted in reliance on the impression created by the [lessee's] conduct in acting to secure possession of the premises for reletting.'[171] Justice Higgins held that, in those circumstances, the lessee was estopped from denying the validity of the lessor's determination of the lease. It was also established that the lessee had repudiated the lease by abandonment, so estoppel was an alternative ground for Higgins J's conclusion that the lease was at an end. Since the lease was brought to an end by the lessor's acceptance of the lessee's repudiation, it seems that no detriment was suffered by the lessor as a result of the lessee's

166 Ibid 484-6.
167 Ibid 486.
168 *Verwayen* (1990) 170 CLR 394, 413 (Mason CJ).
169 Chief Justice Mason said in *Verwayen* that '[r]eliance upon an assumption for an extended period may give rise to an estoppel justifying a court in requiring that the assumption be made good.': ibid 416.
170 (1993) ANZ ConvR 162.
171 Ibid 169.

departure from the relevant assumption. On that basis, no estoppel should have arisen.

Nevertheless, an estoppel was held to have arisen, so it is appropriate to consider whether the relief granted represented the minimum equity. It is arguable that it did not. Leaving aside the fact that the lease was at an end in any event, the relief granted would appear to have been out of proportion to the detriment suffered by the landlord. The effect of the tenant being estopped from denying the validity of the landlord's determination of the lease was that the tenant was liable for substantial damages for breach of the lease. If the only detriment suffered by the landlord was the wasted effort and expense incurred in unnecessarily securing the premises for reletting, then an award of equitable compensation, of the type proposed by Brennan and McHugh JJ in *Verwayen*,[172] would appear to have been sufficient to reverse it.

The final case in which reliance relief may have represented the minimum equity was *Re Neal; ex parte Neal v Duncan Properties Pty Ltd.*[173] That case was concerned with the validity of a bankruptcy notice. A judgment creditor entered into a deed of compromise with two debtors granting them a stay of execution in return for a cash payment and a bill of exchange. The bill was dishonoured when presented on behalf of the creditor. The creditor then represented to the debtors that it would not insist on its right to receive the proceeds of the bill if the debtors were to arrange to have $100,000 transferred to the trust account of the creditor's solicitor. In reliance on that representation, the debtors incurred legal costs in seeking to make arrangements for that transfer. The creditor then sought to insist on its right to payment of the bill and later served a bankruptcy notice based on non-payment. The debtors sought to have the bankruptcy notice set aside on the ground, *inter alia*, that the creditor was estopped from insisting on its right to payment of the bill.

Justice Drummond held that the legal costs incurred by the debtors in reliance on the creditor's representation constituted sufficient detriment to raise an estoppel against the creditor. Referring to the requirement under *Verwayen* for proportionality between the remedy and the detriment which is its purpose to avoid, his Honour said that an undertaking to pay the legal costs incurred by the debtor in reliance on the representation would have been enough to preclude a finding of estoppel. Since the creditor did not offer such an undertaking, however, the creditor was estopped from insisting on its right to payment.[174] On that basis, Drummond J ordered that the bankruptcy notice be set aside:

> on the ... ground [*inter alia*] that the creditor continues to be estopped from denying [the suspension of the creditor's rights] until it undertakes to pay the legal costs the debtors incurred in seeking to make arrangements for the transfer of the $100,000 to the creditor's solicitors.[175]

[172] Ibid 431 (Brennan J), 504 (McHugh J). *Contra* ibid 439 (Deane J) and Marks J in *Clark* [1994] 2 VR 333, 342.
[173] (1993) 114 ALR 659 ('*Re Neal*').
[174] Ibid 669.
[175] Ibid 671.

The effect of that decision is that a representor can avoid a remedy which has the effect of fulfilling the representee's expectations only by undertaking to reverse the relevant detriment suffered by the representee. That approach would appear to be inconsistent with those statements of principle in *Verwayen* which require a court, if possible, to frame relief which has the effect of reversing the detriment suffered by the representee, rather than fulfilling his or her expectations.[176] Justice Drummond could have reversed the relevant detriment by ordering the creditor to pay equitable compensation to the debtors in an amount equivalent to the legal costs unnecessarily incurred by the debtors. Although the amount of those legal costs does not appear in the report, the relief granted by Drummond J, which consisted of setting aside the bankruptcy notice and effectively forcing the issue of a new demand for the debt and a new bankruptcy notice, may well have been out of proportion to the detriment suffered by the debtors.

2 *Expectation Relief as the Minimum Equity*

In each of the other cases since *Verwayen*, expectation relief appeared to be the only way of satisfying the equity raised by the representor's conduct. In most of the cases, that relief can be justified on the basis that the detriment suffered by the representee in reliance on the relevant assumption could not be quantified,[177] because expectation relief neatly avoids a detriment which would be difficult to quantify,[178] or because the reliance and expectation interests coincided.[179]

[176] (1990) 170 CLR 394, 413 (Mason CJ), 429-30 (Brennan J), 454 (Dawson J), 501 (McHugh J). The approach also appears to be inconsistent with the *dictum* of Gaudron J that 'an assumption should be made good *unless* it is clear that no detriment will be suffered other than that which can be compensated by some other remedy': ibid 487 (emphasis added).

[177] *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324 (expenditure incurred over 33 years); *Quach v Marrickville Municipal Council [No 1]* (1991) 22 NSWLR 55 (expenditure incurred over 34 years); *Lee v Ferno Holdings Pty Ltd* (1993) 33 NSWLR 404 (expenditure incurred over five years); *Commonwealth v Clark* [1994] 2 VR 333 (representee suffered stress, anxiety, effort and inconvenience as a result of reliance on assumption); *Drummoyne District Rugby Club Inc v NSW Rugby Union Ltd* (1994) Aust Contract Reports 90-039 (representee club arranged sponsorship, players and hiring of grounds on basis of assumption); *Sunpost Pty Ltd v Alsons Pty Ltd* (1995) ANZ ConvR 575 (representee purchased and conducted business for some years on the basis of assumption).

