Knowledge and Unconscionability in a Unified Estoppel

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The prevailing wisdom in the Australian commentary is that 'unconscionability' is a key element required to establish an equitable estoppel.[1] The inclusion of this undefined and somewhat mysterious element distinguishes equitable estoppel from its common law counterpart, the elements of which have always been clearly defined. That difference is clearly a significant barrier to the unification of the two sets of principles. The aim of this article is to attempt to uncover what it is involved in the unconscionability element, and to attempt to reconcile the common law and equitable doctrines of estoppel in this regard. The article takes as a starting point the notion that the equitable and common law doctrines of estoppel should be unified,[2] and attempts to assist in facilitating that unification by reconciling an important difference between the two doctrines.

Although a number of eminent jurists have suggested that unconscionability is a concept that cannot, and should not, be defined,[3] it is important to do

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1 See, eg: K Sutton, 'Contract by Estoppel' (1989) 1 *Journal of Contract Law* 205, 212; M Dorney, 'The New Estoppel' (1991) 7 *Australian Bar Review* 18, 24–5; A Leopold, 'Estoppel: A Practical Appraisal of Recent Developments' (1991) 7 *Australian Bar Review* 47, 60; N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (7th Aust ed, 1997) 64–5, 68–70, D Butler, 'Equitable Estoppel: Reflections and Directions' (1994) 6 *Corporate and Business Law Journal* 249, 250; J W Carter and D J Harland, *Contract Law in Australia* (3rd ed, 1996) 133; G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand* (1996) 212–17.

2 The arguments in favour of unification have been convincingly made by others: *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 447–53 per Deane J; *Foran* v *Wight* (1989) 168 CLR 385, 411–2 per Mason CJ, 435 per Deane J; *Commonwealth* v *Verwayen* (1990) 170 CLR 394, 410–3 per Mason CJ, 440 per Deane J; M Spence, 'Estoppel and Limitation' (1991) 107 LQR 221, 223–4; M Lunney, 'Towards a Unified Estoppel — The Long and Winding Road' [1992] *The Conveyancer* 239; Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238, 253–6.

3 *Taylor Fashions* v *Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 154 per Oliver J, 'the broad test of whether in the circumstances the conduct complained of is unconscionable [can be asserted] without the necessity of forcing those incumbrances into a Procrustean bed constructed from some unalterable criteria'; *National Westminster Bank* v *Morgan* [1985] 2 WLR 588, 602 per Lord Scarman, 'Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case'; *Commonwealth* v *Verwayen* (1990) 170 CLR 394, 445 per Deane J: 'the question whether departure from the assumption would be unconscionable must be resolved not by reference to some preconceived formula framed to serve as a universal yardstick but by reference to all of the circumstances the case'; Sir Anthony Mason, op cit (fn 2) 255: 'unconscionability . . . is a concept not readily susceptible of precise definition'.

so for three reasons.[4] First, if the doctrines of common law estoppel and equitable estoppel are to be unified, then this difference between them must be resolved. It is only by defining the concept of unconscionability that we can determine whether there is any real difference between the elements required to establish an estoppel at common law and in equity. Secondly, leaving aside the question of unification, the concept should be defined for reasons of certainty. The open ended inquiry as to whether it is unconscionable to depart from an assumption adopted by another person is not a basis for a legal doctrine which is capable of yielding predictable results.[5] As Chief Justice Gleeson has observed, 'it has an alarming capacity to provoke judicial disagreement as to its application to the facts of even fairly straightforward cases.'[6] Thirdly, it is important to attempt to understand how equitable estoppel operates in order to identify its conceptual foundations. Those conceptual foundations are an important guide for judges in borderline cases,[7] and they help us to appreciate the nature of the doctrine we are dealing with, and its relationship to other parts of the law of obligations.[8]

Four essential elements are required to establish an equitable estoppel:[9] first, the representee must have adopted an assumption as to his or her legal rights or the future conduct of the representor (assumption); secondly, the representee must have been induced by the conduct of the representor to adopt or maintain that assumption (inducement); thirdly, the representee must have acted or refrained from acting on the faith of the assumption, such that he or she will suffer detriment if the assumption is not adhered to (detrimental reliance); fourthly, the representee must have acted reasonably in adopting and acting upon the relevant assumption (reasonableness).[10] The essential elements required to establish a common law estoppel are the same, except that the assumption adopted by the representee must be one of existing fact.[11]

Up to this point, the establishment of both equitable estoppel and common law estoppel appears to be almost entirely concerned with the position of the representee, who must adopt the relevant assumption, must act in reliance on

[4] There is also judicial support for a principled approach to unconscionability: *Collin* v *Holden* [1989] VR 510, 516 per Tadgell J, 'What is unconscionable must, however, be determined by reference to principle and not left to expediency'; *Austotel Pty Ltd* v *Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582, 585 per Kirby P, 'offence to conscience being so much a matter of personal opinion, the notion has been tamed and classified according to established categories.'

[5] G H Treitel, *The Law of Contract* (9th ed, 1995) 136.

[6] A M Gleeson, 'Individualised Justice — The Holy Grail' (1995) 69 *ALJ* 421, 426.

[7] *Commonwealth* v *Verwayen* (1990) 170 CLR 394, 443 per Deane J.

[8] See A Robertson, 'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Sydney Law Review* 32.

[9] For simplicity, 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 estoppel can arise at common law or in equity.

[10] See, for example, *Waltons Stores* (1988) 164 CLR 387, 428–9 per Brennan J. It has been held that it is not necessary for a person setting up an estoppel to establish affirmatively that their conduct was reasonable; rather, the onus is on the representor to show that the representee acted unreasonably: *W* v *G* (1996) 20 *Fam LR* 49, 66.

[11] See, eg, *Waltons Stores* (1988) 164 CLR 387, 414 per Brennan J.

it so that he or she will suffer detriment if it is not adhered to, and must act reasonably in doing so. If that were all that were required to establish liability, then one could safely conclude that both doctrines have a strong reliance focus when it came to establishing liability. A number of judges have suggested, however, that before the equitable doctrine can be invoked, 'something more' is required on the representor's side. That 'something more' is often referred to as the unconscionability requirement.[12] Identifying the nature of that requirement is not easy because, as Stephen Parker and Peter Drahos have observed, 'the justices are vague when it comes to suggesting what the "extra" requirements must be to make a breach [of promise] unconscionable.'[13] As this article will show, the central question which needs to be resolved is whether, in addition to the core elements listed above, a representor must be shown to have certain knowledge or a certain state of mind before the representor's departure from the relevant assumption will be regarded as unconscionable.[14] In other words, the key question is whether an element of knowledge or intention must be made out by a representee in order to establish an equitable estoppel.

The central thesis of this article is that the unconscionability requirement is fulfilled in most cases by the core elements set out above: assumption, inducement, detrimental reliance and reasonableness. It is only in cases where the representor has not actively induced the adoption of the relevant assumption that questions of knowledge or intention become relevant. In cases of estoppel by silence or acquiescence, the representor must know of the representee's adoption of the relevant assumption, and must have knowledge of the representee's detrimental reliance, or intend to induce such reliance. As this article will show, that approach in equity is mirrored in the common law estoppel cases, which have also required knowledge only in cases where the representor has remained passive. On that basis, all that is required to reconcile common law and equitable estoppel is for the courts to make the elements of equitable estoppel explicit. If the unconscionability element is defined, it will become clear that the elements required to establish an estoppel at common law and in equity are the same: assumption, inducement and reasonable detrimental reliance are required in cases where the representor has actively induced the relevant assumption, with the additional element of knowledge or intention required in cases where the representor has remained passive. The article will pursue that argument in three sections. The first part of the article will look at the common law estoppel cases to determine the extent to which the concept of unconscionability, and its essential ingredient of knowledge, are reflected in the common law doctrine. The second part

[12] In *Forbes* v *Australian Yachting Federation Inc* (1996) 131 FLR 241, 287, for example, Santow J held that 'it is an essential element of the principle of [equitable] estoppel, that the conduct of the parties sought to be estopped must properly be characterised as "unconscionable".

[13] P Drahos and S Parker, 'Critical Contract Law in Australia' (1990) 3 *Journal of Contract Law* 30, 45.

[14] Dal Pont and Chalmers, op cit (fn1) 214, suggest that 'the principal hallmarks of unconscionable conduct entail inducement, knowledge and intention on behalf of the representor'.

looks at the nature and the role of the unconscionability element in equitable estoppel, and attempts to determine what is required to satisfy the requirement. The third part of the article suggests a way in which those approaches might be reconciled in a unified doctrine.

1. Unconscionability and Knowledge in Common Law Estoppel

(a) English Origins

If it is unconscionable conduct which motivates a court of equity to intervene in equitable estoppel cases, then it is 'inequitable' or 'unjust' conduct which underlies the common law doctrine. Common law estoppel is said to be based on the principle that it is 'most inequitable and unjust' for a person, having made a representation which is acted upon by another party, subsequently to deny the truth of that representation to the loss and injury of the person who acted on it.[15] Sir Anthony Mason has suggested that the concept of unjust departure underlying common law estoppel is in essence describing conduct regarded in equity as unconscionable.[16] Two important differences can, however, be discerned in the cases. First, unlike the concept of unconscionability, the notion of conduct which is inequitable or unjust is not at large in the common law cases, but is very clearly defined. Secondly, questions of the representor's knowledge or intention have played a far less prominent role in determining whether conduct is unjust or inequitable at common law than they have in determining whether conduct is unconscionable in equity.

