Estoppel by Convention and the Sanctity of Contract

Thirty years ago, commercial litigation under the common law was conducted without reference to a doctrine of "estoppel by convention"[1].

The modern doctrine of estoppel by convention was first judicially recognized by the English Court of Appeal in 1981 in ***Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank*** (*"the Texas Bank Case"*)[2].

Since then, it has been raised or discussed in about 400 decided cases in Australia and 300 decided cases in England.

Since 2007, it has received consideration at appellate level in Australia on more than seven occasions[3].

The main attraction of the doctrine is its utility in overcoming unexpected, technical deficiencies which may come to light in the course of a transaction.

This is illustrated by the *Texas Bank* case itself.

In that case, the technical deficiency arose from a late change to a lending transaction. The loan was originally to be from a bank to a borrower, secured by a guarantee from the borrower's parent company to the bank. The guarantee was executed on this basis. However, a late change to the structure of the transaction then occurred, so that the loan was in fact made by a *subsidiary* of the bank to the borrower. The legal implications of this change appear to have gone unnoticed. All parties assumed in their dealings with each other that the guarantee secured the loan, and dealings proceeded for some years on this basis.

On an orthodox approach to this problem, these circumstances presented a number of legal obstacles to the bank. Rectification was not available, because there was no mistake operative at the time the guarantee was executed. A contractual variation could not be established, because of the requirement for writing. Established forms of estoppel did not appear to be available because there was no clear and unequivocal representation or promise from the guarantor.

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1 The first judicial mention of an "estoppel by convention" or a "conventional estoppel" is to be found in the 1979 decision of Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133n.

2 [1982] QB 84. See *Kvaerner Construction Ltd v Eggar (Barony) Ltd* (unreported, QBD (TCC), 20 July 2000) at [146].

3 *W & R Pty Ltd v Birdseye* [2008] SASC 321 (FC) (special leave refused; [2009] HCA Trans 79); *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA); *Attorney-General of the Australian Capital Territory v Eastman* (2008) 163 ACTR 46 (CA); *J C Equipment Hire Pty Ltd v The Registrar of the Workers Compensation Commission of NSW* (2008) 70 NSWLR 704 (CA); *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) (special leave refused: [2008] HCA Trans 211); *Queensland Alumina Ltd v Alinta DQP Pty Ltd* [2007] QCA 387 (special leave refused: [2008] HCA Trans 125) and *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 (CA) (special leave refused: [2007] HCA Trans 698).

In the Court of Appeal[4], these obstacles were overcome through the recognition of an estoppel[5] arising from the common assumption which the parties had acted upon in the transaction. As Lord Denning MR put it:

> If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it - on the faith of which each of them - to the knowledge of the other - acts and conducts their mutual affairs - they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. ..They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract - when it would be inequitable to do so, having regard to dealings which have taken place between the parties.[6]

This doctrine can operate to protect the expectations of parties in the same way as the equitable doctrine of rectification. It can operate to hold parties to the transaction which they *believed* they were making - rather than holding them to an objective reading of the contractual terms they chose.

However, the doctrine of estoppel by convention is much wider in its operation than the doctrine of rectification. It is not limited in its operation to relationships formed by written instruments, or even by contracts. It is not limited to common assumptions formed *prior* to a transaction being entered into. It is not limited to mistakes concerning the *recording* of the transaction in an instrument.

Within certain limits, the doctrine can apply to any common assumptions of fact or law made at any time in any legal relationship.

It is this potential width of the doctrine – and its ability to outflank some of the most fundamental elements of the law of contract - which has caused concern and divergence in the authorities.

One of the key themes in the law of contract is the respect it accords to the written agreement. This is reflected in the parol evidence rule, in the objective approach to questions of construction and in the narrow scope of the doctrine of rectification.

In four distinct ways, this approach encourages certainty and stability in legal relations.

First, it assists parties to produce a permanent and certain record of their transaction. The importance of this is obvious to any practicing lawyer. When disputes between

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4 The trial judge was Goff J, who explained his reluctance to accept the submission based on an "estoppel by convention" in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 40.

5 Although the same result was reached through a generous construction of the guarantee.

6 [1982] QB 84 at 121. This statement of principle continues to be influential in this doctrine: eg *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65 (CA) at [197]; *Super 1000 v Pacific General Securities* (2008) 221 FLR 427 (White J) at [174].

commercial parties arise, the usual starting point is to identify the terms of any relevant agreement. If the terms are wholly in writing, then this issue is readily resolved. If they are not, then one must seek to find the relevant witnesses. They may be dead. They may no longer work with the contracting party. They may be disaffected. If they can be found, then the passage of time is almost certain to have dimmed their memory. Even without the passage of time, they cannot be expected to recall the precise words which the parties used. In any event, their recollection is likely to provide only one perspective on the relevant events. Legal rules which respect the integrity of written agreements allow parties to document their arrangements so as to avoid this pitfall. As McLelland J observed in ***Johnson Matthey Ltd v AC Rochester Overseas Corp*** [7]***:***

> It would be a serious threat to the stability of commercial relationships and dealings if parties who, after lengthy and intricate negotiations, deliberately recorded their agreement in permanent written form, were subject to the risk of having that permanent written record yield to the inherently less reliable evidence of oral statements made during the course of negotiation, given possibly many years after the event when witnesses may have become unavailable, and when memories may have faded or become distorted by subsequent occurrences and changing perceptions of self-interest.

Secondly, the written agreement provides a mechanism for the parties to easily distinguish between the terms which they are prepared to agree upon – with a consequential allocation of risk – and those matters which are not agreed[8]. This is important tool for parties engaged in negotiation. During the early phases of negotiation, it is common for a range of issues to be discussed to the point where only broad consensus is reached. But not all these issues will find their way into a written agreement. Parties may choose to have a speedy commitment upon key terms which can be agreed, rather than risk the loss of a transaction by negotiating in detail about more contentious matters. They are prepared to take the risk of *not* agreeing everything which might be agreed. Legal rules which respect the integrity of written agreements allow parties to clearly understand which risks have been accepted and which have not. As Miles CJ observed in ***Skywest Aviation Pty Ltd v Commonwealth of Australia***[9]:

> Further and, again as observed by Mason J in *Codelfa* at 346, in many cases what the parties have actually recorded as their agreement does represent a totality of their willingness to agree; each may be prepared to take a chance in relation to an eventuality which is in contemplation but about which consensus is not reached and for which no provision is made. In such cases, and, in my view, the present case is one of them, the scope of negotiations and discussions may include reference to some possible eventuality not provided for in the contract, for each party shrinks from seeking to reach express agreement with the other on

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7 (1990) 23 NSWLR 190. And see *Skywest Aviation Pty Ltd v Commonwealth of Australia* (1995) 126 FLR 61; *Australian Co-operative Foods Ltd v Norco Co-operative Ltd* (1999) 46 NSWLR 267; *C.G. Mal Pty Ltd v Sanyo Office Machines Pty Ltd* [2001] NSWSC 445; and *Arnot v Hill-Douglas* [2006] NSWSC 429 at [78]–[80], [87].

8 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 346.