[178] *Australian Workers Union (NSW Branch) v Minister for Natural Resources* (1991) 43 IR 158 (employer lost opportunity to seek fresh exemption which would not have been open to challenge); *Corumo Holdings Pty Ltd v C Itoh Ltd* (1991) 24 NSWLR 370 (creditor lost opportunity to obtain substitute guarantee); *Austral Standard Cables Pty Ltd v Walker Nominees Pty Ltd* (1992) 26 NSWLR 524 (vendor lost opportunity to complete contract on time); *FAI Leasing Pty Ltd v Nyst* (1992) 5 BPR 11,673 (purchaser entered into contract on basis of assumption that it could rescind); *DTR Securities Pty Ltd v Sutherland Shire Council* (1993) 79 LGERA 88 (council lost opportunity to require dedication of land); *Newcrest Mining (WA) Ltd v Commonwealth* (1993) 46 FCR 342 (transferee of lease lost opportunity to seek consent to transfer lease; *S&E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 (sublessee lost opportunity to exercise option for renewal of lease); *Sharp v Anderson* (1995) Aust Contract Reports 90,051 (son invested savings into house for his mother, losing opportunity to purchase own property); *CIC Insurance Ltd v Bankstown Football Club Limited* (1995) 8 ANZ Insurances Cases 61-232 (insurer lost opportunity to cancel policy). In *Sunpost Pty Ltd v Alsons Pty Ltd* (1995) ANZ ConvR 575, 578, Bryson J justified granting expectation relief on the following basis: 'I do not have confidence in achieving a just result by attempting to assess a sum of money to be paid as a condition of allowing the first defendant to rely on its legal rights. The principles for assessment of compensation would not be clear or simple.'

Expectation relief can also be justified in some of the cases on the basis that the relevant assumption was relied upon for an extended period of time,[180] or because the expectation was of less value than the detriment.[181] There are also several cases in which it is not clear from the report what detriment was suffered in reliance on the relevant representation; either because it was not clear what action was taken in reliance on the relevant representation,[182] or because the representor's departure from the assumption did not appear to cause the representee to suffer detriment.[183] In those cases, it is not possible to identify the minimum equity arising out of the representor's conduct.

B *Conclusions to be Drawn*

The above discussion considers only 24 cases decided over the relatively short period of five years since the High Court in *Verwayen* laid down a new approach to the formulation of relief in equitable estoppel cases. Obviously, it will take some time for the new approach to be widely understood and accepted. Nevertheless, in the short time since *Verwayen* some patterns are emerging, and some conclusions can be drawn.

First, it seems that the courts have not yet embraced the reliance based approach laid down in *Verwayen*. It is clear from the judgments that Australian judges still instinctively give equitable estoppel, like common law estoppel, a preclusionary operation. That instinct leads to the conclusion that a representor is

179 *CSR Ltd v The New Zealand Insurance Co Ltd* (1993) Aust Contract Reports 90-034, 89,745 (insured failed to obtain a substitute insurance policy on the assumption that activities of subsidiary were covered by existing policy); *Morris v FAI General Insurance Co Ltd* (1995) 8 ANZ Insurance Cases 75,881 (plaintiff refrained from instituting proceedings within limitation period on faith of defendant's admission of liability). In each of those cases, it was clear that the detriment suffered by the representee as a result of reliance on the relevant assumption coincided with the benefit expected by the representee. It may be possible to rationalise some of the cases referred to in n 178 above in the same way.

180 *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324; *Quach v Marrickville Municipal Council [No 1]* (1991) 22 NSWLR 55; *Lee v Ferno Holdings Pty Ltd* (1993) 33 NSWLR 404; *Sharp v Anderson* (1995) Aust Contract Reports 90,051.

181 As previously discussed, Heydon, Gummow and Austin, above n 80, 421, suggest that in such circumstances expectation relief should be preferred to reliance relief. In *Burnside Sub-Branch RSSILA Inc v Burnside Memorial Bowling Club Inc* (1990) 58 SASR 324, the expectancy, a lease with only 7 years left to run, may have been of less value than the detriment, which consisted of considerable expenditure incurred over a period of 33 years.

182 *Tasita Pty Ltd v Papua New Guinea* (1991) 34 NSWLR 691; *Spedley Securities Ltd (in liq) v Bank of New Zealand* (1992) 7 ASCR 70; *Re Ferdinando; ex parte Australia and New Zealand Banking Group v The Official Trustee in Bankruptcy (as Trustee of the bankrupt estate of Maurice Christie Ferdinando* (1993) 42 FCR 243. The issue of the representees' detrimental reliance in *Re Ferdinando* is discussed in Andrew Robertson, 'Limits on the Recovery of Secured Debts: Estoppel and Section 52' (1994) 5 *Journal of Banking and Finance Law and Practice* 211, 212-13.

183 *Linter Group Ltd v Goldberg* (1992) 7 ACSR 580 (Southwell J held that no constructive trust could be asserted by the representor because the trust moneys could not be traced; accordingly, departure by the representor from the assumption which it induced, that it would not assert its rights as beneficiary, did not cause detriment to the representee); *Leda Commercial Properties Pty Ltd v DHK Retailers Pty Ltd* (1993) ANZ ConvR 162 (departure by tenant from the assumption induced by its conduct did not affect landlord because the lease was at an end in any event).