A number of the early cases at common law did stipulate that the representor must intend the representee to act on the representation in question before an estoppel will arise.[17] The requirement is given some prominence by Spencer Bower and Turner, who suggest that it has been taken for granted in those cases in which it was not mentioned.[18] The nature and strength of the requirement are, however, dramatically altered by the concession that:

> the [representor's] intention need not necessarily be established directly: it may — indeed, it generally must — be presumed or inferred from other facts; and, particularly, from the voluntary use of language, or conduct, on the part of the representor which was of such a nature to induce a normal person in the circumstances of the particular case to act as the representee did, and which was calculated in this sense to have that effect, though not in the sense of a personal design.[19]

There is, in fact, considerable support for the proposition that proof of the representor's intention is not required; it is enough for the representee to prove that he or she acted reasonably in adopting and acting on the

[15] *Sarat Chunder Dey* v *Gopal Chunder Laha* (1892) 19 LR Ind App 203, 215–6 (PC).
[16] Mason, op cit (fn 2) 256.
[17] *Pickard* v *Sears* (1837) 6 Ad & E 469; 112 ER 179; *De Bussche* v *Alt* (1878) 8 Ch D 286, 315; *Pierson* v *Altrincham UDC* (1917) 86 LJKB 969; *Greenwood* v *Martin's Bank* [1933] AC 51, 57.
[18] G Spencer Bower and A K Turner, *The Law Relating to Estoppel by Representation* (3rd ed, 1977) 94.
[19] Id 95.

representation.[20] The most famous of such statements is that of Parke B in *Freeman* v *Cooke*, which was intended to clarify the proposition put forward by Lord Denman CJ in *Pickard* v *Sears*[21] that the representor must 'wilfully' induce the representee's assumption:

> By the term "wilfully," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon . . . it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.[22]

The Privy Council in *Sarat Chunder Dey* v *Gopal Chunder Laha* later said that, in order to create estoppel, the law does not require that the representor 'must have been under no mistake himself, or must have acted with an intention to mislead or deceive.'[23] The Judicial Committee made it clear that the determining element is the representee's detrimental reliance, and that the court's attention is focussed on the representee: 'What the law and the Indian Statute [which adopted it] mainly regard is the position of the person who was induced to act.'[24] Thus, it is clear that, while judges in some of the early cases were concerned to limit the application of common law estoppel to those cases in which the representor intended the representation to be relied upon, the reasonableness of the representee's conduct quickly became an alternative basis for establishing an estoppel.

Despite the clarity of the judgments in *Freeman* v *Cooke* and *Sarat Chunder Dey* v *Gopal Chunder Laha*, we still find Lord Tomkins insisting in the House of Lords in 1933 that an intention to 'induce a course of conduct' was one of the 'essential factors giving rise to an estoppel'.[25] That is perhaps partly attributable to the fact that their Lordships were dealing with a case of estoppel by silence. Nevertheless, the Full Court of the South Australian Supreme

[20] Spencer Bower and Turner, ibid, citing *Freeman* v *Cooke* (1848) 2 Ex 654, 681; 154 ER 652, 663; *Seton, Laing & Co* v *Lafone* (1887) 19 QBD 68, 72 (CA); *Pierson* v *Altrincham UDC* (1917) 86 LJ KB 969, 972 per Lord Reading CJ, 973 per Lush J. Similarly P Parkinson, 'Equitable Estoppel' in P Parkinson (ed) *The Principles of Equity* (1996) 201, 259–60 citing also *De Bussche* v *Alt* (1878) 8 Ch D 286, 315 per Thesiger LJ (for the Court of Appeal) and *Spiro* v *Lintern* [1973] 3 All ER 319, 328 per Buckley LJ (for the Court of Appeal).

[21] (1837) 6 Ad & E 469, 474; 112 ER 179, 181.

[22] (1848) 2 Ex 654, 663; 154 ER 652, 656.

[23] (1892) 19 LR Ind App 203, 215. Their Lordships also approved an earlier statement of Lord Esher MR that a fraudulent intention is not required, and observed that Lord Esher mentions 'other cases or classes of cases in which the determining element is not the motive with which the representation has been made, nor the state of knowledge of the party making it, but the effect of the representation as having caused another to act on the faith of it.' (Id 217).

[24] Id 215.

[25] *Greenwood* v *Martin's Bank Ltd* [1933] AC 51, 57.

Court in *Trenorden* v *Martin* suggested that, in applying this statement from Lord Tomlins' speech:

> It is necessary to remember that the intention can be implied, that is to say, "a man is taken to intend the natural and probable consequences of his acts, and cannot evade civil responsibility for these consequences by saying that he never intended any such result to ensue."[26]

Michael Cababé suggested in 1888 that the actual intention of the representor is irrelevant, and his or her conduct can establish an estoppel if a reasonable outsider looking at the conduct would take the representation to be true, and believe that it was meant that he should act upon it.[27] The reasonableness of the representee's reliance has, in the modern cases, become the primary basis for limiting the application of the doctrine.[28] The abandonment of questions of intention, even implied intention, is evident in *Avon County Council* v *Howlett*,[29] in which the Court of Appeal articulated the circumstances in which an estoppel by representation can be raised as a defence to a restitutionary claim. The court held that a plaintiff will be estopped from asserting a claim to restitution of moneys if three conditions are satisfied: first, the plaintiff must have made a representation of fact which led the defendant to treat the money as his or her own; secondly, the defendant must have, bona fide and without notice of the plaintiff's claim, changed his position; and, thirdly, the payment must not have been primarily caused by the fault of the defendant.[30] The court's focus was on the representee's detrimental reliance on the faith of the assumption induced by the representation, and no element of intention was required to be established or implied.

(b) Common law estoppel in the Australian courts

The trend in the English cases toward a focus on reasonable detrimental reliance and away from questions of intention was reflected in the early High Court decisions on common law estoppel, which were almost exclusively concerned with the position of the representee. Those cases did not require proof of wilful conduct on the part of the representor or knowledge of the representee's detrimental reliance. The court emphasised the reliance basis of common law estoppel in statements of the purpose of the doctrine and in descriptions of its operation, both of which focused on the position of the representee, to the exclusion of the representor. The leading statement of the purpose of the doctrine was that of Dixon J in *Grundt* v *Great Boulder Gold Mines Pty Ltd* that 'the basal purpose of the doctrine . . . is to avoid or prevent a detriment to the party asserting the estoppel'.[31] On the operation of the doctrine, Isaacs J in *Craine* v *Colonial Mutual Fire Insurance Co Ltd* distinguished common law estoppel from waiver by means of the fact that

[26] [1934] SASR 340, 343, quoting M Cababé, *The Principles of Estoppel* (1888) 64.
[27] Cababé, loc cit (fn 26).
[28] See, eg, *Standard Chartered Bank Aust Ltd* v *Bank of China* (1991) 23 NSWLR 164.
[29] [1983] 1 All ER 1073.
[30] Id 1085 per Slade LJ, with whom Cumming-Bruce LJ and Eveleigh LJ agreed.
[31] (1937) 59 CLR 641, 674.

estoppel 'looks chiefly at the situation of the person relying on the estoppel' with the consequence that 'the knowledge of the person sought to be estopped is immaterial.'[32] The focus of the Australian courts on the position of the representee was reflected in the influential list of criteria laid down by Jordan CJ in *Franklin* v *Manufacturers Mutual Insurance Ltd*, which contained no reference to the representor's intention or knowledge. The Chief Justice held that, in order to invoke the doctrine of estoppel, it was necessary that:

> (1) by word or conduct (2) reasonably likely to be understood as a representation of fact, (3) a representation of fact, as contrasted with a mere expression of intention, should be made to another person, *either innocently or fraudulently*, (4) in such circumstances that a reasonable man would regard himself as invited to act upon it in a particular way, (5) and that the representation should have been material in inducing the person to whom it was made to act on it in that way (6) so that his position would be altered to his detriment if the fact were otherwise than as represented.[33]

An important aspect of the principle of common law estoppel applied in the early Australian cases is that it did not include an undefined element equivalent to the notion of unconscionability in equitable estoppel. If an element of unconscionability, or its common law equivalent, unjust conduct, was required in the early cases, it was satisfied by the representor inducing the adoption of the relevant assumption by the representee,[34] as Dixon J made clear in *Thompson* v *Palmer*:

> Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations . . . or because he has exercised against the other party rights which would exist only if the assumption were correct . . . or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption.[35]

It is interesting to note that, in stark contrast with the statements in relation to unconscionability mentioned above,[36] Dixon J was adamant in *Grundt* v *Great Boulder Gold Mines Pty Ltd* that the question of injustice or unfairness

[32] (1920) 28 CLR 305, 327.

[33] (1935) 36 SR (NSW) 76, 82 (emphasis added).

[34] It is important to note that the unjust or unconscionable conduct is the *departure* from the assumption, but departure from an assumption is only regarded as unjust or unconscionable if the representor bears responsibility for its adoption.

[35] (1933) 49 CLR 507, 547, reiterated in *Grundt* v *Great Boulder Gold Mines Pty Ltd* (1937) 59 CLR 641, 676. Similarly, in *Newbon* v *City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723, 734, Rich, Dixon and Evatt JJ observed that 'the injustice of allowing [the representor] to disregard the assumption must arise from the circumstances attending its adoption by the other party.' They went on to say, however, that material detriment resulting from reliance was also necessary to make it unjust to permit the departure from the assumption.

[36] Op cit (fn 3).

was not left at large.[37] It depended on the part played by the representor in the representee's adoption of the assumption, and the law 'defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice'.[38] Given the influence which Dixon J's judgments[39] have had on the development of equitable estoppel in recent decisions of the High Court,[40] it is surprising that his obvious opposition to undefined notions of injustice has been ignored.[41]

While the representor's knowledge and intention have for some time been regarded as irrelevant to common law estoppel arising from an express representation, those factors have played an important role in the case of an estoppel arising by silence. The High Court has reiterated on a number of occasions the principle articulated by Dixon J in *Thompson* v *Palmer* that an estoppel may arise where a party refrains from correcting another party '*knowing the mistake the other laboured under*'.[42] While that principle turned on the representor's knowledge of the representee's mistake, the representor's knowledge of the action taken by the representee in reliance also came into consideration in *Waltons Stores (Interstate) Ltd* v *Maher*.[43] Only two judges, namely Deane and Gaudron JJ, found an estoppel arising from an assumption of existing fact in that case, but they took quite different approaches to the question of knowledge.

Deane J applied the principle that a representor will be prevented from departing from an assumption of existing fact induced by silence 'where the party estopped has *knowingly* and silently stood by and watched the other party act to his detriment.'[44] That principle appears to require knowledge of the representee's detrimental action as well as knowledge of the representee's adoption of a mistaken assumption. Deane J found that Waltons knew the mistake which the Mahers laboured under, and its silence was deliberate and intended to produce the effect which it in fact produced.[45] It may be possible to imply from this that Deane J saw intention to induce reliance as an alternative to knowledge of reliance. Gaudron J, on the other hand, did not insist on knowledge in all cases of estoppel by silence. She found that no estoppel could arise by virtue of Waltons' 'failure ... to correct what it knew to be the

[37] Mason and Deane JJ noted in *Legione* v *Hateley* (1983) 152 CLR 406, 431, that 'the reference to an "unjust" departure was not seen by Dixon J as a charter for idiosyncratic concepts of justice and fairness.'