9 (1995) 126 FLR 61.

> how their contractual relationship should address such eventuality. Either one may be prepared to "take his chance", as Mason J put it, as to the effect of the contract, if any, should the eventuality occur.

Thirdly, the written agreement facilitates the efficient performance of the contract. Parties who are seeking to perform their contractual obligations can do so at lower cost, delay and risk if they can rely upon an objective reading of the written charter of their rights and obligations.

Fourthly, the written agreement facilitates the speedy resolution of any dispute between parties. If the main issue between parties is the interpretation of a written agreement, then it may be resolved by expert determination or application to the court. To the extent that obligations fall to be determined by reference to the subjective beliefs of the parties to negotiations, then commercial relations can become unworkable whilst lengthy litigation is conducted. As Kirby P observed in ***State Rail Authority of New South Wales v Heath Outdoor Pty Ltd***[10]*:*

> Too great a willingness by the courts to discern, in pre-contract negotiations, a basis for estoppel will have the effect of introducing a serious element of uncertainty into our law of contract. It may also encourage expensive litigation in which the terms of the writing are put to one side and the courts busily engaged ... in a minute examination of the wilderness of pre-contract conversations. This may be a reason, at least in the case of written contracts which are accepted by the parties and are not varied or elaborated, to hold the parties to the applicable terms of such contracts and to limit carefully the development of the law of estoppel, lest it seriously undermine the adherence to bargains which are such an important feature of modern economic life.

In seeking to strike an appropriate balance between the sanctity of contractual relations and the concern to protect parties against unconscionable conduct, the courts are diverging in their approach to the modern doctrine of estoppel by convention.

This divergence exists, even at appellate level, about fundamental elements of this doctrine.

The principal purpose of this paper is to examine, particularly by reference to recent authorities in Australia, the present state of development of this doctrine and the issues which remain unresolved.[11]

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10 (1986) 7 NSWLR 170 at 177. And see *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194 (CA) at [113].

11 Valuable textbook accounts of this doctrine are to be found in KR Handley *Estoppel by Conduct and Election* (2006) Ch.8; P. Feltham, D. Hochberg and T. Leech *Spencer Bower the Law Relating to Estoppel by Representation* (4th Ed, 2004) Ch VIII; S. Wilken *The Law of Waiver Variation and Estoppel* (2nd Ed, 2002) Ch.10.

§1 History and Structure

(1) The modern doctrine of estoppel by convention is of relatively recent origin – being first clearly recognized by the courts in England in the 1980s.

(2) The doctrine has since been adopted, in broadly similar terms, by the highest appellate courts in numerous common law jurisdictions, including Australia, Canada, England and New Zealand.

(3) The doctrine operates where parties have adopted a common assumption about a state of affairs as the basis for their legal relationship. Parties to this relationship will not generally be permitted to depart from the assumption if to do so would cause detriment to another party who relied upon it.

(4) The doctrine does not give rise to a separate cause of action – but operates to preclude unconscionable departure from any such assumption.

(5) The doctrine is applied as a distinct form of common law estoppel.

(6) Whilst the doctrine has not yet been subsumed into any broader, unified doctrine of estoppel, a process of cross-fertilization has led to many doctrinal rules being imported from various other categories of estoppel.

(7) This doctrine is properly regarded as distinct from the older doctrines of estoppel arising by deed, agreement or from various legal relationships (eg bailment). These older doctrines do not depend upon proof of a subjective assumption which has been relied upon to the detriment of the party asserting the estoppel.

Historical Origins

The term "*estoppel by convention*" was first coined in 1977[12].

Previous authority had recognised that an estoppel could arise if parties had *agreed* to be bound by an assumed state of facts[13]. An influential statement of principle from this period was the observation of Lord Blackburn in his ***Treatise on the effect of the Contract of Sale***[14]:

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12 The term appears to have been coined by Sir Alexander Turner in *Spencer Bower and Turner The Law Relating to Estoppel by Representation* (3rd Ed., 1977) at 157.

13 The application of estoppel to statements in deeds arose from before the time of Lord Coke: Co.Litt 352a; *Horton v The Westminster Improvement Commissioners* (1852) 7 Ex 780; 115 ER 1165, 1170. The application of estoppel to simple agreements was recognised by the 19th century: eg *Ashpitel v Bryan* (1864) 5 B & S 723; 122 ER 999, 1001 (Ex Ch). And see Cababe *Principles of Estoppel* (1888), Ch.1 "*Estoppel by Agreement*".

14 (2nd Ed, 1887) at 139. Quoted and applied in *M'Cance v London and North Western Railway Company* (1864) 3 H & C 343; 159 ER 563, 564 (Ex Ch), *Knights v Wiffen* (1870) LR 5 QB 660, 666 and *Dabbs v Seaman* (1925) 36 CLR 538, 549.

> when parties have agreed to act on an assumed state of facts, their rights between themselves are justly made to depend upon the conventional state of facts, and not upon the truth. [emphasis added]

Notions of *implied agreement* were also used to explain a number of established categories of estoppel which arose from particular legal relationships (eg. bailment[15]).

However, it is difficult to find any authority from this period where an estoppel was held to arise not from agreement, whether express or implied, but from the common subjective assumptions of the parties. No such category of estoppel is recognized in the texts of this period[16].

In this context, two decisions of Dixon J in the High Court of Australia in the 1930s[17] proved influential.

In 1933, in ***Thompson v Palmer***[18], the following much-quoted passage appears:

> The object of estoppel *in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment. 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, such as bailment; 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. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted. [emphasis added]

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15 An incident of the relationship of bailment is that a bailee is estopped from denying the title of the bailor to the chattels which are the subject of the bailment: *Biddle v Bond* (1865) 6 B & S 225; 122 ER 1179, 1181-2. A similar doctrine applies between landlord and tenant and between indorsers and indorsees of bills of exchange. See the 19th century analysis of this category of case in Cababe *supra* at 29.

16 See, eg, from the 1920s and 1930s, *Halsburys Laws of England (2nd Ed)* 1934, Vol.13 "Estoppel"; G. Spencer. Bower *The Law Relating to Estoppel by Representation* (1st Ed, 1923).

17 *Unruh v Seeberger* [2007] HKCFA 9 at [129]. These judgments continue to be influential in relation to this estoppel: eg *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [157]; *W & R Pty Ltd v Birdseye* [2008] SASC 321 (FC) at [49].

18 (1933) 49 CLR 507 at 547.

In its own era, this judgment does not appear to have been regarded as articulating any new category of estoppel. This is understandable when one considers the explanation which Dixon J himself provided shortly afterwards in ***Grundt v Great Boulder Proprietary Gold Mines Ltd***[19]. In that judgment, the "*conventional basis*" category of case was explained by reference to familiar authorities, where the very nature of the transaction had been regarded as involving an implied agreement as to the relevant matters[20]. There was no suggestion that a "*convention*" for this purpose could arise from a common, subjective assumption of the parties.

