

The following are general comments about the structure and content of an academic essay written for university – they are not prescriptive and intended as an educational guide only.

## QUESTION

Under English law, proprietary and promissory estoppels have quite different elements and remedies. Proprietary estoppel is capable of creating new legal rights in relation to interests in land, whereas promissory estoppel is a negative doctrine only, restricted to restraining the exercise of legal rights.

Since *Waltons Stores (Interstate) Ltd v Maher* was decided, in your view has Australian estoppel developed into a single doctrine of equitable estoppel or not? What differences remain between proprietary estoppel and promissory estoppel under Australian law? Discuss with reference to relevant case law and academic writing.

**Comment [A1]:** Part of responding to this question would require the student to consistently establish throughout the essay that either promissory estoppel continues to restrain exercise of legal rights or whether it has developed into 'something more' or 'something different'.

**Comment [A2]:** It is important to recognise alternative positions and possible arguments for these.

## I. INTRODUCTION

The 'High Trees' estoppel accepted in *Legione v Hateley* has in more recent times developed into a formidable doctrine.<sup>1</sup> Since the decision of the High Court of Australia in *Waltons Stores (Interstate) Ltd v Maher* the application of promissory estoppel as a cause of action has prompted judicial support for a unified doctrine of equitable estoppel, which encompasses both promissory and proprietary estoppel.<sup>2</sup> This equitable estoppel, in compliance with the role of equity, recognises that both doctrines operate to serve a unified purpose, namely the protection against unconscionable dealings. It is within this context that the development of promissory and proprietary estoppel within Australia will be examined. This paper will analyse the judgments in *Waltons Stores* and evidence of subsequent case law applying unified equitable estoppel to demonstrate that there is support among senior members of the judiciary for the application of a general equitable estoppel.<sup>3</sup> However, considerable doubt has been cast over how useful the application of this would be. Certain differences persist between the two doctrines. In terms of the relief provided, there is abundant evidence to suggest that the Australian judiciary remains heavily accustomed to applying traditional English doctrines of estoppel. Also in light of recent judicial reasoning in the NSW Court of Appeal support for a unified equitable estoppel has dwindled, as the traditional distinctions between proprietary estoppel as a 'sword' and promissory estoppel as a 'shield' begin to re-emerge.<sup>4</sup> Ultimately this paper argues that at present, the Australian law of estoppel is in a 'state of flux' as the question of a unified equitable estoppel is one that is yet to gain unanimous High Court support and one that will continue to be the subject of judicial discretion and academic debate.<sup>5</sup>

**Comment [L3]:** Background comment on the essay question – provides context

**Comment [L4]:** The similarities of the 2 estoppels are raised and the context of why some believe they should be combined

**Comment [A5]:** Student's position to question - the 2 estoppels are different

**Comment [L6]:** Student restates that the 2 estoppels are different and that Australian law is undecided about unifying them. This is in line with the directive of the essay question which requires students to recognise alternative positions to their own, identify the limitation of those positions and then present their own view.

**Comment [A7]:** The use of headings for each section is recommended

**Comment [L8]:** This topic sentence provides historical context and an explanation of promissory estoppel.

## II. EQUITABLE ESTOPPEL IN ENGLISH LAW: The Foundations of Promissory and Proprietary

### Estoppel

In *Central London Property Trust Ltd v High Trees House Ltd*, Denning J enunciated the equitable doctrine of promissory estoppel.<sup>6</sup> This is the legal principle that a party is entitled to a remedy where they have acted on a promise of future intent (not a contract) made to them by another party, resulting in detriment to themselves.

<sup>1</sup> *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; *Legione v Hateley* (1983) 152 CLR 406.

<sup>2</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 ('*Waltons Stores*').

<sup>3</sup> *Austotel Pty Ltd v Franklins SelfServe Pty Ltd* (1989) NSWLR 582; *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466; *W v G* (1996) 20 Fam LR 49; *Gray v National Crime Authority* [2003] NSWSC 111; *Evans v Evans* [2011] NSWCA 92.