'estopped' from resiling from a relied upon representation, rather than a finding that an equity has arisen by way of estoppel and relief must be granted to prevent the representee from suffering detriment as a result of his or her reliance on the relevant assumption.[184] Secondly, it is clear that, even where the reliance based approach is strictly applied, the circumstances will often require the grant of expectation relief on the basis that the detriment suffered by the representee cannot be prevented in any other way. That seemed to be the case in at least 17 of the 24 decisions discussed.[185] One commentator has recently suggested that, under the approach adopted in *Verwayen*, it will only be in exceptional circumstances that gratuitous promises will be enforced and '[o]rdinarily the remedy will be restricted to a correction of the detriment actually suffered'.[186] The above examination of the early post-*Verwayen* cases strongly suggests the opposite conclusion.

Since the courts in the United States have also shown a consistent preference for expectation relief, it is illuminating to compare the conclusions which have recently been drawn by two US commentators, and to consider the applicability of those conclusions to the Australian context. In their recent article, Yorio and Thel argue that, since issues of liability and remedy turn on promise, the true basis of promissory estoppel in the US is promise, not reliance.[187] That finding undermines claims made by Gilmore[188] and others[189] that contract law is being absorbed into a general theory of civil liability based on the tort concept of compensation for harm.[190] Reliance, like consideration, serves the function of screening for serious promises. If a promise is identified as serious, according to Yorio and Thel, the court will enforce it by means of expectation relief.[191]

There are at least three reasons why those conclusions cannot be drawn in Australia, despite a superficial similarity in the preference for expectation relief. First, in the United States promissory estoppel is seen as part of the law of contract, with reliance on a promise acting as a substitute for consideration and

184 One of the post-*Verwayen* decisions, that of the Queensland Court of Appeal in *Morris v FAI General Insurance Co Ltd* (1995) 8 ANZ Insurance Cases 61-258, has been criticised for failing to 'explore in any depth the process of determining the appropriate remedy': Des Butler, 'Admissions of Liability in Litigation: Contractual Undertakings and Estoppel' (1995) 25 *Queensland Law Society Journal* 591, 594.

185 This conclusion is arrived at by excluding from the 24 cases under discussion those three cases in which reliance relief could have been granted, and the four others in which it was not clear what relevant detriment would be suffered by the representee if the representor was allowed to depart from the assumption in question.

186 Derek Davies, 'What Should Happen When Developments Outpace Origins?' in Malcolm Cope (ed), *Equity: Issues and Trends* (1995) 7. Similarly, J Carter, 'Chapter 2: Australia' in Ewoud Hondius (ed), *Precontractual Liability* (1991) 29, 37 suggested that 'it would not be going too far to say that compensation for loss by reliance or in respect of benefits conferred, rather than expectation damages, is more likely to be the norm.'

187 Yorio and Thel, above n 19, 113.

188 Grant Gilmore, *The Death of Contract* (1974) 87 *et seq*.

189 See, eg, Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 777. Similar claims have been made in Australia: Jane Swanton, 'The Convergence of Tort and Contract' (1989) 12 *Sydney Law Review* 40; Nicholas Seddon, 'Australian Contract Law: Maelstrom or Measured Mutation?' (1994) 7 *Journal of Contract Law* 93, 94.

190 Yorio and Thel, above n 19, 115. See also Farber and Matheson, above n 156, 905.

191 Yorio and Thel, above n 19, 113.

giving rise to what is often referred to as a 'contract'.[192] In the Second Restatement of the Law of Contracts, s 90 appears under the heading 'Contracts Without Consideration'. In Australia, on the other hand, promissory estoppel is a purely equitable doctrine which is still enforced exclusively by way of equitable remedies. Australian courts consistently take pains to distance equitable estoppel from the law of contract.[193] Secondly, in Australia, issues of liability turn on reliance, rather than promise. Our preference for a 'reasonableness of reliance' test, rather than the 'reasonable expectation of reliance' test applied under section 90, exemplifies the greater focus on reliance in Australia.[194] Thirdly, equitable estoppel has only recently begun to be seen as a substantive doctrine in Australia, and a reliance based approach to relief has even more recently been adopted to give effect to that doctrine. Australian lawyers' perception of estoppels as preclusionary doctrines has evoked an instinct for expectation relief. That instinct should gradually disappear as the 'new equitable estoppel'[195] comes to be more widely understood.

C *Problems with the Reliance Based Approach*

In *Clark*[196] the Full Court of the Victorian Supreme Court subjected the reliance based approach laid down in *Verwayen* to a thorough analysis. The facts of the case were almost identical to those in *Verwayen*. Mr Clark was also a member of the Royal Australian Navy injured in the Voyager collision in 1964. He commenced action against the Commonwealth in August 1985 in reliance on representations that the Commonwealth would not take advantage of defences open to it. In February 1986 the Commonwealth indicated that it would defend the action and would rely on the two defences in question. The most important difference between *Clark* and *Verwayen* was that, since the High Court's decision in *Verwayen* had been handed down by the time *Clark* came to trial, Mr Clark was able to substantiate the detriment he would suffer as a result of reliance on the Commonwealth's representations if it were allowed to resile from the assumption it created.

The trial judge found that Mr Clark had participated in the litigation as a result of the Commonwealth's representations and, in doing so, incurred a debt of $10,000 as well as stress, anxiety, effort and inconvenience. That detriment was such that the minimum equity required to do justice between the parties was to hold the Commonwealth to its original representations that it would not plead the relevant defences. The Commonwealth's appeal from that decision was dismissed by the Full Court. Justice Fullagar found that there was no material distinction

192 See, eg, E Allan Farnsworth, *Contracts* (2nd ed, 1990) 102. In *Waltons Stores* (1988) 164 CLR 387, 401-2, Mason CJ and Wilson J explain the contractual nature of promissory estoppel in the United States as a response to the constraining effects of the bargain theory of consideration.