[38] (1937) 59 CLR 641, 676.

[39] In *Thompson* v *Palmer* (1933) 49 CLR 507 and *Grundt* v *Great Boulder Gold Mines Pty Ltd* (1937) 59 CLR 641.

[40] See, eg, *Waltons Stores (Interstate) Ltd* v *Maher* (1988) 164 CLR 387, 404 per Mason CJ and Wilson J, 419, 427 per Brennan J, 458 per Gaudron J; *Commonwealth* v *Verwayen* (1990) 170 CLR 394, 429 per Brennan J, 453 per Dawson J, 501 per McHugh J.

[41] Seddon and Ellinghaus, op cit (fn 1) 68, have observed that some of the statements of Dixon J 'may be thought to preclude the use of a broad concept of unconscionability as a basis for determining whether the promisor may resile.'

[42] (1933) 49 CLR 507, 547 (emphasis added). See, to similar effect, *Grundt* v *Great Boulder Gold Mines Pty Ltd* (1937) 59 CLR 641, 676 per Dixon J; *West* v *Commercial Bank of Australia Ltd* (1935) 55 CLR 315, 322 per Rich, Starke, Dixon and McTiernan JJ; *Laws Holdings Pty Ltd* v *Short* (1972) 46 ALJR 563, 570, per Gibbs J.

[43] (1988) 164 CLR 387.

[44] Id 443 (emphasis added).

[45] Id 444.

mistaken belief' of the Mahers, because the evidence was not capable of supporting an inference that the appellant knew of the Mahers' mistaken belief.[46] Gaudron J did, however, find an estoppel arising by virtue of Waltons' imprudence, which was 'a proximate cause of [the Maher's] adopting and acting upon the faith of that assumption.'[47] The notion of estoppel by imprudence was drawn from the statement of Dixon J in *Thompson* v *Palmer*[48] which, Gaudron J said, requires *no knowledge* as to the representee's state of mind.[49]

In *Lorimer* v *State Bank of New South Wales*,[50] the New South Wales Court of Appeal took rather a different view of what was necessary to establish an estoppel by imprudence. The case involved an unsuccessful attempt by a farmer to establish an estoppel after he had acted to his detriment on the faith of an assumption that a bank had agreed to fund the expansion of his farm. All members of the Court of Appeal regarded the representor's knowledge as relevant to the question whether it had acted imprudently. In a dissenting judgment, Kirby P proceeded on the basis that estoppel by silence or negligence requires a finding that the representor knew of the representee's mistaken assumption and knew that the representee was acting to his or her detriment on the faith of that assumption.[51] Kirby P found that the representor's imprudence was a cause of the representee's adoption of the relevant assumption and detrimental action. He accepted that there was no finding that the representor had actual knowledge that the representee was acting on the faith of the assumption,[52] but appeared to regard a form of constructive knowledge as sufficient. His conclusion that the representor acted imprudently was based on the finding that the representor '*ought to have been aware* that there was a real possibility or likelihood' that the representee was acting to his detriment on the faith of the relevant assumption.[53] Prudence in those circumstances required the representor to disabuse the representee of the assumption.

Priestley JA also saw the question of the representor's imprudence as bound up with the question whether it knew or should have known of the representee's assumption. If the representor 'neither knew *nor had reason to know*' of the representee's assumption, according to Priestley JA, then the representor's conduct could not be said to be imprudent.[54] Handley JA held that estoppel by negligence or by silence depends upon findings that the representor knew that the representee was acting to his or her detriment on the faith of the relevant assumption.[55] He therefore regarded both knowledge of the

[46] Id 461.
[47] Id 463.
[48] (1933) 49 CLR 507, 547.
[49] Id 463.
[50] (Unreported, New South Wales Court of Appeal, 5 July 1991). Page numbers refer to the judgment transcript.
[51] Id 34.
[52] Id 34–7.
[53] Id 30 (emphasis added).
[54] Id 53 (emphasis added).The italicised words indicate that actual knowledge is not required.
[55] Id 69.

representee's mistake, and knowledge of the representee's reliance, as necessary to establish an estoppel in circumstances where the representor remained silent, whether the estoppel was characterised as an estoppel by silence or by imprudence. Handley JA also appeared to regard a form of constructive knowledge as sufficient: he found that a mistake cannot found an estoppel unless the representor was aware '*or should have been aware*' of the representee's mistake.[56]

While it seems clear that the representor's knowledge is relevant in cases of estoppel by silence at common law, the differences between the various approaches leave considerable doubt as to what the representor must know, and whether that knowledge is required in all such cases. One approach focuses on the representor's knowledge of the mistaken assumption adopted by the representee,[57] while another seems to require knowledge of both the mistaken assumption and the detrimental action taken by the representee.[58] A third view was articulated by Gaudron J in *Waltons Stores*: she appeared to regard the representor's knowledge as irrelevant in cases where the representee's adoption of the relevant assumption, and action on the faith of that assumption, can be attributed to the representor's imprudence. The judgments of the New South Wales Court of Appeal in *Lorimer* v *State Bank of New South Wales* indicate that actual knowledge on the part of the representor is not required in cases of estoppel by silence, provided it can be established that the representor ought to have known of the representee's adoption of, and reliance upon, the relevant assumption.

In summary, it can be seen that the principles of common law estoppel are not readily susceptible to the introduction of an unconscionability element. The common law courts have always attempted to provide a clear definition of the circumstances in which an estoppel arises and the court's attention, in Australia at least, has been focussed almost exclusively on the representee. Although some of the early English cases were concerned with the representor's intention, that concern appears to have been transformed into a question of the reasonableness of the representee's reliance. It does seem clear, however, that the central ingredients of unconscionability, the representor's knowledge and intention, do have a role to play in cases where the representor has not made an express representation but has, by his or her silence, induced the adoption of, or reliance upon, an assumption of fact.

2. Equitable Estoppel

(a) Origins of the unconscionability question

There are two different ways in which the question of unconscionability has been used to determine liability in equitable estoppel cases. In the recent Australian cases discussed below, unconscionability has been seen as one of

[56] Id 70 (emphasis added).
[57] Op cit (fn 42); *Lorimer* v *State Bank of New South Wales* per Priestley JA and Handley JA.
[58] *Waltons Stores* per Deane J and *Lorimer* per Kirby P.

the elements which must be made out by a representee in order to establish an equitable estoppel. The approach in some of the modern English cases, on the other hand, has been to adopt the question of unconscionability as the only inquiry which needs to be made in order to establish an estoppel: the court applies 'the broad test of whether in the circumstances the conduct complained of is unconscionable'.[59] In most of the early proprietary[60] and promissory[61] estoppel cases the representee was not required to show that the representor had behaved unconscionably in order to make out an estoppel. In *Dann* v *Spurrier*, however, Eldon LC held that the onus was on the plaintiff to prove 'bad faith and bad conscience' against the defendant in order to make out an estoppel by encouragement.[62]

The broad unconscionability approach was developed in a series of proprietary estoppel cases in the 1970s, apparently as a reaction to the formulaic approach adopted in the influential case of *Willmott* v *Barber*, where Fry J laid down five elements that must be established in order to make out a plea of estoppel by acquiescence.[63] The unconscionability test appears to have its origins in the judgment of the Court of Appeal in *Shaw* v *Applegate* where, after doubting whether all of the five elements set out by Fry J must be satisfied in each case, Buckley LJ said:

> The real test, I think, must be whether upon the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it.[64]

The unconscionability question was also referred to by Scarman LJ in *Crabb* v *Arun District Council*, but not as a definitive test. Scarman LJ held that, in order to invoke equitable estoppel, 'the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable or unjust.'[65] The analysis of equitable estoppel on the basis of unconscionability reached its high point in the judgment of Oliver J in *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co*

[59] *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 154.

[60] *Gregory* v *Mighell* (1811) 18 Ves Jun 328; 34 ER 1211; *The Duke of Beaufort* v *Patrick* (1853) 17 Beav 59; 51 ER 954; *The Unity Joint Stock Mutual Banking Association* v *King* (1858) 25 Beav 72; 53 ER 563; *Dillwyn* v *Llewelyn* (1862) 4 De GF&J 517; 45 ER 1285.

[61] *Hughes* v *Metropolitan Railway Co* (1877) 2 App Cas 439; *Birmingham and District Land Co* v *London and North Western Railway Co* (1888) 40 Ch D 268, 286. Lord Cairns LC in *Hughes* v *Metropolitan Railway Co* (1877) 2 App Cas 439, 448, did use the expression 'inequitable' to describe the conduct of a party who sought to enforce rights which he or she has led another person to believe will not be enforced.

[62] (1802) 7 Ves Jnr 231; 32 ER 94, 95–6.

[63] (1880) 15 Ch D 96, 105–6. Fry J held that where: (1) a plaintiff has made a mistake as to his or her legal rights, (2) the plaintiff has expended money or done an act on the faith of that mistaken belief, (3) the defendant knows of his or her own rights, (4) the defendant knows of the plaintiff's belief, and (5) the defendant has encouraged the expenditure, then the defendant is guilty of such fraud as will entitle the court to restrain the defendant from exercising his rights.

[64] [1977] 1 WLR 970, 977–8. Goff LJ agreed (id 980) 'that the test is whether, in the circumstances, it has become unconscionable for the plaintiff to rely on his legal right.'

[65] [1976] 1 Ch 179, 195.

Ltd.[66] Responding to counsel's attempt to separate equitable estoppel into rigidly defined categories with strict requirements, Oliver J held that the only inquiry he had to make was whether, in all the circumstances of the case, it was unconscionable for the representors to seek to take advantage of the mistake which they shared with the representees.[67] As will be discussed below, the 'unconscionability' approach formulated by Oliver J was adopted with some modification by the High Court in *Waltons Stores (Interstate) Ltd* v *Maher*.[68]

(b) Origins of the knowledge requirement

In both the early proprietary estoppel and promissory estoppel lines of cases are to be found inconsistent views on the questions of whether and when the court should be concerned with questions relating to the representor's knowledge or intention. Turning first to proprietary estoppel, the requirement of knowledge has generally been imposed only in cases of estoppel by acquiescence, where the conduct complained of is standing by while the representee acts to his or her detriment on the faith of an assumed or anticipated interest in the representor's land. In most of the early cases, the courts focused on the question whether the representor knew of the mistaken belief adopted by the representee as to his or her rights, and appear to have assumed that the representor knew of the detrimental action taken by the representee.[69] The issue of knowledge assumes central importance in cases of estoppel by acquiescence. Where the representor has not engaged in any active conduct which induces the adoption of the relevant assumption, responsibility for any detriment suffered by the representee can only be attributed to the representor if the representor has stood by with knowledge that the representee was acting to his or her detriment on the faith of that assumption.[70] In *Ramsden* v *Dyson* Lord Cranworth LC made it clear that in cases where one person builds on another's land, the latter's knowledge of the former's mistake is an essential

[66] [1982] 1 QB 133.