<sup>4</sup> Michael Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 *Journal of Equity* 131; *Saleh & Anor v Romanous & Anor* [2010] NSWCA 274; *DHJM Pty Ltd v Blackthorn Resources Ltd* (2011) 285 ALR 311 (Handley AJA). The terms 'sword' and 'shield' have taken on an alternate interpretation in the context of relief, as proprietary estoppel confers 'positive' rights while promissory estoppel is limited to conferring 'negative' rights.

<sup>5</sup> Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing, 1999) 17, quoting *Lorimer v State Bank of NSW* [1991] ACL Rep NSW 95 (Kirby P).

In the case of High Trees, the tenants had been promised a lower rent because of adverse economic conditions during the war. The plaintiff landlord sought to apply a higher rent once these conditions changed and were awarded the right to do so *in future* but not retrospectively to the time the promise had been made. This created the principle of legal enforceability of future intentions. It was reasoned that, due to the presence of an existing legal relationship in the case of *Jordan v Money*, the law had 'not been standing still' and the facts in this case were different to that of High Trees.<sup>7</sup> However the doctrine would be limited. The 'High Trees' estoppel would not support an independent cause of action,<sup>10</sup> and would only apply where a pre-existing legal relationship existed between two parties.

Proprietary estoppel also 'a creature of equity', differs from the 'High Trees' estoppel as it has always been both a 'sword' and 'shield.' Proprietary estoppel (by acquiescence or encouragement) operates to protect a party's interest in property where one party has created an expectation in another that an interest in land, has or will be conferred, as is demonstrated in *Dillwyn v Llewelyn*, *Ramsden v Dyson* and *Crabb v Arun District Council*.<sup>11</sup> Certain distinctions between estoppel by acquiescence 'and by 'encouragement' persist in light of the decisions in *Willmott v Barber* and *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd*.<sup>12</sup>

**Comment [L9]:** Historical context & explanation of proprietary estoppel

### III. EQUITABLE ESTOPPEL IN AUSTRALIAN LAW: The Decision in *Waltons Stores v Maher*<sup>13</sup>

The decision in *Walton Stores* expanded the doctrine of promissory estoppel established in 'High Trees' estoppel paving the way for an 'equitable estoppel' to be recognised and applied in subsequent case law. Equitable estoppel is the principle that recognizes that it would be unconscionable of one party from gaining advantage over second party due to misrepresentation resulting in actions taken by the second party that led to a detrimental outcome to themselves.

**Comment [L10]:** Application to Australian Law as requested in the question – note correct footnote referencing

**Comment [A11]:** Note that legal cases are mentioned in chronological order

In *Waltons Stores* the issue that arose was whether Waltons had created or encouraged an assumption in Maher that they would enter into a future lease of land owned by Maher.<sup>14</sup> The material facts in the case, particularly the urgency of the negotiations that took place between the party's solicitors, the execution of a counterpart deed by the Maher's and the undue delay by Waltons to make known their intention not to proceed, were all relevant in reaching a judgment in favour of the Maher's.<sup>15</sup>

**Comment [L12]:** 'Ibid' footnote= reference the same as the one immediately above

<sup>7</sup> [1947] 1 KB 130, 134.

<sup>10</sup> *Combe v Combe* [1951] 2 KB 215. The fear of undermining the contractual doctrine of consideration influenced the reasoning of Denning J in *Combe v Combe* as it was stated, at 220, that 'the doctrine of consideration is too firmly fixed to be overthrown by a side-wind.'

<sup>11</sup> (1862) 45 ER 1285; (1866) LR 1 HL 129; [1976] Ch 179 CA.

<sup>12</sup> (1880) 15 Ch D 96, 105 (Fry J); [1982] QB 133, 152 (Oliver J) ('*Taylor's Fashions*'). Estoppel by acquiescence requires that the representor must have knowledge of the other party's mistake and their own inconsistent rights. This as noted in *Taylor's Fashions* is not a requirement for encouragement cases.

<sup>13</sup> (1988) 164 CLR 387.

<sup>14</sup> Ibid.

<sup>15</sup> (1988) 164 CLR 387, 407 (Mason CJ and Wilson J).