In 1977, these judgments of Dixon J provided the principal foundation for the "*estoppel by convention*" first described by Sir Alexander Turner[21]. The doctrine which he described was intended to embrace the existing doctrines of estoppel by deed, estoppel by agreement and the various estoppels arising from relationships such as bailment. In a passage which has been frequently quoted and considered, he observed:

> This form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed[22]. [emphasis added]

Subsequent authorities have taken issue with many aspects of this definition[23].

However, it was this attempt to describe a doctrine of estoppel by convention which prompted the English Court of Appeal in the *Texas Bank* case to first articulate the doctrine in its modern form[24].

Recognition and Definition

The modern doctrine of estoppel by convention, as articulated in the *Texas Bank* case, has since been recognized by the highest appellate courts in a number of common law jurisdictions. Each of these formulations, in its own way, seeks to strike a balance between retaining flexibility in the doctrine, and confining the doctrine to defined elements.[25]

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19 (1937) 59 CLR 641 at 675-677.

20 See, eg, the discussion of an indorser of a promissory note being estopped by his implied agreement that the note had been issued and indorsed in good order (at 677).

21 *Spencer Bower and Turner The Law Relating to Estoppel by Representation* (3rd Ed, 1977), Chapter 8.

22 Ibid at 157.

23 eg. *Norwegian American Cruises v Paul Mundy Ltd (the 'Vistafjord')* [1988] 2 Lloyd's Rep 343 (CA) at 351-2.

24 *Kenneth Allison Ltd v A.E. Limehouse & Co* [1992] 2 AC 105 (HC) at 127; *Durham v BAI (Run Off) Ltd* [2008] EWHC 2692 (QB).

25 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at 183-4.

In 1985, a unanimous decision of the High Court of Australia recognized the doctrine in ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd***[26] in the following terms[27]:

> Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted on by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying. The existence of an estoppel based on a convention between the parties has often been recognized: *Thompson v Palmer* (1933) 49 CLR 507, at p 547; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, at pp 657, 675–677; *Legione v Hateley* (1983) 152 CLR 406 ; 46 ALR 1, at pp 430–431; *Amalgamated Investment & Property Co Ltd (In liq.) v Texas Commerce International Bank Ltd* [1982] QB 84, at pp 121, 126, 130–131; Spencer Bower and Turner, *Estoppel by Representation* 3rd ed (1977), pp 157–177.But in our opinion the doctrine has no application to the present case for two reasons. First, there is no estoppel unless it can be shown that the alleged assumption has in fact been adopted by the parties as the conventional basis of their relationship: *Dabbs v Seaman* (1925) 36 CLR 538 at 549. In the absence of proof of custom, there is no evidence that the parties adopted the alleged assumption. Secondly, just as estoppel by representation requires a representation of fact, so too estoppel by convention requires the assumed state of affairs to be an assumed state of fact: *Greer v Kettle* [1938] AC 156 at 170; Spencer Bower and Turner: *Estoppel by Representation* (1977) 3rd ed, at 167–8. The state of affairs relied on by Con-Stan is that the parties conducted their business relationship on the basis that the broker was alone liable to the insurer for the premiums. That is clearly an assumption as to the legal effect of their conduct, and not an assumption of fact. The submission with respect to estoppel accordingly fails.

This remains the only clear statement of a majority of the High Court in relation to this doctrine[28], although its requirement that the assumption be of "fact" has since been characterised as dicta and interpreted broadly.[29]

In 1993, a unanimous decision of the New Zealand Court of Appeal recognized the doctrine in ***National Westminster Finance NZ Ltd v National Bank of NZ Ltd***[30] in the following terms:

> The authorities show that for an estoppel by convention to arise the following points must be established by the party claiming the benefit of the estoppel (the proponent):

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26 (1985) 160 CLR 226 at 244–5

27 This formulation of the doctrine, insofar as it is confined to matters of fact, has been substantially qualified by subsequent authorities. Subject to this qualification, however, it continues to be quoted with approval, eg, *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [56].

28 The doctrine has been discussed in passing by individual members of the Court in a number of cases including *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* (2007) 235 CLR 1 at [8]-[9]. However, the joint judgment of the Court in *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at [58] provides the only glimpse into the Court's current approach.

29 See below at §4.

30 [1996] 1 NZLR 548n at 550.

(1) The parties have proceeded on the basis of an underlying assumption of fact, law, or both, of sufficient certainty to be enforceable (the assumption).
(2) Each party has, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction.
(3) Such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.
(4) The proponent was entitled to act and has, as the other party knew or intended, acted in reliance upon the assumption being regarded as true and binding.
(5) The proponent would suffer detriment if the other party were allowed to resile or depart from the assumption.
(6) In all the circumstances it would be unconscionable to allow the other party to resile or depart from the assumption.

Subject to a qualification about the extension of the doctrine to matters of law, this statement of principle has been indorsed at appellate level in Australia[31].

In 1997, a unanimous judgment of the House of Lords recognized the doctrine in ***Republic of India v India Steamship Co Ltd (No.2)***[32] in the following terms:

> It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: *K.Lokumal & Sons (London) Ltd v. Lotte Shipping Co Pte Ltd* [1985] 2 Lloyd's Rep 28; *Norwegian American Cruises A/S v. Paul Mundy Ltd* [1988] 2 Lloyd's Rep 343; *Treitel, The Law of Contract,* 9th Ed (1995), pp 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.

This formulation has also been quoted with approval at appellate level in Australia[33].

In 2005, a unanimous judgment of the Supreme Court of Canada recognized the doctrine in ***Ryan v Moore***[34] in the following terms:

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31 *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [164]; *Attorney-General of the Australian Capital Territory v Eastman* (2008) 163 ACTR 46 (CA) at [42]. And see *GEC Marconi Systems Pty Ltd v BNP Information Technology Pty Ltd* (2003) 128 FCR 1 (Finn J) at [426]; *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2008] VSC 143 (Robson J) at [202].

32 [1998] AC 878, 913

33 Eg, in *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 (CA) at 645.

34 [2005] 2 SCR 53 at [59]. This decision has not yet been considered by Australian or English courts.

After having reviewed the jurisprudence in the United Kingdom and Canada as well as academic comments on the subject, I am of the view that the following criteria form the basis of the doctrine of estoppel by convention:

(1) The parties' dealings must have been based on a shared understanding of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).

(2) A party must have conducted itself, ie acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.

(3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile form the assumption since there has been a change from the presumed position.

In 2007, a unanimous judgment of the Court of Final Appeal of Hong Kong recognized the doctrine in ***Unruh v Seeberger***[35]. This judgment adopted the general statement of principle from the *Republic of India* case and then carefully considered points of uncertainty in each of the elements of the doctrine in turn.

An examination of these various definitions identifies a number of areas of controversy. Does the doctrine arise from assumptions of fact or law? Must the parties subjectively share the same assumption? Is there a need for some objective manifestation of this assumption? Must the assumption be held or expressed with some degree of clarity or certainty? Is there a need for detrimental reliance? Is there some additional element of unconscionability? As appears from the analysis which follows, only some of these issues have been resolved.

Not a Cause of Action

Estoppel by convention is not itself a cause of action. It operates to preclude another party from asserting a particular state of affairs[36].