[67] Id 155. For subsequent applications of the approach, see *Amalgamated Investment & Property Co Ltd (in liq)* v *Texas Commerce International Bank Ltd* [1982] 1 QB 84, 104 per Robert Goff J at first instance; *British Leyland Motor Corporation* v *Armstrong Patents Co Ltd* [1982] FSR 481, 495; *Hoover PLC* v *George Hulme Ltd* [1982] FSR 565, 585–8; *Wham-O MFG Co* v *Lincoln Industries Ltd* [1984] 1 NZLR 641, 671–6; *Lim Teng Huan* v *Ang Swee Chuan* [1992] 1 WLR 113, 117–8 (PC) and P Milne, 'Proprietary Estoppel in a Procrustean Bed' (1995) 58 MLR 412. Cf *Gillies* v *Keogh* [1989] 2 NZLR 327, 345–7.

[68] (1988) 164 CLR 387.

[69] Although in *Dann* v *Spurrier* (1802) 7 Ves Jnr 232; 32 ER 94 one of the reasons for the plaintiff's failure to establish an estoppel by acquiescence was that Eldon LC was not satisfied that the defendant knew of the repairs effected by the plaintiff to the property in question.

[70] In *Brand* v *Chris Building Co Pty Ltd* [1957] VR 625, the defendant failed to make out a case of estoppel by acquiescence because the plaintiff was aware of neither the defendant's mistake nor the defendant's acts of reliance. Hudson J held (id 629) that no estoppel arose because there was nothing 'in the nature of a fraud' to raise an equity against the plaintiff. Similarly, in *KMA Corporation Pty Ltd* v *G & F Productions Pty Ltd* (1997) 38 IPR 243, Eames J held that an estoppel by silence could not arise without, *inter alia*, knowledge of the mistaken assumption made by the representor.

ingredient in establishing liability.[71] Lord Kingsdown went further, suggesting that such knowledge was even required in cases where the representor had promised the representee an interest in the land in question or had created or encouraged an expectation on the part of the representee that he or she would have a certain interest.[72]

The element of knowledge was given the greatest prominence in Fry J's statement in *Willmott* v *Barber* of the five essential elements required to establish estoppel by acquiescence.[73] Fry J's five probanda included requirements that the representor must know of the existence of the representor's own rights and must know of the representee's mistaken belief as to his or her rights. There has been considerable discussion as to whether Fry J intended his five probanda to apply to all cases of proprietary estoppel, or just those in which the assumption adopted by the representee was induced by the representor's silence.[74] Although there was some ambiguity in the judgment, it appeared that Fry J was only setting out the elements of 'the *acquiescence* which will deprive a man of his legal rights'.[75] The elements of knowledge were required because, if the representor does not have such knowledge, 'there is nothing which calls on him to assert his own rights.'[76] Clearly, that explanation justifies the knowledge requirement only in cases where the representor remains silent; the requirement should not, therefore, apply in cases where the representor has actively led the representee to believe that his or her legal rights will not be asserted. As Evershed MR said in *Hopgood* v *Brown*, Fry J's formulation 'was addressed to and limited to cases where the party is alleged to be estopped by acquiescence, and it is not intended to be a comprehensive formulation of the necessary requisites of any case of estoppel by representation.'[77] Despite the statement of Lord Kingsdown in *Ramsden* v *Dyson* quoted above, the better view is that the requirement of knowledge applies only in cases of mere acquiescence.[78]

In the promissory estoppel cases, the contentious question has not been whether the representor must have knowledge of the representee's reliance, but whether the representor must intend reliance or must intend his or her

[71] (1866) LR 1 E&IA 128, 140–1.

[72] Id 170–1, cited with approval by the Privy Council in *Plimmer* v *Wellington Corporation* (1884) 9 HLC 699, 710.

[73] Op cit (fn 63).

[74] See, eg, *Shaw* v *Applegate* [1977] 1 WLR 970, 977–8; *Amalgamated Investment & Property Co Ltd (in liq)* v *Texas Commerce International Bank Ltd* [1982] 1 QB 84, 104; *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 155–6; MP Thompson, 'From Representation to Expectation: Estoppel as a Cause of Action' [1983] *CLJ* 257, 267–72; P Milne, op cit (fn 67) 416.

[75] (1880) 15 Ch D 96, 105 (emphasis added).

[76] Ibid.

[77] [1955] 1 WLR 213, 223.

[78] *Kammins Ballrooms Co Ltd* v *Zenith Investments (Torquay) Ltd* [1970] 2 All ER 871, 895 per Lord Diplock; *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 155–6; Thompson, op cit (fn 74) 267–70; P V Baker and P St J Langan, *Snell's Equity* (29th ed, 1990) 576. It also appeared to be implicit in the statement of Lord Bridge in *Lloyds Bank* v *Rossett* [1991] 1 AC 107, 132 that, once an agreement to share a property beneficially is found, it is only necessary for the party asserting a beneficial interest to show that he or she has acted to his or her detriment in reliance on the agreement in order to give rise to a proprietary estoppel.

promise to be binding. No such element of intention is to be found in Lord Cairns LC's statement of principle in *Hughes* v *Metropolitan Railway Co*,[79] or that of Bowen LJ in *Birmingham and District Land Co* v *London and North Western Railway Co*.[80] The principle extracted from those two cases by Denning J in *Central London Property Trust Ltd* v *High Trees House Ltd*,[81] however, required that a promise be 'intended to be binding, intended to be acted upon and in fact acted upon' before it would be binding in equity.[82] That intention on the part of the representor was not an element of the principle of promissory estoppel adopted by the Privy Council in *Ajayi* v *RT Briscoe (Nigeria) Ltd*,[83] which was held to apply where a party to a contract agrees not to enforce his or her rights and the other party to the contract alters his or her position on the faith of that promise.[84] Nevertheless, Denning J continued to assert the requirement of intention in subsequent promissory estoppel cases,[85] and it was taken up by Lord Diplock in the House of Lords in *Kammins Ballroom Co Ltd* v *Zenith Investments (Torquay) Ltd*.[86]

A significant difference between the promissory estoppel cases and the proprietary estoppel cases, therefore, is that, while the proprietary estoppel cases have been concerned with the representor's *knowledge* of the representee's assumption or acts of reliance, the promissory estoppel cases have tended to focus on the representor's *intention* to affect the legal relations between the parties or to induce reliance by the promisee.[87] In *The 'Kanchenjunga'* the House of Lords went so far as to say that, in establishing a promissory estoppel, 'no question arises of any particular knowledge on the part of the representor'.[88] There has, however, been at least one promissory estoppel case which was concerned with the representor's knowledge. In *James* v *Heim Gallery (London) Ltd* the Court of Appeal held that, in order to found a promissory estoppel, a promise 'must have been made in circumstances in which, to the promisor's knowledge, the promise would be acted upon by the promisee'.[89] In bringing together the principles of promissory

[79] (1877) 2 App Cas 439, 448.
[80] (1888) 40 Ch D 268, 286.
[81] [1947] 1 KB 130.
[82] Id 136.
[83] [1964] 3 All ER 556.
[84] Id 559.
[85] *Foot Clinics (1943) Ltd* v *Cooper's Gowns Ltd* [1947] 1 KB 506, 510–11; *Robertson* v *Minister of Pensions* [1949] 1 KB 227, 230; *Charles Rickards Ltd* v *Oppenhaim* [1950] 1 KB 616, 623 (CA); *Combe* v *Combe* [1951] 2 KB 215, 220 (CA); *Plasticmoda Societa Per Azione* v *Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527, 539 (CA); *WJ Alan & Co Ltd* v *El Nasr Export and Import Co* [1972] 2 QB 189, 213 (CA); *Brikom Investments Ltd* v *Carr* [1979] 2 All ER 753, 758 (CA). Cf *Wallis's Cayton Bay Holiday Camp Ltd* v *Shell-Mex and BP Ltd* [1974] 3 All ER 575, 580 (CA).
[86] [1970] 2 All ER 371, 895. See also *Braithwaite* v *Winwood* [1960] 1 WLR 1257, 1262, where Cross J rejected a plea of promissory estoppel on the basis that there was no evidence that what was said by the representor 'was intended to effect (sic) the legal relations between the parties'.
[87] In *Cameron* v *Murdoch* [1983] WAR 321, 360, Brinsden J held that the intention to affect legal relations requirement did not apply in proprietary estoppel cases, and doubted whether it was even satisfied in all of the promissory estoppel cases.
[88] *Motor Oil Hellas (Corinth) Refineries SA* v *Shipping Corporation of India (The 'Kanchenjunga')* [1990] 1 Lloyd's Rep 391, 399.
[89] (1950) 256 EG 819, 823 per Buckley LJ, with whom Shaw and Oliver LJJ agreed.

estoppel with those of proprietary estoppel, the Court of Appeal in *Crabb* v *Arun District Council*[90] appeared to retain the element of knowledge from the proprietary estoppel cases, at least in the case of estoppel by silence. The case involved a difficult question of whether the representor induced the representee's adoption of the relevant assumption by direct conduct or by silence.[91] That question ultimately did not need to be resolved because the Court of Appeal held unanimously that the representor knew of the representee's intention to act on the faith of the relevant assumption.[92] In an interesting combination of the approaches in the proprietary and promissory estoppel cases, Lord Denning MR held that in all cases of equitable estoppel the representor must, at the time of inducing the relevant assumption, *know or intend* that the representee will act on the faith of the belief.[93] Rejecting the trial judge's stipulation that the representor must have known of the action taken by the representee on the faith of the assumption, Lord Denning held that it was sufficient that the representor knew of the representee's intention to rely and engaged in positive conduct which confirmed the relevant assumption.[94] Similarly, Scarman LJ held that an equity arose against the defendant because of the positive actions by which it induced the adoption of the relevant assumption, and because it knew of the plaintiff's intended detrimental reliance.[95]

Unfortunately, the adoption of a broad unconscionability approach to determining liability appears to have reopened the possibility that inquiries as to the representor's knowledge may not be confined to cases of estoppel by silence. In *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd*, Oliver J held that, in deciding whether the representor's conduct is unconscionable, knowledge is only one of the relevant factors to be taken into account in the overall inquiry.[96] Oliver J did, however, appear to recognise that knowledge of the representee's mistake would be necessary in cases involving 'acquiescence pure and simple', where all the representor has done is to stand by without protest.[97]

In summary, there is considerable inconsistency in the English cases as to whether knowledge of the representee's reliance, or an intention to induce

[90] [1976] 1 Ch 179. Lord Denning MR and Scarman LJ recognised that the principles of estoppel recognised in courts of equity could be seen as emanations of the same broad principle, which prevent a person from insisting upon his or her legal rights where it is inequitable to do so in the light of the dealings which have taken place between the parties: 187–8 (Lord Denning MR), 193 (Scarman LJ).