Mason CJ and Wilson J in a joint judgment based their reasoning on the fact that the Maher's 'assumed that exchange of contracts *would* take place as a matter of course.'<sup>16</sup> As such they dismissed the application of common law estoppel and endeavoured to analyse the law in relation to promissory estoppel.<sup>17</sup> What was discerned from the cases of *Grundt* and *Thompson* was a common principle which would reconcile the doctrines of promissory and proprietary estoppel:

One may therefore discern in the cases a common thread which links them together, namely, the principle that... Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore that assumption.<sup>18</sup>

**Comment [A13]:** Note the use of correctly formatted long quotations

They continued to (incorrectly) acknowledge the case of *Crabb v Arun District Council* as an 'instance of promissory estoppel', and mistakenly likened the outcome of that case to *Ramsden v Dryson*.<sup>19</sup> From their analysis of these and several other cases (albeit their confusion), Mason CJ and Wilson J concluded:

The foregoing review of the doctrine [of promissory estoppel] demonstrates that it extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction... must be unconscionable.<sup>20</sup>

**Comment [A14]:** Note the use of correctly formatted long quotations

On this basis and in light of several material factors demonstrating unconscionable conduct on the part of Waltons Stores, their Honours found in favour of the Maher's.<sup>21</sup>

Brennan J similarly based his reasoning on the expectation by the Maher's that Waltons 'would duly complete the exchange.'<sup>22</sup> Brennan J advocated a unified promissory and proprietary estoppel as a cause of action grounded in the object of preventing unconscionability. His Honour questioned:

**Comment [L15]:** Reference to Judge

If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a *non-proprietary* legal right on another?<sup>23</sup>

<sup>16</sup> Ibid 398.

<sup>17</sup> Ibid 407.

<sup>18</sup> Ibid 404 (Mason CJ and Wilson J), citing *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 675 (Dixon J) and *Thompson v Palmer* (1933) 49 CLR 507, 547.

<sup>19</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 403-4 (Mason CJ and Wilson J) citing *Crabb v Arun District Council* [1976] Ch 179 CA and *Ramsden v Dryson* (1866) LR 1 HL 129. Their Honours confusion of these authorities has been criticised by academics and other members of the judiciary. This essentially gives heed to the argument that the foundational basis for the doctrine of 'equitable estoppel' was incorrect and casts doubt over the authority of their Honour reasoning. As noted by Handley AJA 'the decision is an example of a hard case making bad law... The reasoning in favour of an expanded promissory estoppel was contrary to principle and authority, and unnecessary': Justice KR Handley, 'Three High Court decisions on estoppel 1988-1990' (2006) 80 *Australian Law Journal* 724, 729.

<sup>20</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 406.

<sup>21</sup> Ibid 407.

<sup>22</sup> Ibid 413.

<sup>23</sup> (1988) 164 CLR 387, 426 (emphasis added).

Brennan J then went a step further and set out the elements required to fulfil an 'equitable estoppel' and demonstrated how the facts in the present case satisfied these elements.<sup>24</sup>

It can be seen from the majority reasoning in *Waltons Stores* that the doctrine of promissory estoppel was taken to a new height. Firstly it was found that an equitable estoppel could form the basis for an independent cause of action and secondly that such an estoppel could arise even in the absence of a pre-existing legal relationship.<sup>25</sup> Thirdly, and as a result of the first two developments, the notion of a unified equitable estoppel emerged, blurring the distinction between promissory and proprietary estoppel. Case law has since demonstrated that there is a degree of support among certain members of the judiciary for applying promissory estoppel as a cause of action and in effect advocating a unified doctrine of equitable estoppel.

**Comment [L16]:** Student explanation of why the initial question arises ie. whether the 2 estoppels are in fact the same

*Austotel Pty Ltd v Franklins SelfServe Pty Ltd* was a case concerning an agreement between a property developer and supermarket proprietor for the lease of premises.<sup>26</sup> The majority upheld the appeal and concluded that an estoppel could not be raised against the developer as no binding agreement had been reached between the parties as to the essential terms of the lease.<sup>27</sup> However Priestley JA in dissent expressed support for the judgment of Mason CJ and Wilson J in *Waltons Stores*. In compliance with the principles expressed in *Silovi Pty Ltd v Barbaro* Priestley JA accepted promissory and proprietary estoppel as 'species of equitable estoppel.'<sup>28</sup> In extending the fifth principle set out in *Silovi* to include '...the creation or encouragement by the defendant in the plaintiff of an assumption that... *an interest [be] granted to the plaintiff by the defendant...*' Priestley JA expressed support for a unified equitable estoppel.<sup>29</sup> This amendment recognised that an equitable estoppel existed to prevent a defendant from withdrawing from a contract or a promise or from the granting of a proprietary interest where it would be unconscionable.<sup>30</sup>

**Comment [L17]:** Reference to case

<sup>24</sup> Ibid, 428-9.