This characteristic of the estoppel has led to it being described as a "*shield but not a sword*"[37]. Whilst this maxim provides an evocative metaphor, it does not assist in resolving some fundamental questions about the remedy[38]. Just how extensively can this estoppel be used to modify rights? Is it merely defensive (as suggested by Eveleigh LJ in *Texas Bank*) or can it be used as principal *element* of a cause of action (as suggested by Denning MR and Brandon LJ)? Can an action for breach of contract be founded upon a particular *meaning* of a clause which only arises by estoppel? Can an action for breach of contract be pleaded against a *non-party*

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35 (2007) 10 HKCFAR 31. The Court included a former member of the High Court of Australia, Justice McHugh. This decision has not yet been considered in Australian courts.

36 *Unruh v Seeberger* [2007] HKCFA 9 at [153]; *The Bell Group Ltd (In Liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239 (Owen J) at [3458].

37 *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank* [1982] QB 84 (CA) at 131.

38 *Unruh v Seeberger* [2007] HKCFA 9 at [151].

through use of the estoppel? Can an action for breach of contract be based upon a contract which only *exists* by reason of an estoppel? Again, the resolution of some of these questions remains a topic of controversy in the authorities.

Common Law Estoppel

Estoppel by convention, together with estoppel by deed and estoppel by representation, are commonly characterised as common law estoppels[39]. This characterization is important because of the differences in remedy which are recognized between common law and equitable estoppels.

Rejection of Unification

In the 1980s and early 1990s, a substantial body of authority in both England and Australia suggested that the various forms of estoppel by conduct should be subsumed within one over-arching doctrine. In England, this approach was championed by Lord Denning MR[40]. In Australia, it received some measure of support in the High Court[41].

For the present time, at least, this approach has lost its impetus.

In Australia, the High Court has indicated that the law of estoppel should at present be approached as comprising separate doctrines[42]. A similar approach has been taken in other common law jurisdictions[43].

This is not to say that the doctrinal rules within other estoppels have been ignored in the development of estoppel by convention. There has been substantial cross-fertilization of concepts and doctrinal rules amongst the various estoppels[44], which has proved valuable in the development of estoppel by convention.

Distinct from Older Estoppels

For historical reasons, the development of estoppel by convention owes much to older forms of estoppel (eg. estoppel by deed and agreement).

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39 *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [78]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3515]; *Unruh v Seeberger* [2007] HKCFA 9 at [139], [151] ff; *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [444].

40 *Texas Bank Case* [1982] QB 84 (CA) at 122; *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 50.

41 eg *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 409-413, 440, 445.

42 *Giumelli v Giumelli* (1999) 196 CLR 101 at [7]. And see *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3456].

43 *Unruh v Seeberger* [2007] HKCFA 9 [126]; *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878 (HC) at 914; *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 39-41; *First National Bank plc v Thompson* [1996] Ch 231, 236.

44 As to the sharing of concepts between the estoppels, see: *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637 (FFC) at 653; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3457].

In some authorities, this connection has been taken further, with the suggestion being made that various older forms of estoppel should properly be regarded as particular forms of estoppel by convention[45].

This would seem to be an unhelpful generalization, because the elements of these various doctrines are so different.

Estoppels by deed and agreement arise simply upon execution of the relevant deed or agreement[46]. They do not involve any enquiry into questions of assumption, reliance or detriment[47]. It is because of this that these doctrines have distinct limits which are unique to them (eg. the requirement for precision[48], the special treatment of receipt clauses[49]).

Various other estoppels arise from particular transactions (eg. in the law of landlord and tenant, bailment and negotiable instruments), as incidents of the particular legal relationships. They do not depend upon deed or contract. They do not depend upon the actual assumptions, reliance or detriment of any party.[50]

For these reasons, these doctrines are best treated distinctly from the modern doctrine of estoppel by convention.

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§2 Common Assumption – The Subjective Elements

(1) An estoppel by convention arises where the parties to a legal relationship, or a proposed legal relationship, adopt a common assumption about some state of affairs relevant to the relationship.

(2) A "common assumption" for this purpose comprises both subjective and objective elements. The subjective elements are as follows.

(3) *First*, the party asserting the estoppel must have adopted an assumption as to the terms governing its legal relationship with the other relevant parties.

(4) *Secondly*, the party asserting the estoppel must have believed that all other relevant parties to the transaction were proceeding on the same assumption.

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45 *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527 at [189]; *Slan v Edgerly* [2008] NSWSC 1316.

46 *Greer v Kettle* [1938] AC 156; *Dong v Monkiro Pty Ltd* [2005] NSWSC 749 at [70]; *Peekey Intermark Ltd v Australian and New Zealand Banking Group Ltd* [2006] EWCA Civ. 386 at [56]-[61]; *JP Morgan Chase Bank v Springwell Navigation Corporation* [2008] EWHC 1186 (Comm) at [557].

47 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [148]-[149].

48 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [149], [155].

49 *Peterson v Maloney* (1951) 84 CLR 91, 100.

50 *Maynegrain Pty Ltd v Compafina Bank* [1982] 2 NSWLR 141 (CA) at 148.

(5) *Thirdly,* it seems, the party asserting the estoppel must have been caused to either form or maintain these beliefs by reason of the conduct (including silence) of the party to be estopped.

(6) *Fourthly,* the other relevant parties to the transaction must have either:

(a) shared these beliefs and (it seems) knew or intended that they would be relied upon by the other relevant parties to the transaction; or

(b) acquiesced in these beliefs being adopted and relied upon by the party seeking to raise the estoppel; or

(c) (it seems) shared these beliefs in circumstances where a reasonable person in their position should have appreciated that they would be relied upon by the other relevant parties to the transaction.

Common Assumption

The fundamental element of an estoppel by convention is the existence of a common or conventional assumption shared by all parties to a relevant legal relationship or proposed legal relationship[51]. They must be " of a like mind"[52].

Most discussions of the doctrine of estoppel by convention are concerned with transactions involving only two parties.

However, as English authorities dealing with the rules governing pension funds have now established, the doctrine is capable of extending to multi-party transactions[53]. In this category of case, there is a particular difficulty in establishing the requisite elements of the common assumption amongst all parties to the transaction affected by the estoppel[54]. There is also a difficulty in withdrawing from a convention of this kind without the consent of all.[55]

A shared assumption comprises both subjective and objective elements. The subjective elements are considered below.

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51 *Unruh v Seeberger* [2007] HKCFA 9 at [133].

52 *Troop v Gibson* [1986] 1 EGLR 1.

53 *Foster Wheeler Ltd v Hanley* [2008] EWHC 2926 (Ch) at [83] ff; *Trustee Solutions Limited v Dubery* [2006] EWHC 1426 (Ch); *Redrow plc v Pedley* [2002] EWHC 983; *Icarus (Hertford) Ltd v Driscoll* [1990] PLR 1; *ITN v Ward* [1997] PLR 131; *Lansing Linde v Alber* [2000] PLR 15.

54 eg *Mulherin v Bank of Western Australia* [2006] QCA 175 at [2]; *Redrow plc v Pedley* [2002] EWHC 983 at [61]ff. *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* [2007] NSWSC 676 (Young CJ in Eq) at [134]ff.