[91] Id 197 per Scarman LJ.

[92] Id 189 per Lord Denning MR, 192 per Lawton LJ, 198 per Scarman LJ.

[93] Id 188. Lord Denning MR's statement was cited by Brennan J in *Waltons Stores* (1988) 164 CLR 387, 423, who went on to say that the knowledge or intention that the assumption or expectation will be acted upon may be easily inferred in the case of a promise, but may be more difficult to draw in the case of encouragement or acquiescence.

[94] Id 189. The relevant assumption adopted by the representee was that he would have a right of access over the representor's land. That assumption was confirmed by the representor putting up gates at the point of access.

[95] Id 196.

[96] Id 152.

[97] Id 155–6. See *Amalgamated Investment & Property Co Ltd (in liq)* v *Texas Commerce International Bank Ltd* [1982] 1 QB 84, 104 per Robert Goff J at first instance.

reliance, on the part of the representor is required to establish an equitable estoppel. The better view, which is supported by a coherent rationale, is that knowledge of the representee's reliance or an intention to induce reliance should only be required in cases of mere acquiescence. As Oliver J explained in *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd*, 'in a case of mere passivity, it is readily intelligible that there must be shown a duty to speak, protest or interfere which cannot normally arise in the absence of knowledge or at least a suspicion of the true position.'[98] Where the representor, by a promise, a representation or other unequivocal conduct, induces the representee to adopt an assumption, then the representor bears responsibility for the representee's loss by reason of that conduct alone.

(c) The approach of the High Court

(i) Legione v *Hateley*

Although the concept of unconscionability had begun to dominate the decisions of the English courts by the time the High Court came to hear *Legione* v *Hateley*,[99] the concept was not part of the doctrine of promissory estoppel accepted by the court. The only members of the court to uphold the plea of equitable estoppel, Gibbs CJ and Murphy J, did not invoke the question of unconscionability, but did require conduct which was *inequitable* before an estoppel would arise.[100] Their Honours held that an estoppel would arise if it were inequitable for the representor to depart from the induced assumption without first notifying the representee of their intentions.[101] No question of knowledge of the representees' reliance appeared to arise. The representors' conduct was held to be inequitable on the basis that the representors had induced the belief that their legal rights would not be enforced and the representees had altered their position to their detriment on the faith of that belief.[102] The requirement of inequitable conduct was, therefore, satisfied by the core elements of assumption, inducement and detrimental reliance.

(ii) Waltons Stores (Interstate) Ltd v *Maher*

The concept of unconscionability reached its high point in Australia in the decision of the High Court in *Waltons Stores (Interstate) Ltd* v *Maher*[103] which, it is important to recall, was a case of an estoppel arising by silence. Mason CJ and Wilson J suggested that courts of equity intervene in equitable estoppel cases to prevent unconscionable conduct. A mere failure to fulfil a promise does not amount to unconscionable conduct and, accordingly,

[98] [1982] 1 QB 133, 147.
[99] (1983) 152 CLR 406.
[100] The notion that conduct must be inequitable before it could give rise to a promissory estoppel was supported by *D & C Builders Ltd* v *Rees* [1966] 2 QB 617, 625, where Lord Denning held that a promissory estoppel would only prevent the creditor from asserting his legal rights 'when it would be *inequitable* for him to insist upon them.'
[101] Id 421.
[102] Id 422–3.
[103] *Waltons Stores* (1988) 164 CLR 387.

detrimental reliance on an executory promise does not bring promissory estoppel into play. 'Something more would be required.'[104] Their Honours suggested two different ways in which that 'something more' can be established. First, it may be found in the creation of an assumption that a contract will come into existence or a promise will be performed and detrimental reliance on that assumption *to the knowledge of the other party.*[105] Secondly, it may be found in the representor's reasonable expectation of detrimental reliance by the representee.[106] On the facts, Mason CJ and Wilson J found the necessary element in the representor's knowledge that the representees were acting to their detriment on the basis of a false assumption, and the representor's inaction in those circumstances.[107] If one looks at unconscionability as an element which must be established in addition to the core elements of equitable estoppel outlined at the beginning of this article, then the essence of the unconscionability requirement, on the interpretation of Mason CJ and Wilson J, is knowledge or a reasonable expectation of the representee's detrimental action or inaction.

Brennan J conveniently reduced his understanding of what is required to establish an equitable estoppel to a list of six elements that a plaintiff must prove.[108] Element one requires the adoption of an assumption by the representee, element two requires the representor's inducement of that assumption, elements three and five require the representee's detrimental reliance on that assumption and element six requires that the representor has failed to act to avoid the detriment. The equivalent of the 'something extra' required by Mason CJ and Wilson J is to be found in element four: that the representor must have known of or intended the representee's detrimental action or inaction in reliance on the relevant assumption.[109]

Mark Dorney has suggested that there is a significant difference between the approaches of Mason CJ and Wilson J and Brennan J to this issue.[110] Dorney suggests that while Brennan J would treat knowledge 'as a necessary precondition to the exercise of the jurisdiction . . . Mason CJ and Wilson J would view knowledge simply as one factor to be weighed in balancing the equities involved in the particular case'.[111] In other words, while Brennan J saw knowledge as one of the factors that a plaintiff must establish in each case, Mason CJ and Wilson J saw it as one of the factors which can make it unconscionable for the representor to resile from his or her representation. Ultimately, however, if one leaves to one side the fundamental and indisputable requirements of an assumption, inducement and detrimental reliance, it is difficult to see what the unconscionability element can be, other than

[104] Id 406.
[105] Ibid, drawing on *Attorney-General (Hong Kong)* v *Humphrey's Estate Ltd* [1987] 1 AC 114 (PC).
[106] Ibid, drawing on the doctrine of promissory estoppel applied in the United States, as described in s 90, *Restatement of Contracts* (2d).
[107] Id 407–8.
[108] Id 428–9.
[109] cf Butler, op cit (fn 1).
[110] Dorney, op cit (fn 1) 27.
[111] Ibid.

knowledge or imputed knowledge.[112] That seemed to be the approach adopted by Kenneth Sutton, when he suggested that the element of unconscionability can be met by establishing knowledge by the representor of the representee's reliance or a reasonable expectation of reliance.[113] The 'something extra' required by Mason CJ and Wilson J is equivalent to, and differed only slightly from, Brennan J's fourth element. What is required is knowledge of the representee's detrimental reliance; while Brennan J appeared to require actual knowledge, Mason CJ and Wilson J would impute knowledge where it was reasonable to expect reliance. The question whether constructive or imputed knowledge will suffice is an important one; as Peter Drahos and Stephen Parker have suggested, once constructive knowledge is accepted, it becomes difficult to deny that the courts are simply protecting reasonable reliance.

> Once the door to constructive knowledge is opened, one slides towards the position that a promisor is deemed to know of detriment when it was reasonably incurred by the promisee. So one just enforces reasonable reliance and outflanks consideration.[114]

The notion that reasonable reliance alone should be protected is not too far from the position taken by Mason CJ and Wilson J in *Waltons Stores*, when they said that the reason mere reliance on a promise to do something did not bring promissory estoppel into play was because a promisee should reasonably be expected to know that to be binding it must form part of a binding contract.[115] When the circumstances are such that the representee's reliance on the relevant assumption is reasonable, then it could be argued that the representor's departure from that assumption should be regarded as unconscionable and, therefore, actionable.

The High Court's approach to equitable estoppel in *Waltons Stores* was The court's profound concern with questions of knowledge and unconscionability is justified by the fact that the representor in that case had not actively induced the adoption of the relevant assumption. The imposition of a knowledge requirement in those circumstances is consistent with the cases at common law and in equity in which knowledge has been held to be an essential element of estoppel by silence.[116] As Spencer Bower and Turner have said:

> The necessity for actual knowledge on the part of the representor is a characteristic of all estoppels by silence, and in this respect such estoppels differ from estoppels based on representations by words or positive conduct, in which the effect on the representee, not the state of mind of the

[112] See Drahos and Parker, op cit (fn 13) 46.
[113] Sutton, op cit (fn 1).
[114] Drahos and Parker op cit (fn 13) 46.
[115] (1988) 164 CLR 387, 417, citing *Amalgamated Investment and Property Co Ltd* v *Texas Commerce International Bank Ltd* [1982] 1 QB 84, 107.
[116] In addition to the cases discussed elsewhere in this article, it is also consistent with the New Zealand Court of Appeal's refusal to find a representor's 'lack of action' unconscionable in circumstances where the representee's reliance had not been brought to its attention: *Gold Star Insurance Co Ltd* v *Gaunt* (1992) 7 ANZ Ins Cas 61-097, 77,397.

representor, is the aspect of the matter with which the court is principally concerned.'[117]

A final aspect of the *Waltons Stores* decision which is of considerable importance to the unconscionability question was Brennan J's inclusion of an 'intention to affect legal relations' requirement in equitable estoppel. Brennan J held in *Waltons Stores* that the doctrine of equitable estoppel 'has no application to an assumption or expectation induced by a promise which is not intended by the promisor and understood by the promisee to affect their legal relations.'[118] The requirement was imposed, as Brennan J explained, to solve the problem of estoppel being used in a pre-contractual context where parties expected to be able to agree to terms.[119] Where two parties expect to reach an agreement, but each recognises that the other is free to withdraw from the negotiations before a binding agreement is concluded, then 'it cannot be unconscionable for one of the parties to do so.'[120] There are, however, other ways in which the requirements of estoppel already deal with that problem. First, the nature of the assumption should be scrutinised carefully, as Deane J did in *Waltons Stores*.[121] A representation as to a party's present intention cannot found an estoppel, unless that party also indicates that they do not intend to change their mind in the future, because it is clear that a change of mind is possible.[122] Even if the representee does assume that the representor will not change his or her mind, the representee must act reasonably in adopting and acting upon that assumption.[123] It would rarely be reasonable for a party involved in contractual negotiations to assume that terms will be agreed and a contract concluded, and even more rarely be reasonable to act on such an assumption.