<sup>25</sup> Ibid 416, 425-7. In *Commonwealth v Clark* [1994] 2 VR 333, Marks J commented (at 339) that after *Waltons Stores*, it was clear that 'promissory estoppel may be pleaded as a cause of action, that is, may be a sword.'

<sup>26</sup> (1989) NSWLR 582, 610 (Priestly JA and Kirby P agreeing) ('*Austotel Investments*').

<sup>27</sup> Ibid (Kirby P and Rogers AJA). Kirby P agreed with Priestley JA in describing the doctrine of equitable estoppel as extending to not only a promise to be fulfilled or contract to be made but also to an *interest granted* by a defendant to a plaintiff.

<sup>28</sup> (1988) 13 NSWLR 466, 472. ('*Silovi*').

<sup>29</sup> (1989) NSWLR 582, 582-3.

<sup>30</sup> Ibid, 610 (emphasis added).

Furthermore, in *W v G*,<sup>31</sup> Hodgson J applied the elements of equitable estoppel and held in favour of the plaintiff mother of two, who had relied upon a promise by her partner that she would support her. In the circumstances the plaintiff suffered the detriment of having to raise two children alone and Hodgson J justified raising an equitable estoppel on the basis that it would be unconscionable of the defendant to refuse to contribute to the cost of raising the children.<sup>32</sup> Similarly in *Gray v National Crime Authority*, Austin J relied upon the judgement of Priestley JA above, to justify an estoppel in favour of the Grays who had relied upon the representation of the Crime Authority in entering into a witness protection program.<sup>33</sup>

**Comment [A18]:** Linking word demonstrates development of argument

In a most recent instance, Brereton J in *Evans v Evans* considered the application of an 'equitable proprietary estoppel' in citing the elements set out by Brennan J in *Waltons Stores* and Priestley JA in *Silovi* as amended in *Austotel Investments*.<sup>34</sup> On appeal this reasoning was agreed upon by Campbell JA evidencing support for the general application of an equitable doctrine of estoppel, finding no necessity in distinguishing the application of promissory and proprietary estoppel.<sup>35</sup>

**Comment [L19]:** Reference to case

The above cases demonstrate that there exists judicial support for a general doctrine of equitable estoppel. In support of the majority in *Waltons Stores*,<sup>36</sup> the view is that 'once the restrictions on the operation of promissory estoppel are lifted' as they were in *Waltons Stores*, 'there is little point in maintaining a distinction between promissory and proprietary estoppel.'<sup>37</sup> However the reasoning of Mason CJ and Wilson J in *Waltons Stores* is not without its critics and in many judgments doubt has been cast over the application of a unified equitable estoppel. This will be discussed in the following section.

#### IV. PROMISSORY ESTOPPEL vs. PROPRIETARY ESTOPPEL

##### A. Relief awarded in estoppel cases casting doubt on judicial support for a unified doctrine

**Comment [L20]:** Reason why the 2 estoppels are different

The High Court in *Waltons Stores* supported a reliance-based measure of relief in order to compensate a claimant for their detrimental reliance. Brennan J observed the basic object of equitable estoppel is to avoid the detriment a promisee would suffer while Mason CJ and Wilson J spoke of the 'minimum equity to do justice.'<sup>38</sup>

**Comment [L21]:** The notion of relief for detrimental outcome

<sup>31</sup> (1996) 20 Fam LR 49.

<sup>32</sup> (1996) 20 Fam LR 49, 66.

<sup>33</sup> [2003] NSWSC 111, 157.

<sup>34</sup> *Evans v Evans* [2010] NSWSC 170, [36]-[41].

<sup>35</sup> *Evans v Evans* [2011] NSWCA 92, [15] (Campbell JA and Giles JA agreed). Other recent decisions in the NSW Court of Appeal which have relied upon Brennan J's six probanda include *Waddell v Waddell* [2012] NSWCA 214 and *BBB Constructions Pty Ltd v Aldi Foods Pty Ltd* [2012] NSWCA 224.