193 See, eg, *Waltons Stores*, ibid 400-1 (Mason CJ and Wilson J), 423-7 (Brennan J); *Verwayen* (1990) 170 CLR 394, 439-40 (Deane J) 453 (Dawson J), 501 (McHugh J).

194 See Robertson, above n 21 and Andrew Robertson, 'The "reasonableness" requirement in estoppel' (1994) 1 *Canberra Law Review* 231.

195 Dorney, above n 2, 46.

196 [1994] 2 VR 333.

between the facts of *Verwayen* and the facts of the present case. Since there was no clearly binding *ratio decidendi* in the High Court's decision, the Full Court was obliged to follow its own previous decision.[197] Justice Marks found the minimum equity concept unhelpful in framing relief, preferring the formulation which allows a court to grant relief which is necessary to prevent unconscionable conduct and to do justice between the parties.[198] He dismissed the appeal, adopting the reasoning of Deane and Dawson JJ in *Verwayen*.[199]

Justice Ormiston, on the other hand, adopted an interpretation of the approach to relief in the judgments of the High Court in *Verwayen* which is more consistent with the interpretation adopted in this article:

> In my opinion, although I am inclined to favour Deane J's analysis in that it would more evenly place the competing considerations on the scales, I feel obliged to accept that the other members of the court, with the possible exception of McHugh J (who might take a more stringent approach), would appear to have held that the relevant equity does not in every case require the party sought to be bound to fulfil the assumption and is designed primarily to avoid the detriment which the court sees as likely to flow from the non-fulfilment of the assumption.[200]

Applying that approach, Ormiston J found that the detriment suffered by Mr Clark was such that it could not 'be fairly compensated except by holding the Commonwealth to the assumptions it induced'.[201] Both Marks J and Ormiston J seemed to be opposed to the reliance based approach and, in the course of their respective judgments, their Honours raised a number of important issues which have the potential to undermine the viability of that approach. The principal problems raised in those judgments will be addressed under the four headings below.

1 *Estoppel as a Defensive Equity*

The first challenge made by Marks J to the reliance based approach was to question its application in cases where equitable estoppel is raised defensively. Justice Marks noted that, in the Victorian Full Court's decision in *Verwayen*:[202]

> the majority took the view that the doctrine [promissory estoppel] was capable of being relied on as an answer and would succeed as such in the same way as estoppel at common law, that is, if it were established.[203]

On that interpretation, the minimum equity principle does not apply where promissory estoppel, or indeed any equitable estoppel, is raised as a defence. The estoppel simply has a preclusionary effect, and the parties' rights are determined according to the state of affairs which the plaintiff representor induced the

197 Ibid 335.
198 Ibid 342-3. This type of approach has been criticised by Burrows, above n 56, 243.
199 Ibid 343-4.
200 Ibid 383.
201 Ibid 384.
202 *Verwayen v The Commonwealth (No 2)* [1989] VR 712.
203 *Clark* [1994] 2 VR 333, 337.

defendant representee to assume existed. Equitable estoppel would then in many cases afford a complete defence. However, as Marks J noted,[204] Brennan J in *Verwayen* appeared to take a different view:

> In strict theory, a party who is entitled to equitable relief to make good some detriment suffered in reliance on a promise has a cause of action rather than an answer to a plea raised by a defendant-promisor in proceedings to enforce another cause of action. But when an equity by way of estoppel is raised as an answer to a plea in a defence which a defendant promisor seeks to raise contrary to his promise, it may be appropriate to give effect to the defence on terms that the defendant promisor satisfy the plaintiff's equity.[205]

By analogy, it would seem clear that where estoppel is raised as a defence, then the court should give judgment for the plaintiff on terms that require the plaintiff to satisfy the defendant's equity. As Marks J noted in *Clark*, although Brennan J's view was not explicitly supported by the other members of the High Court in *Verwayen*, all members of the Court 'accepted the relevance of the extent of detriment to the availability of equitable estoppel as an answer'.[206]

Justice Marks suggested, however, that where estoppel is raised defensively, Deane J would perhaps only relate the representee's detriment to the question of whether it was unconscionable to depart from the relevant assumption. In other words, the representee's detriment would only be relevant to the question of whether an estoppel was made out. If material detriment was not made out, then the plea would fail. If it was made out, then estoppel would operate as a complete answer to the plaintiff's claim. When raised defensively, equitable estoppel would then 'become an all or nothing plea to be determined in the same way as estoppel at common law.'[207] Justice Marks conceded, though, that the law 'has not yet rationalised itself in this way.'[208] Indeed, it would not appear that Deane J's judgment supports such a rationalisation. His Honour's statement of the principles of estoppel by conduct in *Verwayen* would tend to suggest that he supports Brennan J's analysis. Justice Deane said that the assumed fact or state of affairs may be relied upon defensively and went on to say, without distinguishing between a defensive or aggressive use of the doctrine, that the *prima facie* entitlement to relief based on the assumed state of affairs will be qualified in a case where such relief would exceed what could be justified by the requirements of good conscience.[209]

The other judgments show a similar failure to distinguish between the effect of an equitable estoppel raised defensively and one raised aggressively. Chief Justice Mason, for example, made no such distinction when he said that:

204 Ibid.
205 (1990) 170 CLR 394, 430.
206 [1994] VR 333, 338.
207 Ibid 341.
208 Ibid.
209 *Verwayen* (1990) 170 CLR 394, 445-6.