Justice Brennan's requirement that a representor must intend to affect the parties' legal relations did not receive support from any of the other judges in *Waltons Stores* and, perhaps more importantly, was not referred to by any members of the High Court in *Verwayen*.[124] The facts of *Verwayen* show that the contractual 'intention to affect legal relations' requirement is inappropriate outside the contractual context. In *Verwayen*, there was no suggestion that the Commonwealth intended to be bound by its statement that it would not plead the limitation defence or the defence of no duty of care. The assumption

[117] Spencer Bower and Turner, op cit (fn 18) 288.

[118] (1988) 164 CLR 387, 421, adopting a statement of Denning LJ in *Combe* v *Combe* [1951] 2 KB 215, 220. In *Gollin & Co Ltd* v *Consolidated Fertiliser Sales Pty Ltd* [1982] Qd R 435, 453 WB Campbell J also appeared to accept that an intention on the part of the promisor to affect the legal relations between the parties was required to establish a promissory estoppel.

[119] Id 422–3.

[120] Id 423.

[121] Id 450.

[122] Reliance on such a representation was found not to give rise to an estoppel in *Maunsell* v *Hedges* (1854) 4 HLC 1039; 10 ER 769. See also F Dawson, 'Making Representations Good' (1982) 1 *Canterbury Law Review* 329, 335, who suggests that the representation in *Maunsell* v *Hedges* was 'couched in such terms that the representee could not be said to have reasonably placed reliance upon it.'

[123] See, eg, *ASC* v *Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 506.

[124] It would be impossible to reconcile the existence of such a requirement in Australian law with the decision of Hodgson J in *W* v *G* (1996) 20 Fam LR 49.

adopted by Mr Verwayen was not that the Commonwealth was *bound* not to plead the relevant defences, but simply that it had made a decision not to do so, and that the decision would not be changed.[125] Such an assumption was reasonable in the unusual circumstances of the case.[126]

The principle that a promisor must intend to be legally bound before an estoppel can arise originated from the judgments of Lord Denning relating to promissory estoppel. It is clear from Lord Denning's extra-judicial writings that he thought the intention to affect legal relations requirement should be imposed only in those cases involving deliberate promises.[127] The requirement of an intention to affect legal relations stood as an alternative to detrimental reliance in such cases which 'seem to fall more naturally under the law of contract, rather than the law of estoppel.'[128] The source of obligation in such cases was the promise itself, rather than the representee's detrimental reliance. The requirement that a promisor must intend to affect the legal relations between the parties flows naturally from such a view of promissory estoppel. It does not, however, have any place to play in the considerably broader, substantive doctrine of equitable estoppel applied by the High Court in *Commonwealth* v *Verwayen*, which is based on reliance, rather than promise.[129] It is clear that the doctrine of equitable estoppel applied in *Verwayen* is not contractual, and is not based on the notion of the assumption of obligation through promise.[130] Accordingly, it should be irrelevant to the establishment of such an estoppel whether the representor intended to be bound by his or her promise or intended, by his or her actions, to affect the legal relations between the parties.

(iii) Commonwealth v *Verwayen*[131]

A feature of Mason CJ's judgment in *Commonwealth* v *Verwayen* which has attracted considerable comment, is that the Chief Justice joined Deane J in accepting a unification of common law and equitable estoppel. More interesting for present purposes, however, is the fact that, in applying the principles of that unified doctrine to the facts, Mason CJ seems to have abandoned both the 'unconscionability' element and the requirement of knowledge which were so prominent in his Honour's joint judgment with Wilson J in *Waltons Stores*. In applying the principles of the unified doctrine to the facts in *Verwayen*, the Chief Justice considered only the need to establish that the Commonwealth had induced the adoption of the relevant assumption by Mr Verwayen,[132] the element of detriment[133] and the nature of the relief

[125] (1990) 170 CLR 394, 414 per Mason CJ.
[126] Ibid.
[127] A T Denning, 'Recent Developments in the Doctrine of Consideration' (1952) 15 MLR 1, 9.
[128] Ibid.
[129] (1990) 170 CLR 394.
[130] See Robertson, op cit (fn 8),42–7.
[131] (1990) 170 CLR 394.
[132] Id 414.
[133] Id 415–6.

appropriate to satisfy the estoppel.[134] Neither the element of unconscionability, nor the need for the representor to have knowledge or a reasonable expectation of the representee's reliance were mentioned in Mason CJ's application of the doctrine to the facts. The abandonment of those concepts is evident in the Chief Justice's description of the operation of the single doctrine of estoppel in the following terms, which focus on the elements of assumption, inducement and detrimental reliance, and which do not include elements of unconscionability or knowledge:

> It should be accepted that there is but one doctrine of estoppel, which provides that a court of common law or equity 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 (including a legal 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.[135]

Two important conclusions can be drawn from Mason CJ's apparent abandonment of the concept of unconscionability and the requirement of knowledge in *Verwayen*. First, both developments can be seen as a means of reconciling equitable estoppel with the common law doctrine. In other respects, Mason CJ's version of a unified estoppel can be seen as an extension of equitable estoppel to cover representations of existing fact. The extent to which Mason CJ's unified doctrine draws on equitable estoppel is particularly apparent in his Honour's approach to relief, which allows the court a discretion to fashion relief which is proportional to the detriment suffered.[136] Common law estoppel, in contrast, operates simply by holding the representor to the truth of the assumption which his or her conduct has induced,[137] allowing the court no flexibility in the granting of relief.[138] In abandoning the unconscionability element, and with it the requirement that the representor must have knowledge of the representee's detrimental reliance, however, Mason CJ can be seen to be rationalising the unified estoppel with the strongly reliance-based approach of the common law doctrine. The emphasis on reliance was particularly marked in the early Australian High Court decisions on common law estoppel.[139] As noted above, the approach adopted in those cases focussed attention on the position of the representee, and did not involve any inquiry into the knowledge of the representor. The second conclusion that can be drawn from Mason CJ's abandonment of the knowledge

[134] Id 416–7.
[135] Id 413.
[136] Ibid.
[137] *Thompson* v *Palmer* (1933) 49 CLR 507, 547; *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674.
[138] *Waltons Stores* (1988) 164 CLR 387, 414 per Brennan J. Cf *Avon County Council* v *Howlett* [1983] 1 All ER 1073, 1086–9 per Slade LJ.
[139] *Craine* v *Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305; *Thompson* v *Palmer* (1933) 49 CLR 507; *Newbon* v *City Mutual Life Assurance Society Ltd* (1935) 52 CLR 723; *Grundt* v *Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641.

requirement is that it is consistent with the notion that knowledge is not required, at common law or in equity, where the representee has induced the relevant assumption by means of positive conduct. The relevant assumption in *Verwayen* was, unlike that in *Waltons Stores*, induced by a clear representation on the part of the Commonwealth. The fact that Mason CJ imposed a knowledge requirement in *Waltons Stores*, but did not do so in *Verwayen*, is explicable on the basis that knowledge is only required in case of estoppels by silence.

Chief Justice Mason's omission of the element of knowledge in *Verwayen* is particularly interesting when one looks at his Honour's later, extra-judicial attempt to rationalise the unification of equitable and common law estoppel, on the basis that conduct which is regarded as 'unconscionable' in equitable estoppel is equivalent to the 'unjust' conduct which was at the basis of common law estoppel in cases such as *Thompson* v *Palmer*[140] and *Grundt* v *Great Boulder Pty Gold Mines Ltd.*[141] The approach taken in *Verwayen* moves the concept of unconscionable conduct closer to that of unjust conduct: it was more clearly defined, more focussed on the representee's reliance, and did not involve the element of knowledge of the representee's detrimental reliance.

While Brennan J did not discuss the elements of knowledge or unconscionability in *Verwayen*, those elements were discussed by Deane J at some length.[142] The unified doctrine of estoppel applied by Deane J was based on the notion that the law will not permit an unconscionable departure from an assumption which has been adopted and acted upon by another party.[143] Although Deane J said that the question whether departure would be unconscionable could not be resolved by some preconceived formula serving as a universal yardstick, it appeared that his Honour regarded the question as having two elements: first, the part played by the representor in the adoption of or persistence of the assumption and, secondly, some additional element rendering the representor's conduct unconscionable in the circumstances.[144]

The representor would bear sufficient responsibility for the representee's assumption to establish the first element where the representor:

> (a) has induced the assumption by express or implied representation; (b) has entered into contractual or other material relations with the other party on the conventional basis of the assumption; (c) has exercised against the other party rights which would exist only if the assumption were correct; (d) knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so.[145]

[140] (1933) 49 CLR 507.
[141] (1937) 59 CLR 641.
[142] (1990) 170 CLR 394, 440–1, 444–5.
[143] Id 444.
[144] Id 444–5.
[145] Id 444.

It is more difficult to categorise the circumstances in which Deane J envisaged the second element being made out. It may depend on:

(a) the reasonableness of the conduct of the representee in acting upon the assumption;
(b) the nature and extent of the detriment the representee would suffer if departure from the assumption were permitted; or
(c) where the assumption has been induced by an express or implied representation, whether 'the allegedly estopped party knew or intended or clearly ought to have known that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption.'[146]

Like the unconscionability element required by Mason CJ and Wilson J in *Waltons Stores*, Deane J's unconscionability element can ultimately be reduced to the question of knowledge. If we leave aside the core elements of assumption, inducement and reasonable detrimental reliance, the only element remaining is the question of the representor's knowledge or imputed knowledge of the potentially detrimental action being taken by the representee. Of particular significance is Deane J's suggestion that actual knowledge may not be required. His Honour's description of the second element leaves open the possibility that either the reasonableness of the representee's conduct, or the nature and extent of the detriment, alone may satisfy the unconscionability requirement, without any inquiry as to knowledge on the part of the representor. Imputed knowledge may also suffice, perhaps even in cases of estoppel by silence. Even more than Mason CJ and Wilson J's approach to unconscionability in *Waltons Stores*, Deane J's definition admits of the possibility that the court may simply protect reasonable reliance.