<sup>36</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

<sup>37</sup> Donal Nolan, 'Following in their footsteps: Equitable Estoppel in Australia and the United States' (2000) 11 *Kings College Law Journal* 202, 209.

<sup>38</sup> *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, 421 (Brennan J) and 406 (Mason CJ and Wilson J).

The issue of relief to be awarded in estoppel cases was again raised in *Commonwealth v Verwayen*.<sup>39</sup> The High Court offered disparate views on the issue in this case. Faced with the question of whether an equitable estoppel arose against the Commonwealth which sought to rely on a limitation defence it had initially promised not to raise, the Court had to decide on the nature of the relief. The Court ultimately took the view that fulfilling the respondent's expectation and barring the Commonwealth from relying upon the defence, was the only way to fully compensate the respondent for his loss. Mason CJ, Brennan and McHugh JJ (although in dissent) made their position clear that an equitable estoppel 'would permit a court to do what is required... to avoid detriment... but no more.'<sup>40</sup> Deane and Dawson JJ the only two justices to rely on estoppel ultimately took the view that on the present facts fulfilling the respondent's expectation was most appropriate.<sup>41</sup>

**Comment [A22]:** Note that the legal cases are presented in chronological order

In *Giumelli v Giumelli* the High Court, in awarding relief on the basis of an estoppel arising in relation to an interest in land accepted that in certain circumstances making good the assumption created was necessary.<sup>42</sup> The High Court decided, however that imposing a constructive trust in favour of the son raising the estoppel was not equitable in the circumstances and reasoned that 'the court must look at the circumstances in each case to decide in what way the equity can be satisfied'.<sup>43</sup> In this case the impact on a third party negated the imposition of a constructive trust and the Court awarded instead a monetary sum reflecting the present value of the son's interest in the property.<sup>44</sup> The reasoning of the High Court in *Giumelli* was supported by the NSW Court of Appeal in *DeLaforce v Simpson-Cook* another case dealing with a proprietary interest.<sup>45</sup> Handley AJA noted that 'the Court's natural response is to fulfil the claimant's expectations' and only if those expectations are 'uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered' then a more limited remedy may be appropriate.<sup>46</sup>

It has been argued by academics that the decision of the High Court in *Giumelli* despite advocating an expectation-based remedy did not in fact 'disapprove or qualify' the reasoning of the Court in

**Comment [A23]:** Characteristic of academic writing, the passive voice is used here

<sup>39</sup> *Commonwealth v Verwayen* (1990) 170 CLR 394 ('*Verwayen*').

<sup>40</sup> *Ibid* 412, 422, 501 (Mason CJ, Brennan J and McHugh).

<sup>41</sup> *Ibid* 449, 454 (Deane J and Dawson J).

<sup>42</sup> *Giumelli v Giumelli* (1999) 196 CLR 101.

<sup>43</sup> *Ibid*, 113 (Gleeson CJ, McHugh, Gummow and Callinan JJ) citing *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699, 714. ('*Giumelli*').

<sup>44</sup> *Giumelli v Giumelli* (1999) 196 CLR 101, 113.

<sup>45</sup> *DeLaforce v Simpson-Cook* (2010) 78 NSWLR 483

<sup>46</sup> *Ibid* [69] citing *Jennings v Rice* [2003] 1 P&CR 100, 114 (Walker LJ).

*Verwayen*.<sup>47</sup> As such *Giumelli* is not incompatible with the earlier views set out by the High Court in relation to reliance-based relief.<sup>48</sup> It is necessary to note that *Giumelli* was a case concerned with a proprietary interest and in *Verwayen* while the majority decided upon fulfilling the respondent's expectations this was primarily due to the difficulty in calculating the respondent's reliance loss.<sup>49</sup>

As a result, several academics have come to the conclusion that there appears to be a preference among members of the High Court for reliance-based relief in promissory estoppel cases.<sup>50</sup> However, there is an abundance of evidence suggesting a 'predilection' in cases of promissory estoppel for expectation-based recovery.<sup>51</sup> Robertson argues that a preference for expectation-based relief among Australian judges persists because they 'remain wedded to the idea that [promissory] estoppel is evidentiary in nature, and this "perception of estoppels as preclusionary doctrines has evoked an instinct for expectation relief."<sup>52</sup>

The above academic review on the relief awarded in estoppel cases demonstrates that there is a lack of clarity in relation to the effect of raising promissory estoppel. It is this lack of clarity that negates support for a unified equitable estoppel.