55 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [218]ff.

Assumption About Basis of Transaction

First, the party asserting the estoppel must have formed an assumption concerning the terms of its legal relationship with other parties[56].

The nature of the assumption is not merely that some fact or state of affairs exists, but that this state of affairs *governs* the legal position between them[57].

This is an important control on the operation of the doctrine, and aligns it closely with the elements required to establish a claim for rectification.

The assumption need not have been induced, in the first instance, by the conduct of other parties. It may have been initiated by a self-induced mistake[58].

The assumption need not be a belief in the *truth* of particular matters. It is enough if the assumption adopted is that the transaction is proceeding on the *basis* that those matters are true[59].

The proof of this element usually requires a proponent of the estoppel to establish this intention by direct evidence of the person who held the relevant assumption[60].

Belief that Assumption Shared

Secondly, the party asserting the estoppel must have believed that all other parties to the transaction accepted the same assumption as governing the legal position between them[61]. They must be "fully cognizant" of the shared assumption[62].

Minor differences in the assumptions held by parties are not necessarily fatal. The matter is to be tested by examining the substance of the matter[63].

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56 *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 (CA) at [200]. And see *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300 (Brereton J) at [83]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3517].

57 *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [164].

58 *Unruh v Seeberger* [2007] HKCFA 9 at [134]; *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [459]ff..

59 *Unruh* v Seeberger [2007] HKCFA 9 at [136]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 (CQ) at [195].

60 *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA).

61 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 584n at 550; Alpha *Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [164]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [200]. See *Towry Law v Chubb Insurance* [2008] NSWSC 1352 (McDougall JJ) at [212]; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300 (Brereton J) at [83]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3517].

62 *Durham v BAI (Run Off) Ltd* [2008] EWHC 2692 (QB) at [268].

63 *Mulherin v Bank of Western Australia* [2006] QCA 175 at [73].

Belief Caused by Conduct of Other Parties

It is clear from the authorities that the individual, undisclosed assumptions of parties to a transaction are insufficient to constitute a "common assumption". There must be a sufficient objective manifestation of that assumption[64].

Again, this requirement reflects a similar element to a claim for rectification. It controls the ability of parties to make baseless allegations by requiring some contemporaneous, objective manifestation of the assumption relied upon

What is unclear is whether that objective conduct must have a *causal* effect, in inducing the party relying upon the estoppel to form or maintain the relevant assumption.

This question was considered by the English Court of Appeal, shortly after the *Texas Bank* case was decided, in ***K. Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd ("the August Leonhardt")***[65]. In that case, which concerned a common, but uncommunicated assumption, it was held that:

> Similarly, in cases of so-called estoppel by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. The alleged representor's participation in this conduct can then be relied upon by the representee as a basis for this form of estoppel ... There cannot be any estoppel unless the alleged representor has said or done something, or failed to do something, with the result that – across the line between the parties – his action or inaction has produced some belief or expectation in the mind of the alleged representee, so that, depending on the circumstances, it would thereafter no longer be right to allow the alleged representee to resile by challenging the belief or expectation which he has engendered.

Whilst this statement continues to be quoted with apparent approval at appellate level in England[66], the courts have also noted that the definition adopted by the House of Lords in *Republic of India v India Steamship Co Ltd (No 2)*[67] only appears to require reliance on a *shared assumption*. If this requirement is satisfied, no requirement of reliance upon the *communications* may be necessary[68].

A similar uncertainty is to be found in the Australian authorities.

In ***Moratic Pty Ltd v Gordon***[69], it was held that:

> ...there is no requirement that either have induced, or acquiesced in, the adoption of the assumption by the other; and in particular there is no requirement that either know that the other may incur detriment by reliance on the assumption. To the contrary - since the assumption is one common to both parties, and may

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64 See below at §3.
65 [1985] 2 Lloyds Rep 28 (CA) at 34-35.
66 eg *Hillingdon Borough Council v ARC Limited* (Eng CA, 16 June 2000, unreported at [50]).
67 [1988] AC 878 (HC).
68 *Smith Kline Beecham v Apotex Europe* [2006] 4 All ER 1078 (CA) at [124].
69 (2007) 13 BPR 24,713 (Brereton J) at [37].

> involve a mistaken interpretation of the contract - the possibility that either party might incur detriment by reliance on it will usually not occur to the other.

A similar view appears to have been accepted by the Victorian Court of Appeal[70] and has found some support from the Queensland Court of Appeal[71]. The absence of a requirement that the assumption be caused by other parties is also apparent from the formulation of the doctrine in other authorities[72].

There is, however, a substantial body of contrary authority[73]. In particular, the Full Court of South Australia in ***W & R Pty Ltd v Birdseye*** recently held that[74]:

> Further, the person to be estopped must have contributed in some way to the creation or continuation of the assumption so as to make it unconscionable for that party to depart from the understood basis of dealing between the parties.

An unusual case which turned on this issue was ***Public Trustee v Smith***[75]. In that case, the common assumption was said to have arisen between a deceased person (Dr Ward) and the company which she controlled (Helen Ward Nominees Pty Ltd). Whilst the Court was satisfied that each proceeded upon the same relevant assumptions, the estoppel was not established:

> "I do not consider that anything that Dr Ward did or failed to do was the result of any action or inaction on the part of Helen Ward Nominees, or that Helen Ward Nominees knew or intended that Dr Ward should act on that basis. Helen Ward Nominees gave no thought to the basis on which Dr Ward should act."[76]

Assumption by Other Parties

In general, it is necessary that these various assumptions be held by all parties to the transaction. Again, these assumptions may all have originated in self-induced mistakes[77].

All parties must share the same assumption as to the terms of the legal relationship[78].

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70 *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [77].

71 *Qld Alumina Ltd v Alinta DQP Pty Ltd* [2007] QCA 387 at [92]. See also *Presbyterian Church (NSW) Property Trust v Scots Church Development Ltd* [2007] NSWSC 676 (Young CJ in Eq) at [145].

72 eg *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA)at [164].

73 *K.Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (the "August Leonhardt")* [1985] 2 Lloyds Rep 28 (CA) at 34-35; *Unruh v Seeberger* [2007] HKCFA 9 at [135]; *Towry Law v Chubb Insurance* [2008] NSWSC 1352 (McDougall J) at [199]-[200]; *The Bell Group (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J); *Public Trustee v Smith* [2008] NSWSC 397 at [89]–[92]); *Super 1000 v Pacific General Securities* (2008) 221 FLR 427 (White J) at [178]; *Whitehouse v BHP Steel Ltd* [2004] NSWCA 428 at [52], [53]; *Torrens Re-Development & Research Pty Ltd v Oakworth Developments Pty Ltd* [2008] NSWSC 1096 (Windeyer J) at [91].

74 [2008] SASC 321 (FC) at [115] per Duggan J. See also Doyle CJ at [54].

75 [2008] NSWSC 397 (White J).

76 at [91].

77 *Unruh v Seeberger* [2007[HKCFA 9 at [134].

They must believe or intend that all other parties to the transaction are proceeding on the same assumption[79].