> as a matter of principle and authority, equitable estoppel will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more.[210]

If the purpose of equitable estoppel is, as several members of the High Court have recently suggested,[211] to prevent detriment resulting from reasonable reliance on the conduct of others, then there seems no legitimate reason to distinguish between a defensive use of such an estoppel and an aggressive use. Indeed, in many cases, the question of whether an estoppel is raised aggressively or defensively depends only on who is the first to institute proceedings. If, for example, a tenant expends money on the faith of a representation by the landlord that a lease is valid, then either party might institute proceedings in the event that the landlord subsequently sought to deny the validity of the lease. According to Marks J's analysis, the outcome would depend on who sues first. If the tenant sues, claiming relief on the basis of equitable estoppel, then the court may compensate the tenant for his or her expenditure, on the basis that such relief represents the minimum necessary to prevent detriment. If the landlord seeks to evict the tenant, and the estoppel is raised defensively by the tenant, then the estoppel has a preclusionary operation, preventing the landlord from denying the truth of the representation that the lease is valid. Such an anomaly would be avoided if the minimum equity requirement was applied, as the judgments in *Verwayen* seem to suggest, in the case of a defensive plea as well as an aggressive one.

There remains the problem of pleading, which was raised by Marks J in *Clark* as follows:

> I refer briefly to the pleading problem which emerges from *Verwayen's Case*. It is whether promissory estoppel may be pleaded as an answer to a defence or a claim as distinct from being pleaded as a cause of action in itself.[212]

That problem raises questions of great practical importance. Must equitable estoppel be raised by way of cross claim, rather than as a defence? Where equitable estoppel is pleaded as a defence, can a court grant other than expectation relief to the defendant? If equitable estoppel is not strictly a defence, but a right to relief to satisfy an equity, then equitable estoppel strictly should not be pleaded as a defence, except perhaps where it is clear that the equity raised by the plaintiff's conduct can only be accounted for by denying his or her cause of action. In all other cases in which a representor asserts a cause of action which is inconsistent with representations relied upon by the representee, the representee should plead equitable estoppel by way of a cross claim.

On the other hand, the statement of Brennan J quoted above strongly suggests that a defendant need not plead a defensive equity by way of a cross claim in

[210] Ibid 412 (Mason CJ). Similarly unqualified statements were made by other members of the Bench: ibid 454 (Dawson J), 475-6 (Toohey J), 487 (Gaudron J), 501 (McHugh J).

[211] *Legione v Hateley* (1983) 152 CLR 406, 430 (Mason and Deane JJ); *Waltons Stores* (1988) 164 CLR 387, 423, 426-7, (Brennan J); *Verwayen* (1990) 170 CLR 394, 409-10, 415-16 (Mason CJ), 423 (Brennan J), 501 (McHugh J).

[212] [1994] 2 VR 333, 337.

order to obtain relief.[213] The court can presumably, in such circumstances, grant the relief claimed by the plaintiff, subject to an order reversing the detriment suffered by the defendant. Such an approach is consistent with the High Court's recent confirmation of the flexibility enjoyed by courts of equity in giving effect to equitable defences. In *Vadasz v Pioneer Concrete (SA) Pty Ltd*, in the context of partially setting aside a guarantee on the ground of misrepresentation, the court said that '[t]he concern of equity, in moulding relief between the parties is to prevent, nullify, or provide compensation for, wrongful injury.'[214] As Meagher, Gummow and Lehane have observed, '[i]n giving effect to its doctrines, equity has wide powers ... And it may, unlike the common law, impose terms as the price of relief.' [215]

2 *Compensation in Equity*

The second challenge made by Marks J to the reliance based approach to relief related to the appropriateness of compensation as an equitable remedy. His Honour suggested that the word 'minimum' in the expression 'minimum equity' is not to be given its literal meaning, and implicitly disapproved of suggestions by Mason CJ and Brennan J that a monetary equivalent of financial loss can be granted. Justice Marks did not see how such a common law remedy 'could be reconciled with the preservation of equitable estoppel and the equitable nature of the remedy.'[216] Similarly, in *Verwayen*, Deane J said that:

> estoppel does not of itself provide an independent cause of action in equity for non-traditional equitable relief in the form of compensatory damages, under Lord Cairns' Act or subsequent statutory provisions, for the detriment caused by a departure from an otherwise unenforceable promise as to future conduct.[217]

Courts of equity have two sources of jurisdiction to order payment of monetary compensation, each of which will be examined in turn.

(a) Damages Under Lord Cairns' Act

The remedy granted in many equitable estoppel cases is an award of equitable damages in lieu of specific performance of a contract. Courts of equity have jurisdiction to award damages in such circumstances under provisions re-enacting s 2 of the Chancery Amendment Act (1858),[218] known as Lord Cairns' Act. In Australia the provisions vary from court to court, but most provide in essence that, where the court has power to grant an injunction against the commission of a wrongful act or to order specific performance of any contract, the court may award damages to the party injured, either in addition to or in substitution for an

213 Although Leopold, above n 2, 54, suggests that it would be prudent to do so.
214 *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 130 ALR 570, 579.
215 R Meagher, W Gummow and J Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 432.
216 *Clark* [1994]2 VR 333, 342.
217 (1990) 170 CLR 394, 439.
218 21 & 22 Vict c 27.

order for the injunction or specific performance.[219] There are two potential limitations on the use of Lord Cairns' Act to give effect to equitable estoppel: first, the argument that Lord Cairns' Act does not empower a court to award damages in substitution for injunctions in aid of purely equitable rights and, secondly, the requirement that equitable damages awarded in substitution for an injunction or specific performance must be calculated so as to provide a true substitute for such specific relief.