### B. Recent reasoning of the NSW Court of Appeal maintaining a distinction between promissory and proprietary estoppel

In more recent times a greater degree of doubt has been cast on the existence of a unified estoppel and the reasoning of the High Court in *Waltons Stores* and *Verwayen* has been the subject of criticism.

The dicta of the High Court in these cases has been criticised for 'ranging much further than the issues raised by the cases require' and 'for misstating the effect of authority invoked in support' of the application of promissory estoppel as a cause of action.<sup>53</sup>

<sup>47</sup> Michael Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 *Journal of Equity* 131, 132.

<sup>48</sup> Ibid.

<sup>49</sup> Donal Nolan, 'Following in their footsteps: Equitable Estoppel in Australia and the United States' (2000) 11 *Kings College Law Journal* 202, 212.

<sup>50</sup> Andrew Robertson 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805. A main reason for members of the High Court reasoning to limit the relief to the 'minimum equity' to reverse the detriment was to preserve the role of contract law. Limiting the remedy to a reliance-based measure ensures that promissory estoppel does not become an alternative to contract in the enforcement of promises.

<sup>51</sup> Above n 47, 223; Andrew Robertson 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805, 829. In an analysis of 24 cases relying upon promissory estoppel, post *Verwayen*, Robertson found that in all of them an expectation-based measure of relief was awarded.

<sup>52</sup> Ibid 213, citing Andrew Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805, 825.

<sup>53</sup> Above n 45, 131.

**Comment [L24]:** Critical reasoning by the student and reiteration of the argument that the 2 estoppels should not be unified (refer to question)



Furthermore in a decision of the NSW Court of Appeal, Handley AJA a clear proponent of reinstating the traditional distinction between the estoppels has negated the existence of a unified equitable estoppel.<sup>54</sup> In *Saleh v Romanous* a promissory estoppel against the vendors of property arose.<sup>55</sup> The Court of Appeal upheld judgment in favour of the purchaser however in awarding relief. Handley AJA reasoned that a promissory estoppel is 'a restraint on the enforcement of rights and thus, unlike a proprietary estoppel, it must be negative in substance.'<sup>56</sup> As a result the purchasers were not allowed to rescind the contract and recover their deposit on this basis since rescission was a 'positive' remedy and not a 'negative restraint' on the enforcement of rights.<sup>57</sup> The decision in *Saleh v Romanous* maintains that promissory and proprietary estoppel are two distinct doctrines, operating in alternate circumstances with promissory estoppel only conferring rights that are 'positive' in substance.<sup>58</sup>

Having considered the current standing of several academics and recent Court of Appeal authorities negating the existence of a unified equitable estoppel the final point to be made is whether there is any justifiable basis in upholding a unified equitable estoppel.

#### V. PROMISSORY AND PROPRIETARY ESTOPPEL: A Unified Equitable Doctrine?

The fundamental purpose of preventing 'unconscionable' dealings is the cornerstone which unites the doctrines of promissory and proprietary estoppel. However, relying on an abstract notion of 'unconscionability' is an insufficient basis to unify two historical doctrines that prior to *Waltons Stores* were treated as applying to different forms of representations and conferring different forms of rights.<sup>59</sup>

Furthermore one must consider the usefulness of unifying them into a single legal principle applicable in **all** cases. Certain distinctions between the two doctrines still persist. Proprietary estoppel has its basis in claims related to interests in land and is supported by way of encouragement or by way of acquiescence. These two streams of proprietary

<sup>54</sup> *Saleh & Anor v Romanous & Anor* [2010] NSWCA 274. <sup>55</sup>

*Saleh & Anor v Romanous & Anor* [2010] NSWCA 274. <sup>56</sup>  
Ibid [74].

<sup>57</sup> Ibid [83]. The purchaser ultimately recovered their deposit pursuant to s55(2A) of the *Conveyancing Act 1919* (NSW).