However, there is a conflict of authority on the question of whether these parties should have known or intended that the assumptions be acted upon by the party asserting the estoppel. This requirement has been recognized at appellate level in Australia and New Zealand[80]. Other authorities have rejected it[81].

However, a shared assumption of this kind is not required where a party "acquiesces" in other parties proceeding upon the basis of such an assumption[82]. The precise content of this notion of "acquiescence" is presently unclear.

There is also some authority which suggests that it is sufficient if the party alleged to be estopped merely shares the relevant assumption, if a reasonable person in their position should have appreciated that the other relevant parties would be acting in reliance upon the common assumption.[83]

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§3 Common Assumption – The Objective Element

(1) An estoppel by convention cannot arise from the purely private assumptions which are common to the relevant parties.

(2) The convention must be constituted by mutually manifest conduct, by which the relevant parties communicate to each other their intention to be governed by the relevant assumption. In some circumstances, silence can be sufficient for this purpose.

(3) It is doubtful whether it is necessary that the communications contain a clear and unequivocal statement of this intention.

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78 *Unruh v Seeberger* [2007] HKCFA 9 at [137]; *Moratic Pty Ltd v Gordon* (2007) 13 BPR 24,713 at [32], approved in *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603. And see *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300 (Brereton J) at [83]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3517]. As mentioned above, immaterial differences in the nature of assumptions are not fatal.

79 Ibid.

80 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548n at 550; *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [164].

81 *Moratic Pty Ltd v Gordon* (2007) 13 BPR 24,713 (Brereton J) at [37].

82 *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878 (HC) at 913. Quoted with apparent approval in *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [198]; *Whitehouse v BHP Steel Ltd* [2004] NSWCA 428 at [52].

83 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [175], [181]-[182].

Private Assumptions Insufficient

An estoppel by convention does not arise if the assumptions of the relevant parties remain private and undisclosed[84].

There must be some mutually manifest conduct which "crosses the line" between the parties, as explained by the Court of Appeal in England in ***K.Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd (The 'August Leonhardt')***[85]:

> 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. In this sense all estoppels may be regarded as requiring some manifest representation which crosses the line between representor and representee, either by statement or conduct. It may be an express statement or it may be implied from conduct, eg a failure by the alleged representor to react to something said or done by the alleged representee so as to imply a manifestation of assent which leads to an estoppel by silence or acquiescence. Similarly, in cases of so called estoppel by convention, there must be some mutually manifest conduct by the parties which is based on a common but mistaken assumption. The alleged representor's participation in this conduct can then be relied upon by the representee as a basis for this form of estoppel. [emphasis added]

The need for such "mutually manifest conduct" has been accepted in the Australian authorities[86]. But what does it require?

Mutually Manifest Conduct

A body of authority suggests that what is required is conduct (including silence[87]), from each relevant party, which expressly or implied communicates that the assumption is accepted as governing the legal position between the parties for the purposes of the transaction[88]. There must be an objective intention to make, affect or confirm a legal relationship[89].

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84 *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40 at 46.

85 [1985] 2 Lloyd's Rep 28 34; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3521].

86 eg *Cleary Bros (Bombo) Pty Ltd v Waste Recycling and Processing Corporation* [2007] NSWSC 538 (Einstein J) at [9]-[10]. And see *Unruh v Seeberger* [2007] HKCFA 9 at [135].

87 *Republic of India v India Steamship Co Ltd (No 2)* [1988] AC 878 (HC) at 891; *Hodgson v Toray Textiles Europe Ltd* [2006] EWHC 2612 (Ch); *Whitehouse v BHP Steel Ltd* [2004] NSWCA 428 at [52]; *Pegela Pty Ltd v National Mutual Life Association of Australasia Ltd* [2006] VSC 507 (Redlich J) at [565]; *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [456].

88 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548n at 550; *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [164]. *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [455]. And see *Unruh v Seeberger* [2007] HKCFA 9 at [135]-[137], [144].

In ***The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)***[90], the position was explained this way:

> It seems clear that there must be some mutually manifest conduct by the parties that is based on a common but mistaken assumption. But what exactly does this mean? As McPherson J remarked in *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40 at 46 , the conventional basis for the assumption relied upon must first be identified. The word 'conventional' in this context carries connotations of agreement, not necessarily express but to be inferred. There must be at least a demonstrable acceptance of a particular state of things as the foundation for the dealings of the parties. There has to be a course of dealing between the parties, that is to say, acts or conduct that impinge upon their mutual affairs. [emphasis added]

This "*demonstrable acceptance*" test has received some support from subsequent authorities[91]. It seems to be closely analogous to the concept of what constitutes a "common" intention for the purposes of the doctrine of rectification[92].

Is conduct of this kind not sufficient to have contractual effect?

In some cases, it may be sufficient. However, a core category of case is one where the parties do not, on any objective test, manifest an intention to vary their contractual rights. They are merely manifesting their acceptance - perhaps mistakenly - that their existing rights are governed on a particular basis[93].

What remains unresolved is the degree of clarity, on an objective test, these communications must have.

Clear and Unequivocal

In some other doctrines of estoppel, including estoppel by representation and promissory estoppel, the authorities suggest that conduct must be "clear and unequivocal" to establish the estoppel[94]. This requirement relates to two distinct issues[95]. First, the conduct relied upon must be sufficiently "clear and unequivocal" to establish that a relevant representation or promise was made. Secondly, the representation or promise actually established by the evidence must have sufficient clarity or certainty to allow the estoppel to be enforced.

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89 *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ 274 at [92]; *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548n at 550; *GT Corporation Pty Ltd v Amare Safety Pty Ltd* [2008] VSC 143 (Robson J) at [203].

90 [2008] WASC 239 (Owen J) at [3521].

91 *Super 1000 v Pacific General Securities* (2008) 221 FLR 427 (White J) at [175] and in *W and R Pty Ltd v Birdseye* [2008] SASC 321 (CA) by Duggan J at [114].

92 *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603.

93 *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [454].

94 *Low v Bouverie* [1891] 3 Ch 82 at 86, *Legione v Hately* (1983) 152 CLR 406 at 435–436 *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Ltd* [1972] AC 741

95 *Flinn v Flinn* [1999] 3 VR 712 at 738.

In the context of estoppel by convention, there has been widespread acceptance that the second of these requirements has application[96].

However, the first of these requirements has not commonly figured in the principal authorities[97].

In ***Troop v Gibson***[98] a central issue considered by the Court of Appeal in England was whether such a requirement existed. All members of the court rejected this suggestion, on the basis that estoppels by convention only arose when parties were of "a like mind" and so problems of ambiguity do not arise. This appears to remain the position in England[99].

In Australia, the point was discussed by the Full Court of Queensland in ***Queensland Independent Wholesalers Limited v Coutts Townsville Pty Ltd***[100]. It was held that to establish a relevant convention:

> ...the acts or conduct relied upon must point plainly, if not unequivocally, to the assumption put forward as the conventional basis of relations. A course of dealing that is explicable by reference to some other equally plausible assumption inevitably falls short of establishing that the parties accept the basis of their relations the particular assumption contended for.