Dawson J did not discuss the unconscionability requirement in any detail, but did advert briefly to the question whether the Commonwealth's departure from the relevant assumption was unconscionable in the circumstances. His conclusion that the Commonwealth's departure was unconscionable appeared to be based exclusively on the part played by the Commonwealth in inducing Mr Verwayen's adoption of the relevant assumption.[147] The only other member of the Court to discuss the doctrine of equitable estoppel in any detail was McHugh J, who conveniently spelt out the circumstances in which it will be unconscionable for a party to insist on his or her strict legal rights.[148] Three elements are required: inducement, detrimental reliance and knowledge on the part of the representor of the representee's detrimental action or inaction.

Justice McHugh's approach follows that of Mason CJ and Wilson and Brennan JJ in *Waltons Stores* in requiring knowledge, in addition to the core elements of equitable estoppel, in order to satisfy the unconscionability element. Interestingly, however, McHugh J was the only member of the High Court in *Verwayen* to impose such a requirement. Mason CJ appeared to leave it out of his unified estoppel deliberately, Brennan J did not raise it,

[146] Id 445.
[147] Id 460.
[148] Id 500.

Deane J seemed to contemplate a range of situations in which it was not required, or could be imputed, and Dawson J also did not seem to require it.

Unfortunately, the only conclusion one can draw from those decisions is that there is little agreement as to what is required to satisfy the unconscionability element. No doubt many would regard that as a good thing, on the basis that the element of unconscionability should not be defined, but should, by some mysterious process, be divined from the facts of each case. The element of mystery is, however, unsatisfactory from the point of view of a person who wishes to know whether they are free to resile from an assumption which they have induced another party to adopt or whether, having resiled from such an assumption, they have incurred liability to that other party. It is equally unsatisfactory from the point of view of a person who has relied to their detriment on the conduct of another party, and wishes to know whether they have a cause of action against that party. The High Court has recently removed one element of mystery from this area of the law by articulating clearly the principles on which relief is framed to give effect to equitable estoppel once liability is established.[149] While that clarification is a positive development, it also serves to highlight how unfortunate it is that this important question in relation to liability remains so elusive.

3. Reconciling the Differences

(a) When is a representor's conduct unconscionable?

In order to reconcile the common law and equitable doctrines of estoppel, the courts must abandon the notion of an undefined 'unconscionability' element, and must clearly articulate the circumstances in which an estoppel will arise. Despite the diversity of views examined in this article, there is now considerable agreement as to the central elements required to establish both common law and equitable estoppel. At the heart of both the common law and equitable doctrines are the elements of an assumption, inducement and detrimental reliance. A number of alternatives have been suggested as to what else, if anything, is required to make the representor's conduct unconscionable in the case of the equitable doctrine. They include the reasonableness of the representee's reliance, an intention to induce reliance, actual knowledge of reliance, imputed knowledge of reliance or a reasonable expectation of reliance. Reasonableness of reliance can, however, be left to one side, since it is clearly required in all cases of common law estoppel and equitable estoppel.[150] The question which remains, then, is when knowledge of the representee's detrimental reliance, or an intention to induce reliance are required to

[149] *Verwayen* (1990) 170 CLR 394; see A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 MULR 805.

[150] *Standard Chartered Bank Aust Ltd* v *Bank of China* (1991) 23 NSWLR 164, 180–1 (common law estoppel) and *ASC* v *Marlborough Gold Mines* (1993) 177 CLR 485, 506 (equitable estoppel). See also A Robertson, 'Towards a Unifying Purpose for Estoppel' (1996) 22 *Mon LR* 1, 16–19 and A Robertson, 'The "reasonableness" requirement in estoppel' (1994) 1 *Canberra Law Review* 231.

make departure from an assumption unconscionable. The answer to that question clearly must be: only in cases of estoppel by silence.

The proposition that knowledge of, or an intention to induce, reliance should be required only in cases where the representor has remained inactive is consistent with most of the cases at common law and in equity. It is clear that the representor must bear some responsibility for the representee's adoption of the relevant assumption, or for the action taken by the representee on the faith of that assumption.[151] Where the representor has engaged in some active conduct which clearly indicates that a particular factual or legal state of affairs exists, or clearly indicates that the representor will engage in some conduct in the future, then the representor bears responsibility for the representee's adoption of the assumption by reason of that conduct alone. Such responsibility exists regardless of the representor's knowledge or intention; in those cases, therefore, reasonable reliance alone warrants protection. On the other hand, where the representor has not engaged in any positive conduct which induces the adoption of the assumption, then the representor can only be held liable if he or she has culpably remained silent.[152] The representor's silence is only blameworthy if the representor is under a duty to speak arising from custom or trade usage,[153] or remains silent with the intention of the representee acting upon the faith of a mistaken assumption, with knowledge of the representee's intention to act upon the faith of such an assumption, or with knowledge of the representee's acts of reliance.[154] The representor's knowledge and intentions should, therefore, be relevant only in a case where

[151] As Kerr LJ said on behalf of the English Court of Appeal in *K Lokumal & Sons (London) Ltd* v *Lotte Shipping Co Pte Ltd (The 'August Leonhardt')* [1985] 2 Lloyd's Rep 28, 34: 'All estoppels must involve some statement or conduct by the party alleged to be estopped on which the alleged representee was entitled to rely and did rely.'

[152] *Ettershank* v *Zeal* (1882) 8 VLR (E) 333, 343 (FC): 'It is considered [in equity and at law] that a man is bound to disclose his rights if he knows that another man will be injuriously misled by their concealment.' See also *Brand* v *Chris Building Co Pty Ltd* [1957] VR 625, 628–9, where the defendant failed to make out a case of estoppel by acquiescence because the plaintiff was not aware of the defendant's mistake or acts of reliance; *Marvon Pty Ltd* v *Yulara Development Co Ltd* (1989) 98 FLR 348, 351, where Kearney J held that, even if the facts did not establish that there was an active inducement by the defendant, the defendant should be held to have induced the assumption because it knew of the plaintiff's detrimental reliance and remained silent; and *KMA Corporation Pty Ltd* v *G & F Productions Pty Ltd* (1997) 38 IPR 243, where Eames J held that an estoppel could not arise by silence unless, *inter alia*, the representor knew of the representee's mistaken assumption.

[153] Parke B observed in *Freeman v Cooke* (1848) 2 Ex 654; 154 ER 652, 663 that 'a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect' as a representation. An example of such a duty is that owed by customers to their bankers to disclose forgeries: *Greenwood v Martin's Bank Ltd* [1933] 1 AC 51. See further Spencer Bower and Turner, op cit (fn 18) 55–79, *Thomas Australia Wholesale Vehicle Trading Co Pty Ltd v Marac Finance Australia Ltd* [1985] 3 NSWLR 452. It seems that in such cases the representor need not necessarily know of or intend reliance by the representee (as the representor did in *Greenwood v Martin's Bank Ltd*), but must know or believe that the representee labours under a mistake: *West v Commercial Bank of Australia Ltd* (1935) 55 CLR 515 at 322 per Rich, Starke, Dixon and McTiernan JJ; *Thompson v Palmer* (1933) 49 CLR 507 at 547 per Dixon J.

[154] Note that knowledge of the representee's acts of reliance will not suffice if the representor does not also have knowledge of the assumption adopted by the representee and there are other plausible explanations for the representee's actions: *Wilson* v *Stewart* (1889) 15 VLR 781, 802 per Higinbotham J (FC).

the representor has not actively induced the adoption of the relevant assumption by the representee.

An analogy can be drawn here between estoppel and misleading or deceptive conduct under s 52 of the *Trade Practices Act* 1974 (Cth).[155] The act of remaining silent is only regarded as 'conduct', and hence can only breach s 52, if it is 'otherwise than inadvertent'.[156] In other words, silence can only breach s 52 if it is conscious or deliberate. Similarly, the act of remaining silent can be said only to found an estoppel if it is engaged in consciously, with the knowledge that the representee is acting on the faith of a false assumption to his or her detriment, or with the intention or expectation that he or she will do so. If the representor remains silent, but does not have actual or constructive knowledge of the representee's reliance, then the representor cannot be regarded as bearing any responsibility for the loss suffered by the representee as a result of that reliance.

As a result of the difference between the treatment of positive conduct and that of silence under s 52, the question whether it was positive conduct or silence which led the plaintiff into error assumes great importance.[157] Similarly, if the requisite knowledge or intention is required only in the case of estoppel by silence, then, as under s 52, it is crucial for the courts to determine whether it is positive conduct or silence on the part of the representor which induced the representee to adopt or act on the relevant assumption. In *Crabb* v *Arun DC*, for example, had the representor's positive conduct been regarded as insufficient on its own to have induced reliance, then it would have been critical for the representee to establish the requisite knowledge or intention on the part of the representor.

(b) The nature and type of knowledge or intention required

If one accepts the view outlined above, that knowledge or intention is only required in the case of an estoppel by silence, then the final question that needs to be addressed is the nature and type of knowledge or intention required. The relevant questions are, first, what must the representor know or intend and, secondly, must actual knowledge or intention be proved, or will it be imputed to the representor by the court?

Knowledge of three different matters may be relevant: first, knowledge of the assumption adopted by the representee, secondly, knowledge that the assumption is false (ie: knowledge that the representee is mistaken as to the

[155] It is also interesting to note that the 'reasonable expectation' test recently adopted by the Full Federal Court for determining whether silence in a particular situation is misleading or deceptive (*Warner* v *Elders Rural Finance Ltd* (1993) 113 ALR 517) is essentially the same as the test applied in *Moorgate Mercantile Co Ltd* v *Twitchings* [1977] AC 890, 903, *Pacol Ltd* v *Trade Lines Ltd (the 'Herick Sif')* [1982] 1 Lloyd's Rep 456, 465 and *KMA Corporation Pty Ltd* v *G & F Productions Pty Ltd* (1997) 38 IPR 243, 249 for determining whether silence in a particular situation is capable of forming the basis of an estoppel.