Meagher, Gummow and Lehane have argued for some time that Lord Cairns' Act should be construed as applicable only in equity's auxiliary jurisdiction, the reference to 'wrongful acts' in the statute being confined to legal wrongs.[220] The weight of authority, however, runs contrary to such an interpretation.[221] Indeed, *Waltons Stores* itself does not support such an interpretation, at least on the approach of Mason CJ and Wilson and Brennan JJ: Lord Cairns' Act damages were awarded even though no legal wrong was committed by Waltons. Moreover, the reformulation of the provision in some jurisdictions to omit the expression 'wrongful act' would seem to make it clear in those jurisdictions that equitable damages can be awarded in the case of the infringement of a purely equitable obligation.[222] The second limitation is, therefore, likely to be of greater practical relevance than the first.

In *Wroth v Tyler*, Megarry J held that the then English provision 'envisages that the damages awarded [in substitution for specific performance] will in fact constitute a true substitute for specific performance.'[223] Although the Lord Cairns' Act provisions typically provide that the damages 'may be assessed in such manner as the court shall direct', that does not appear to give the court a discretion as to the basis on which damages should be calculated. In *Johnson v Agnew*, Lord Wilberforce, with whom the other members of the House of Lords agreed, expressed the opinion that the words do not give the court any such discretion, but refer only to the procedure by which the damages are assessed.[224] Equitable damages awarded in lieu of specific performance are to be assessed on the same compensatory principle as common law damages, 'ie that the innocent party is to be placed, so far as money can do, in the same position as if the contract had been performed.'[225]

219 The principal provisions are: Australian Capital Territory Supreme Court Act 1933 (Cth) s 11(a); Supreme Court Act 1970 (NSW) s 68; Supreme Court Act 1979 (NT) s 14(1)(b); Equity Act 1867 (Qld) s 62 (as saved by The Statute Law Revision Act 1908 (QLD) s 2(iv)) ; Supreme Court Act 1935 (SA) s 30; Supreme Court Civil Procedure Act 1932 (Tas) s 11(13); Supreme Court Act 1986 (Vic) s 38; Supreme Court Act 1935 (WA) s 25(10). See generally Peter McDermott, *Equitable Damages* (1994).

220 Meagher, Gummow and Lehane, above n 215, 649-50.

221 McDermott, above n 219, 153-5.

222 Ibid 155.

223 [1974] Ch 30, 58.

224 [1980] AC 367, 400.

225 Ibid.

Unless the Australian courts are prepared to depart from that interpretation,[226] it seems that Lord Cairns' Act damages will only be useful in those estoppel cases, such as *Waltons Stores* and *Jackson v Crosby (No 2)*,[227] where the court wishes to provide the monetary equivalent of expectation relief. The true substitute principle logically requires damages awarded in lieu of specific performance to be calculated on an expectation basis[228] and will, if maintained, prevent the use of the Lord Cairns' Act jurisdiction to award reliance damages in estoppel cases. The only means of awarding monetary compensation for reliance loss, then, is by invoking equity's inherent jurisdiction to order payment of compensation.

(b) Equitable Compensation

An order for the payment of compensation for breach of a purely equitable obligation is a remedy most commonly granted to provide restitutionary relief against defaulting fiduciaries. As McLelland J observed in *United States Surgical Corporation v Hospital Products International Pty Ltd*, however, a court of equity 'has an inherent power to grant relief by way of monetary compensation for breach of a fiduciary *or other equitable obligation*'.[229] The New Zealand Court of Appeal has also suggested that it should be regarded as settled that monetary compensation may be awarded for breach of any duty deriving historically from equity.[230] Furthermore, as Meagher, Gummow and Lehane note:

> whilst the monetary sum awarded to the plaintiff normally is computed by reference to the profit which has been made by the defendant, this is not invariably so. It can be computed by reference to the detriment suffered by the plaintiff. *Nocton v Lord Ashburton*,[231] ... *McKenzie v McDonald*,[232] ... and *Re Dawson*[233] ... all afford illustrations of that proposition.[234]

Indeed, in *Hospital Products*, McLelland J suggested that equitable compensation 'differs from an account of profits in that the loss to the plaintiff rather than the gain to the defendant is the measure of relief.'[235] Michael Tilbury has explained that the purpose of equitable compensation is compensatory, rather than restitutionary, since the object is to restore the plaintiff to his or her previous

226 As one commentator has convincingly argued they should: R Austin, 'Moot Point' (1974) 48 *Australian Law Journal* 273, 274-5.

227 (1979) 21 SASR 280. McDermott, above n 219, 186, seems to suggest that the court in *Jackson v Crosby* could have ordered payment of reliance damages under the South Australian equivalent of Lord Cairns' Act. It is not clear, though, how that is possible under the true substitute principle, which is described elsewhere by McDermott as an 'important principle', ibid 107.

228 Terence Ingman and John Wakefield, 'Equitable Damages Under Lord Cairns' Act' [1981] *The Conveyancer and Property Lawyer* 286, 303-4.

229 [1982] 2 NSWLR 766, 816 (emphasis added). The breadth of the jurisdiction is supported by Meagher, Gummow and Lehane, above n 215, 635 and by Ian Davidson, 'The Equitable Remedy of Compensation' (1982) 13 *Melbourne University Law Review* 349.

230 *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301.

231 [1914] AC 932.

232 [1927] VLR 134.

233 [1966] 2 NSWR 211.