It is doubtful whether this continues to represent the position, even in Queensland. It has been followed by some authorities[101].

However, the Queensland Court of Appeal in ***Qld Alumina Ltd v Alinta DQP Pty Ltd***[102] appears to have unanimously accepted that conduct which was not sufficiently "unequivocal" to constitute an estoppel by representation could give rise to an estoppel by convention. This approach which aligns estoppels by convention more closely with the requirements for rectification, has much to commend it.

Even if a requirement for conduct that is "clear and unequivocal" is applicable, it should be observed that recent authorities have defined this requirement by reference to the fundamental principle of unconscionability. In ***Galaxidis v Galaxidis***[103], it was held that:

> In my opinion, the effect of this Court's decision in *Gray* is that even if a representation is insufficiently precise to give rise to a contract (as in the present

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96 See below at §6.

97 See above at §1.

98 [1986] 1 EGLR 1 and see *Unruh v Seeberger* [2007] HKCFA 9 at [138].

99 *Steria Limited v Hutchinson* [2005] CWHC 2993 (Ch) at [95].

100 [1989] 2 Qd R 40 at 46. This case was decided without reference to *Troop v Gibson* [1986] 1 EGLR 1 (CA).

101 *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3470]-[3476]; *Mulherin v Bank of Western Australia Ltd* [2005] QSC 205 at [144]; aff'd [2006] QCA 175; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300 (Brereton J) at [91].

102 [2007] QCA 387 at [92] (Holmes JA, with whom McMurdo P and Fryberg J agreed).

103 [2004] NSWCA 111 at [93]. And see *Waterman v Gerling Australia Insurance Company Pty Ltd* [2005] 65 NSWLR 300 (Brereton J).

case), that fact does not *necessarily* disqualify the representation from founding a promissory estoppel. Much will depend upon the circumstances in which the representation is made and the context against which it is to be considered. In its context, the representation is sufficiently clear and unambiguous if it is reasonable for the representee to have interpreted the representation in a particular way being a meaning which it is clearly capable of bearing and upon which it is reasonable for the representee to rely. In these circumstances, it would be unconscionable for the representor to deny responsibility for the detriment that arises because of that reliance.

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§4 Content of the Assumption – Fact, Law and Future Matters

(1) An assumption of existing fact may give rise to an estoppel by convention.

(2) An assumption of law, at least where is relates to private legal rights, may give rise to an estoppel by convention.

(3) An assumption about future matters has not yet been accepted as supporting an estoppel by convention.

Existing Fact

Sir Alexander Turner defined the doctrine of estoppel by convention as founded upon an assumption of *fact*[104].

Many judicial descriptions of the doctrine recognise a similar requirement.

Indeed, the High Court of Australia recognized such a requirement in ***Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd***[105]. In that case, the issue was whether, pursuant to a contract of insurance, an insured had satisfied its obligation to pay the premium by merely paying the broker. The adequacy of this method of payment was advanced by reference to the terms of the insurance policy, and also by reason of a common assumption as to the legal position under the policy. The estoppel argument was rejected by the High Court. It was held that an assumption as to "the legal effect" of conduct was not an assumption of fact which could give rise to an estoppel by convention.

Law - Private Legal Rights

Whilst the statement of principle in *Con-Stan* seems clear enough[106], and has never been expressly overruled or qualified by a majority of the High Court[107], its effect was immediately qualified by subsequent intermediate appellate authorities[108].

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104 See above at §1.

105 (1985) 160 CLR 226

106 *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272, [471]–[489](per Besanko J).

107 A number of individual judgments of members of the High Court have accepted that assumptions of law can found an estoppel: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 415–416 (Brennan J) and *Foran v Wright* (1989) 168 CLR 385 at 435. *Commonwealth of Australia v Verwayen* (1990) 170 CLR

This statement of principle is now conventionally regarded as an *obiter dictum*, which was not intended to exclude assumptions by parties as to their private legal rights[109].

This position accords with that adopted in other jurisdictions, many of which extend the doctrine to any assumption of fact or law[110].

The authority which first established this proposition in Australia is ***Eslea Holdings Ltd v Butts***[111].

It was held that, because no relevant assumption was in fact established in ***Con-Stan***, the references to assumptions of "fact" were obiter dicta[112]. Further, it was established that the High Court's apparent endorsement of the *Texas Bank* case involved an acceptance that an assumption about the legal effect of a contract was sufficient to support an estoppel[113]. So the dictum should be read as "intended to have a limited effect"[114]:

> Granted the necessity of a conventional basis constituted by an existing state of affairs, and the requirement that there must be some statement or conduct by one party which induces some belief or expectation in the other, I can see no reason in principle or utility why that belief or expectation should not concern the legal rights of the parties.
>
> I can see no reason to suppose that their Honours in *Con-Stan* intended to question the reasoning in *Amalgamated*, or its result. I take the view that the Court regarded the assumption advanced in *Con-Stan*, which it was unnecessary to analyse with precision, as lacking the character required; but I

394, 413. Moreover, a recent passing reference in *Trustees of the Property of Cummins v Cummins* (2006) 227 CLR 278 at [58] provides some support for this approach.

108 This line of authority commences with *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175, which was decided on 20 June 1986, only about two months after *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Aust) Ltd* (1985) 160 CLR 226 (11 April 1986).

109 The Australian appellate decisions which have endorsed this analysis include *W and R Pty Ltd v Birdseye* [2008] SASC 321 (CA) *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [194]; *Sumampow v Mercator Property Consultants Pty Ltd* [2005] WASCA 64 [180]–[181]; *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [489]; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194 (CA) at [112]. And see *Australian Consolidated Investments Limited v England* (1995) 183 LSJS 408; *Government Employees Superannuation Board v Martin* (1997) 19 WAR 224 at 244 (Ipp J). *Heggies Bulkhal Ltd v Global Minerals Australia Pty Ltd* (2003) 59 NSWLR 312 [147] *GEC Marconi Systems Pty Ltd v BNP Information Technology Pty Ltd* (2003) 128 FCR 1, [426] (Finn J).

110 eg *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [174]. And see the general statements of principle at §1 above.

111 (1986) 6 NSWLR 175.

112 at 186

113 at 188

114 at 188

do not feel bound by that decision to reject the estoppel urged in the present case.[115]

Pursuant to the *Eslea* line of authorities, a wide range of common assumptions have since been held to be sufficient to support an estoppel by convention, including assumptions that:

(1) the terms of a contract permitted certain conduct[116] or imposed a liability when, in truth they did not[117];

(2) a contract, which in truth had been validly terminated, was still on foot[118];

(3) a contract or a term of a contract, which in truth was void, was valid[119];

(4) a contract, which in truth was made by one party, was made also by another[120];

(5) a writ, which in truth had been invalidly served, was validly served[121].

Law - Generally

In some formulations of the doctrine, it is accepted more broadly that assumptions of law are capable of giving rise to an estoppel[122].

So, for example, in ***PW & Co v Milton Gate Investments Ltd***[123] a common assumption about the inapplicability of a particular common law rule was held to give rise to an estoppel by convention.