[156] s 4(2), Trade Practices Act (Cth) 1974; see A Robertson, 'Silence as Misleading Conduct: Reasonable Expectations in the Wake of Demagogue Pty Ltd v Ramensky' (1994) 2 *Competition and Consumer Law Journal* 1, 12–14.

[157] Robertson, loc cit (fn 156).

state of affairs, as to the representee's existing legal rights or as to the intentions of the representor); and, thirdly, knowledge of the representee's acts of detrimental reliance.[158] It seems clear that in all cases the representor must know of the assumption adopted by the representee. If the representor did not, by his or her conduct, induce the adoption of the relevant assumption, and did not know of the assumption adopted by the representee, then the representor cannot be said to bear any responsibility for the loss suffered by the representee as a result of reliance on the assumption.

The time for assessing the representor's knowledge is a difficult question. Since the representor is said to act wrongfully or unconscionably only in resiling from the assumption, it could be argued that there is no reason to require knowledge of the true position at any time prior to the representor's attempt to resile from the assumption. On the other hand, if the representor only learns of the representee's assumption after the detrimental action has been taken, then the representor is powerless to prevent the detrimental action. If the representor has not induced the adoption of the relevant assumption by positive conduct, and did not know of it before it was acted upon, then the representor cannot be said to bear responsibility for the consequences of the representee's actions.[159] Accordingly, it seems clear that in a case of estoppel by silence, the representor must know of the representee's assumption at the time detrimental action is taken. Accordingly, what the representee must establish is that, at the time the representee acted on the assumption, the representor:

1. knew of the assumption adopted by the representee; and
2. (a) knew that the representee was acting in reliance on the assumption, (b) knew of the representee's intention to act in reliance on that assumption,[160] or (c) intended the representee to act in reliance on the assumption.

The final question is whether the requisite knowledge or intention must be proved by direct evidence, or whether constructive or imputed knowledge will suffice. There is authority in the common law cases for the proposition that direct proof of the requisite knowledge or intention is not required, and it will be inferred from the facts. The leading case is *Laws Holdings Pty Ltd* v *Short*,[161] where Gibbs J was prepared to infer knowledge where 'it was so obvious' that the representee would have adopted the assumption in question that the representor must have believed this was the case. As to the question of

[158] *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] 1 QB 133, 146.

[159] As Spencer Bower and Turner, op cit (fn 18) 64 have observed, an owner of property is under no duty to protest against an invasion of his or her rights where the owner has no reason to believe that the invader mistakenly believes himself or herself to be acting lawfully. In such a case there is no 'delusion' which the owner is fostering or encouraging, and accordingly, there is nothing to preclude the owner from subsequently asserting his or her rights against the invader.

[160] *Crabb* v *Arun District Council* [1976] 1 Ch 179, 189 (Lord Denning MR), 197–8 (Scarman LJ) and *Laws Holdings Pty Ltd* v *Short* (1972) 46 ALJR 563, 570 (Gibbs J).

[161] (1972) 46 ALJR 563, 571 per Gibbs J, applied by the South Australian Full Court in *Ampol Ltd* v *Matthews* (unreported, FC of SA Sup Ct, 15 April 1992) 164 LSJS 78, 11 per Millhouse J and 21 per Zelling J.

the representor's intention to induce a course of conduct, there is authority at common law that such intention can also be implied from the facts.[162] Brennan J confirmed in *Waltons Stores* that the requisite knowledge or intention can also be inferred for the purposes of equitable estoppel, but suggested that such an inference may be more difficult to draw in a case of estoppel by silence.[163]

The question whether some notice other than actual notice suffices for the establishment of an estoppel is an important one for the philosophy of estoppel. That is because a more stringent approach to notice involves a focus on the representor and indicates a concern with matters of conscience. A less strict approach to notice, on the other hand, tends to suggest that the court is more concerned with the position of the representee and is simply protecting reasonable reliance.[164] The importance of the standard of notice required has also been recognised by Tony Duggan in relation to the equitable doctrine of unconscionable dealing. Duggan suggests that:

> Attenuation of the knowledge requirement in this way [to allow constructive notice] marks an important shift in the philosophical underpinnings of the unconscientious dealing doctrine. Relief of A's misfortune replaces prevention of B's wrongdoing as the basis for intervention.[165]

A person is said to have constructive notice of a fact or state of affairs which would have been revealed by inquiries. There are two ways in which a person can be deemed to have such notice.[166] Constructive notice in the narrow sense is wilful ignorance: deliberately abstaining from inquiry in order to avoid knowledge. Constructive notice in the broad sense involves a mere failure to make the inquiries that a reasonable person would have made in the situation in question. It seems clear that constructive notice in the narrow sense should be sufficient to establish an estoppel. Wilful ignorance is, as Tony Duggan has observed, a type of dishonesty;[167] it therefore clearly affords a sufficient basis for attributing responsibility to the representor for the representee's reliance. Oliver J's suggestion in *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* that 'a suspicion of the true position' may give rise to a duty to speak arguably provides support for the notion that constructive notice in the narrow sense will be accepted for the purposes of equitable estoppel.[168]

A strong case can also be made for allowing constructive knowledge in the broad sense of a mere failure to make reasonable inquiries or a finding that the representor ought to have known of the representee's assumption and detrimental reliance. The authors of *Cheshire and Fifoot's Law of Contract* argue that an objective test should be applied, as it is in the area of unconscionable

[162] *Trenorden* v *Martin* [1934] SASR 340, 343; see fns 26–28 supra and accompanying text.
[163] (1988) 164 CLR 387, 423.
[164] See fn 114 supra and accompanying text.
[165] T Duggan, 'Unconscientious Dealing' in *The Principles of Equity* (P Parkinson ed, 1996) 121, 139.
[166] Id 138; R P Meagher, W M C Gummow and J R F Lehane, *Equity: Doctrines and Remedies* (3rd ed, 1992) 253.
[167] Duggan, op cit (fn 165).
[168] [1982] QB 133, 147.

dealing,[169] so that it is enough to show that 'a reasonable person would have realised there would be detrimental reliance.'[170] That argument finds support in the dictum of Mason CJ and Wilson J in *Waltons Stores* that the requisite unconscionability can be found in the representor's reasonable expectation of detrimental reliance by the representee.[171] It is also supported by the approach taken by the New South Wales Court of Appeal in *Lorimer* v *State Bank of New South Wales*, which was discussed earlier in this article.[172] As the above statement from *Cheshire and Fifoot* suggests, a knowledge requirement which allows constructive knowledge in the broad sense is almost indistinguishable from a requirement that the promisor must reasonably expect reliance by the promisee.[173] Framing it as a 'reasonable expectation of reliance' requirement, rather than as a knowledge requirement which can be satisfied by constructive notice, is simpler, and allows a consistent approach to be taken at common law and in equity. Accordingly, if constructive notice in the broad sense is accepted, then we have two different 'reasonableness' requirements for estoppel. Where the estoppel is claimed to arise from positive conduct on the part of the representor, then it is only required that the representee must act reasonably in adopting and acting upon the assumption. Where the estoppel is claimed on the basis of the representor's silence, then it must *also* be shown that a reasonable person in the position of the representee would have expected reliance.

If that approach is accepted, then the above list of elements[174] can be restated as follows. In the case of an estoppel by silence, in addition to the basic elements required to establish an equitable estoppel by positive conduct, the onus should be on the representee to establish that, at the time the representee took the detrimental action, the representor:

1. knew (or ought to have known) of the assumption adopted by the representee; and
2. (a) knew (or ought to have known) that the representee was acting in reliance on that assumption, (b) knew (or ought to have known) of the representee's intention to act in reliance on the assumption, or (c) intended the representee to act in reliance on the assumption.

If, consistent with the reliance basis of both common law and equitable estoppel, emphasis is to be placed on the representee's reliance, rather than the representor's conduct, then the knowledge and intention requirements

[169] *Commonwealth Bank of Australia Ltd* v *Amadio* (1983) 151 CLR 447, 462 & 467 per Mason J, 474 & 477–9 per Deane J, discussed by Seddon and Ellinghaus, op cit (fn 1) 560–1. Cf Duggan, op cit (fn 165) 138.

[170] Seddon and Ellinghaus, op cit (fn 1) 66.

[171] (1988) 164 CLR 387, 406. It is also supported by Deane J's statement in *Verwayen* (1990) 170 CLR 394, 445, that 'a critical consideration [in determining whether departure from the assumption would be unconscionable] will commonly be that the allegedly estopped party knew or intended *or clearly ought to have known* that the other party would be induced by his conduct to adopt, and act on the basis of, the assumption' (emphasis added).

[172] See fns 50–56 Supra and accompanying text.

[173] Such an element is required in order to establish promissory estoppel in the United States, see Robertson, op cit (fn 150) 15–19.

[174] See fn 160 Supra and accompanying text.

could be simplified so that, in the case of an estoppel by silence, the only extra requirement imposed on a representee is to show that a reasonable person in the position of the representor would have expected reliance by the representee.

4. Conclusions

The role and nature of the unconscionability requirement are important issues which must be resolved in order to facilitate the unification of common law and equitable estoppel. There are considerable similarities between equitable and common law estoppel in this regard. First, knowledge has played an important role in each doctrine in attributing responsibility to the representor in cases where he or she has not made a clear representation or promise. There is, in that respect, a unity of principle between the common law and equitable doctrines. Secondly, the notion of unconscionable conduct in the equitable doctrine can be seen to be reflected in the common law concept of unjust departure from an assumption. Each depends primarily on the elements of inducement on the representor's side, and reasonable detrimental reliance on the part of the representee. The similarity between those two concepts, however, masks a fundamental difference. While the notion of unjust departure under the common law doctrine has always been defined clearly, the concept of unconscionability in the equitable doctrine has deliberately been left undefined. It is clear that the other major difference between equitable and common law estoppel, the question of relief, must be resolved in favour of the equitable approach.[175] In the interests of creating a coherent and workable unified estoppel, it is equally clear that the present question, whether the courts should define the circumstances in which it will be unjust or unconscionable to depart from an assumption, must be resolved in favour of the common law approach. The elements of a unified estoppel must, therefore, be clearly articulated.

[175] See Robertson, op cit (fn 150) 26–8.