234 Meagher, Gummow and Lehane, above n 215, 636-7 (citations added).

235 [1982] 2 NSWLR 766, 816. The same distinction is drawn by Davidson, above n 229, 354.

position, rather than to force the defendant to disgorge a gain.[236] A compensatory approach to the assessment of equitable compensation was recently adopted by the House of Lords.[237]

Unlike Lord Cairns' Act damages, therefore, the remedy of equitable compensation appears to be flexible enough to allow a court of equity in an appropriate case to give effect to an estoppel, in accordance with the minimum equity principle, by awarding payment of compensation calculated to reverse detriment suffered by the representee. It also seems clear that departure from an assumption giving rise to an estoppel is an equitable wrong or a breach of an equitable obligation which gives a court jurisdiction to award compensation. Although Australian and English courts have not traditionally given effect to equitable estoppel by ordering payment of compensation,[238] such a remedy has arguably been granted in English,[239] Canadian[240] and Australian[241] cases, and its availability as an estoppel remedy has recently been supported by two members of the High Court.[242]

Although Marks J was right to suggest in *Clark* that an order for payment of the monetary equivalent of financial loss is a remedy more often granted at common law than in equity,[243] courts of equity clearly do have jurisdiction in estoppel cases to order payment of compensation calculated on a reliance basis. Relief of that nature can be 'reconciled with the preservation of equitable estoppel and the equitable nature of the remedy.'[244] If the courts are to give full effect to the reliance based approach to relief laid down by the High Court in *Verwayen* then it is clear that the compensation jurisdiction must be embraced.

3 *Reconciling the Earlier Authorities*

The third problem raised by Marks J is the question of whether the reliance based approach to the minimum equity principle can be reconciled with the

[236] Michael Tilbury, *Civil Remedies* (1990) vol 1, 180-1. See also C Rickett, 'Equitable Compensation: The Giant Stirs' (1996) 112 *Law Quarterly Review* 27, 28-9.

[237] *Target Holdings Ltd v Redferns* [1995] 3 All ER 785, 793-5.

[238] Cf Davidson, above n 229, 364-8.

[239] In *Baker v Baker* (1993) 25 HLR 408, the Court of Appeal gave effect to a proprietary estoppel by awarding payment of 'compensation' calculated on an expectation basis, which could be rationalised as equitable compensation or as Lord Cairns' Act damages in lieu of an injunction.

[240] In *Stiles v Tod Mountain Development Ltd* (1992) 88 DLR (4th) 735, Huddart J gave effect to a proprietary estoppel by awarding payment of 'equitable damages'. McDermott, above n 219, 186, points out that since there was no jurisdiction to award damages under Lord Cairns' Act in those circumstances, the award must be presumed to have been made in the inherent jurisdiction.

[241] Damages were awarded in *Raffaele v Raffaele* [1962] WAR 29, 33, on the basis of a contract or 'notional contract' arising by way of promissory estoppel, where an order for specific performance was held to be unsuitable. Since the damages were assessed on a restitutionary basis, rather than an expectancy basis in accordance with the 'true substitute' principle, it could be argued that the relief must have been granted by way of compensation in the inherent jurisdiction, rather than damages under Lord Cairns' Act.

[242] *Verwayen* (1990) 170 CLR 394, 430-1 (Brennan J), 504 (McHugh J). At least two commentators have also supported the availability of compensation as a means of giving effect to equitable estoppel: Davidson, above n 229, 367-8 and David Jackson, 'Estoppel as a Sword' (Part 2) (1965) 81 *Law Quarterly Review* 223, 247.

[243] [1994] 2 VR 333, 342.

[244] Ibid.

approach taken by the English courts in cases such as *Pascoe v Turner*.[245] Justice Marks points out that, in *Pascoe v Turner*, the detriment suffered by the representee consisted of expenditure on a house in reliance on a promise from her former de facto husband that he would give her the house.[246] Although there was no suggestion that the expenditure was in the least commensurate with the value of the house, the minimum equity accorded the claimant was perfection of the gift of the house by transfer of the fee simple.[247]

It must be conceded that the approach taken by the English Court of Appeal in *Pascoe v Turner* cannot be reconciled with the approach laid down by the High Court in *Verwayen*, although it is not entirely clear that the case would be decided differently in Australia today. The Court of Appeal considered that 'the court must decide what was the minimum equity to do justice'[248] to the defendant, but clearly did not regard the defendant's reliance interest as representing the minimum equity:

> We are satisfied here that the problem of remedy on the facts resolves itself into a choice between two alternatives: should the equity be satisfied by a licence to the defendant to occupy the house for her lifetime or should there be a transfer to her of the fee simple?[249]

Ultimately, the court concluded that the equity could only be satisfied by 'compelling the plaintiff to give effect to his promise and her expectations.'[250] The court was anxious to ensure that the defendant was assured of quiet enjoyment without interference from the plaintiff, whose conduct indicated that he would evict her by any legal means. It is by no means clear that a reliance based approach such as that adopted in *Verwayen* would produce a different result. Although the defendant's expenditure on the property was modest, she relied on the representation over a period of some three years and 'arranged her affairs on the basis that the house and contents belonged to her', expending personal effort as well as capital on the house.[251] On that basis, monetary compensation may not have prevented her from suffering detriment as a result of her reliance on the relevant assumption. Indeed, Heydon, Gummow and Austin point to *Pascoe v Turner* as an example of a case in which 'special circumstances render an expectation remedy more desirable than a detriment remedy'.[252]

Nevertheless, it is clear that the approach taken by the Court of Appeal was quite different from that adopted by the High Court in *Verwayen*. As discussed earlier in this article, the High Court has taken the minimum equity concept in Australia beyond that which is applied in England. In *Pascoe v Turner*, the minimum equity concept conferred a broad discretion on the court to do justice

245 [1979] 2 All ER 945.
246 *Clark* [1994] 2 VR 333, 342 (Marks J).
247 Ibid.
248 [1979] 2 All ER 945, 950.
249 Ibid 951.
250 Ibid.
251 Ibid.
252 Heydon, Gummow and Austin, above n 80, 421.

between the parties. In *Verwayen* the minimum equity concept was refined, so that in Australia it now means the minimum necessary to prevent detriment being suffered by the representee as a result of his or her reliance on the representor's conduct. Even if the results of the earlier English decisions can be reconciled with that approach, it must be conceded that the way in which remedies have been determined cannot.