<sup>58</sup> Handley AJA reasserted this position in *DHJM Pty Ltd v Blackthorne Resources* [2011] NSWCA 348.

<sup>59</sup> *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324 where the High Court expressed its view that merely basing an action on the notion of unconscionability could not in itself satisfy the application of equitable doctrines which will only apply 'by reference to well developed principles.' Furthermore in an analysis of the present application of proprietary estoppel, Handley AJA concluded in relation to promissory and proprietary estoppel that 'the different forms of estoppel have different elements, they operate differently and they have different results' and establishing an element of unconscionability was not necessary in all cases: KR Handley, 'Further thoughts on proprietary estoppel' (2010) 84 *Australian Law Journal* 239, 243.

estoppel in themselves differ in how they are applied.<sup>60</sup> Cooke also notes an 'irreducible' difference between these two estoppels in relation to the requirement of reliance.<sup>61</sup> For promissory estoppel reliance need not be detrimental as evident in cases such as *High Trees* and *Hughes v Metropolitan Railway* where reliance on the promise made did not create immediate detriment to the applicant.<sup>62</sup> Also in relation to the representation made, a promissory estoppel requires that the representation be clear and unambiguous,<sup>63</sup> while this is arguably not necessary for proprietary estoppel.<sup>64</sup>

It is apparent then, that there is no clear authority for the operation of promissory estoppel as an independent cause of action, nor is there any practical utility for merging the doctrines which retain distinct characteristics in terms of their application and the relief granted.<sup>65</sup>

**Comment [L25]:** Restates the position of the writer in relation to the question

## VI. CONCLUSION

Australia's leading cases of the High Court and Court of Appeal contain an array of judgements 'cast in differing terminology and little concerned to present a coherent picture of the law.'<sup>66</sup> Judicial support for a unified equitable estoppel originated as a result of the decision in *Waltons Stores*. However the doctrine in that case was explained in such general terms and supported merely with the object of preventing unconscionable conduct, that its application as a hard and fast principle of law was undermined. In recent decisions, it is evident that the influence of traditional estoppel reasoning, maintaining a distinction between the way the two doctrines operate is considerable.<sup>67</sup> Therefore it can be concluded that 'signs from the higher judiciary must be clear' if the formation of a unified equitable estoppel doctrine 'limited in its aim to the elimination of detriment is to take firm root' in Australia.<sup>68</sup>

**Comment [L26]:** Context of why the question around unifying the estoppels has arisen

**Comment [L27]:** Context of recent legal decisions highlighting need for separation

<sup>60</sup> See *Willmott v Barber* (1880) 15 Ch D 96, 105 (Fry J); *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 152 (Oliver J).

<sup>61</sup> Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford University Press, 2000) 64-5; *Grundt v Great Boulder Pty Gold Mines Ltd* (1938) 59 CLR 641, 674-5.

<sup>62</sup> *Hughes v Metropolitan Railway* (1877) 2 App Cas 439; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130.

<sup>63</sup> *Legione v Hateley* (1982) 152 CLR 406, 435-6.

<sup>64</sup> *Gillett v Holt* [2001] Ch 210 CA, 226.

<sup>65</sup> Perhaps, in the alternate, it may be suggested that the doctrine of proprietary estoppel extending beyond the realms of real property to personal property may at some point subsume the doctrine of promissory estoppel: Michael Bryan, 'Almost 25 years on: some reflections on *Waltons v Maher*' (2012) 6 *Journal of Equity* 131, 132.

<sup>66</sup> Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing, 1999) 17.

<sup>67</sup> The early decisions on estoppel in *Jordan v Money* (1854) 10 ER 868; *Hughes v Metropolitan Railway* (1877) 2 App Cas 439 and *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 remain authority in England. These cases were decided in accordance with the need to preserve the operation of contract law. In light of recent decisions in Australian case law they also remain considerably persuasive despite the reasoning of the majority in *Waltons Stores*.

<sup>68</sup> Donal Nolan, 'Following in their footsteps: Equitable Estoppel in Australia and the United States' (2000) 11 *Kings College Law Journal* 202, 213.

**Comment [A28]:** Correct footnotes

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**Comment [A29]:** Correctly referenced according to *The Australian Guide to Legal Citation*.

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