4 *Future Detriment*

A final problem with the reliance based approach is that the detriment suffered by a representee often will not be able to be quantified at the time the court is required to grant relief. Indeed, in *Clark*, Ormiston J suggested that 'proof of detriment must, in most cases, be hypothetical'.[253] There are two separate, but related, problems which can arise: hypothetical detriment and future detriment. First, in many cases the representor will not, up to the time of hearing, have departed from the relevant assumption, but will only have threatened to do so. The question then is: what is the detriment which the court perceives will, hypothetically, be suffered by the representee if the representor is allowed to depart from the representation? Secondly, even if departure from the representation has already occurred, the effect on the representee may be ongoing. The Full Court in *Clark* had to contend with the first of those problems. Since Mr Clark had, up to the time of the Full Court's decision, succeeded in his claim of estoppel, 'the effect of any decision preventing him from relying on the pleaded estoppel may only finally be known if an appellate court reverses that finding of the trial judge'.[254]

As Ormiston J observed, the need to consider detriment which is purely hypothetical was implicitly recognised in Dixon J's statement in *Grundt v Great Boulder Pty Gold Mines Ltd* that 'the real detriment or harm from which the law seeks to give protection is that which *would* flow from the change of position if the assumption were deserted that led to it'.[255] Justice Ormiston's approach to resolving the problem of hypothetical detriment was to have regard to what 'the court perceives to be the likely detrimental consequences of proved acts or inaction in reliance on the relevant assumption.'[256] His Honour rightly favoured a 'generous application' of the reliance based approach in those circumstances 'in the sense that it is not always obvious that the estimated detriment can be satisfied merely by an order for costs or some other monetary sum by way of compensation'.[257]

The broader question which this problem poses is – if proof of detriment suffered by the representee as a result of his or her reliance will often be hypothetical, does that suggest that reliance is an unhelpful basis on which to determine relief? One answer is that, while some cases involve purely hypothetical

253 [1994] 2 VR 333, 383.
254 Ibid 358.
255 (1937) 59 CLR 641, 674, cited in *Clark* [1994] 2 VR 333, 356 (Ormiston J) (emphasis added).
256 [1994] 2 VR 333, 383.
257 Ibid.

detriment which is impossible to quantify, others, such as *Re Neal* discussed above, involve past detriment consisting purely of wasted expenditure which is very easy to quantify. Since the purpose of equitable estoppel is to protect against the consequences of detrimental reliance, and not to hold parties to the expectations which they have created, a reliance based approach to relief should be retained. In those cases where detriment is wholly or partly hypothetical and cannot be quantified, the equity raised by the representor's conduct and the representee's reliance will only be satisfied by holding the representor to the truth of the assumption.

III CONCLUSION

In *Verwayen* the High Court took a significant step in the development of equitable estoppel relief. The first part of this article traced the evolution of estoppel relief from its origins in the making good of representations, to a concern with satisfying equities and finally to a goal of fulfilling only the minimum equity. In *Verwayen* the High Court defined the concept of a 'minimum equity', doing so by reference to the purpose of estoppel, which is to protect reasonable reliance on the conduct of others. The adoption of a reliance based approach to satisfying an equity arising by way of estoppel provides a more certain measure of such an equity, while retaining the flexibility which is necessary to do justice between the parties in each case. Perhaps most importantly, the adoption of a reliance based approach to the determination of relief brings the remedy into line with the long stated objective of equitable estoppel, which is to provide protection against the consequences of detrimental reliance.

The examination of the post-*Verwayen* cases in the second part of the article provides some indication of the way in which the *Verwayen* approach to relief is being implemented. Three conclusions can be drawn from that examination. First, it seems that, with some notable exceptions, such as Ormiston J's judgment in *Clark*, there is still a tendency to see equitable estoppel as having a preclusionary operation. To adapt the words of Fuller and Purdue, expectation relief flows so naturally from the language of estoppel that in most cases it is granted without any discussion at all.[258] Although it seems that more attention needs to be paid to the possibility of a reliance remedy in each case, it does seem that expectancy relief will in many, if not most, cases be the only way of satisfying the equity. It seems from the cases decided since *Verwayen* that the detriment caused by the representee's reliance will often be difficult to quantify. That may be because the detriment has been incurred over a long period of time, is of such a nature that it is not quantifiable, is ongoing, or is wholly hypothetical. In each of those cases, provided the court is satisfied that the detriment is or will be substantial, expectation relief must be granted.

The second conclusion to be drawn from the post-*Verwayen* cases is that, if the reliance based approach to relief is to succeed, the remedy of equitable compensation will need to be embraced by the courts. It is clear that courts of equity

[258] Fuller and Purdue, above n 19, 407.

have jurisdiction to order payment of compensation in estoppel cases. It is equally clear that, in those cases where the detriment is quantifiable, the remedy of compensation provides the best means for a court to 'do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more.'[259]

Finally, the extent of the High Court's break with the past in *Verwayen* should be acknowledged. The adoption of a reliance based approach to relief in *Verwayen* significantly altered the principles which govern the way in which courts give effect to equitable estoppel. As the second part of this article has shown, that doctrinal shift appears to have had no impact on the results of the cases decided since. If the approach adopted in *Verwayen* is to be applied more widely and more strictly, then the abandonment of the expectation based and undefined-equities based approaches will need to be articulated more clearly. Although it may be possible to reconcile the new approach with the results of earlier cases in which relief was determined on a different footing, it would be quite artificial to do so. The next step in the implementation of the reliance based approach to relief should be to recognise the shift which was effected in *Verwayen*. It is to be hoped that the High Court will do so at the earliest opportunity.

[259] *Verwayen* (1990) 170 CLR 394, 412 (Mason CJ).