A proposition of this generality cannot, as yet, be regarded as orthodox in Australia[124].

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115 at 188-189

116 *Troop v Gibson* [1986] 1 EGLR 1 (CA).

117 *Texas Bank Case* [1982] QB 84 (CA); *Whitehouse v BHP Steel Ltd* [2004] NSWCA 428.

118 *W and R Pty Ltd v Birdseye* [2008] SASC 321 (CA) at [48] (Doyle CJ with whom Duggan J agreed).

119 *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [73].

120 *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ. 274 at [89]-[90].

121 *Kenneth Allison Ltd v A.E. Limehouse & Co* [1992] 2 AC 105 (HL) at 127.

122 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] q NZLR 548n at 550; *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [26]; *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [173]ff; *Pacific National (ACT) Limited v Queensland Rail* [2006] FCA 91 (Jacobson J) at [667]; *Sumampow v Mercator Property Consultants Pty Ltd* [2005] WASCA 64 at [181].

123 [2004] Ch 142.

124 See *W and R Pty Ltd v Birdseye* [2008] SASC 321 (CA) at [52], [112]. *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3469]; *Equuscorp Pty Ltd v Wilmoth Field Warne* (12007) 18 VR 250 (CA) at [71].

The concern is that estoppels by convention could be used as a device to exclude the general law:

> If, for instance, the parties had been negligently advised by a solicitor that a yearly tenancy was not protected by the Act of 1948 and had entered into one accordingly, it would, we should have thought, be an impossible contention [apart from the mandatory effect of the statute] that the tenant was estopped from invoking the protection which the Act confers on such a tenancy.[125]

However, even if this broader proposition were accepted, there are other features of the doctrine which limit the operation of any such estoppel (eg. the defences of public policy and statutory exclusion).[126] Put shortly, an estoppel by convention cannot make lawful a transaction which was unlawful[127].

Future Matters

The orthodox formulations of the doctrine do not contemplate that the common assumption may relate to assumptions about future events.

This potential use of the doctrine, to date, has not been accepted[128].

This limit provides a substantial control upon this doctrine outflanking the general law of contract.

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§5 Content of the Assumption – Referable to Legal Relationship

(1) The common assumption must be characterized by reference to a particular legal relationship or transaction, whether existing or proposed.

(2) In general, this characterization determines the identity of the parties who must be participants in the common assumption.

(3) This characterization also determines the transaction or legal context in which the estoppel may arise

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Assumption About Legal Relationship

Many formulations of the doctrine of estoppel by convention require the assumption being formed "*as to the terms of a legal relationship*"[129].

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125 *Keen v Holland* [1984] 1 WLR 251 (CA) at 262..

126 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [174].

127 *Unruh v Seeberger* [2007] HKCFA 9 at [141].

128 eg *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3519]; *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ. 274 at [37]-[38]; *Scottish & Newcastle plc v Lancashire Mortgage Corporation Ltd* [2007] EWCA Civ 684 at [62]-[64]; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194 (CA) at [117]; *Pacific National (ACT) Limited v Queensland Rail* [2006] FCA 91 (Jacobson J) at [667], [760].

It seems clear that the assumption may relate to an existing legal relationship[130] or a legal relationship which is being entered[131].

The legal relationship need not be contractual in nature. For example, it may merely comprise the legal relationship which exists between parties to litigation[132].

This characterization is important for two main reasons.

First, by analogy with the doctrine of estoppel by deed, the doctrine of estoppel by convention only operates in relation to the particular legal relationship in respect of which the assumption was adopted[133].

Secondly, the process of characterizing the relationship is necessary to determine the parties to the legal relationship, as so ascertain which parties must be shown to have shared the common assumption[134].

The failure to satisfy this requirement can be fatal to the estoppel, as in ***Super 1000 v Pacific General Securities***[135]. In that case, an estoppel by convention was sought to be established between two lenders to the same borrower. The estoppel failed because "there was no relevant transaction"[136] between the lenders - each was dealing separately with the borrower.

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§6 Content of the Assumption - Certainty

(1) A common assumption will not give rise to an estoppel by convention if the content of the assumption lacks sufficient certainty.

(2) If the content of the assumption is insufficiently certain to give rise to a contractual term between the parties, then it may be insufficiently certain to establish an estoppel by convention.

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129 *Moratic Pty Ltd v Gordon* (2007) 13 BPR 24,713 (Brereton J) at [32], approved in *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65 (CA). *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300 (Brereton J) at [83]. *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3517].

130 *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878 (HC) at 913.

131 *Unruh v Seeberger* [2007] HKCFA 9 at [133].

132 *Kenneth Allison Ltd v A.E. Limehouse & Co* [1992] 1 AC 105 (HC) at 136-127.

133 See below at §11.

134 See above at §2.

135 [2008] NSWSC 1222 (White J)

136 [2008] NSWSC 1222 (White J) at [177].

Certainty

The content of a common assumption must satisfy a test of conceptual certainty to give rise to an estoppel by convention[137].

The assumption must be "sufficiently certain to enable the court to give effect to it"[138].

The link between this test of certainty and the test of certainty required for contractual purposes is conceptually quite important. To the extent that there is any divergence in these tests, then terms or agreements which are unenforceable contractually due to their uncertainty could be potentially enforced through estoppel. In the context of proprietary estoppel, a broader approach to questions of certainty has been adopted[139]. But if this approach were applicable away from the context of proprietary rights, a serious change in the law of obligations would result. This step has not been taken[140].

The point is illustrated by ***Baird Textiles Holdings v Marks & Spencer Plc***[141]. In that case a pleaded estoppel by convention was based on the alleged assumption that "during the subsistence of the relationship Marks & Spencer would acquire garments from BHT in quantities and at prices which in all the circumstances were reasonable". The Court of Appeal struck out a contractual claim based on this allegation because of its lack of sufficient certainty. It was held that this problem could not be avoided by an appeal to the doctrine of estoppel by convention[142]:

> In reality, BHT's possible success in this litigation would depend on establishing liability against M&S in equity when it would not otherwise be liable in contract, and would represent a dramatic, if not indeed a revolutionary development of the legal principles governing the enforcement of private obligations.

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§7 Reasonable Reliance

(1) In general, the common assumption must have been acted upon by all parties conducting their relationship on that basis.

(2) Acts of relevant reliance are not limited to acts in conduct of the relationship.

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137 *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ. 274 at [38]; *Unruh v Seeberger* [2007] HKCFA 9 at [138]; *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548n at 550; *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [164]; *BBC Worldwide Limited v Bee Load Ltd* [2007] EWHC 134 (Comm) at [53]; *Troop v Gibson* [1986] 1 EGLR 1 (CA) (per Gibson LJ).

138 *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ. 274 at [38]; *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548n at 550; *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [164].

139 *Crabb v Arun District Council* [1976] Ch 179 (CA).

140 *Kvaerner Construction Ltd v Eggar (Barony) Ltd* (unreported, QBD (TCC), 20 July 2000) at [153].

141 [2001] EWCA Civ. 274

142 at [54].

(3) All relevant acts of reliance must have been reasonable.

Reliance

Reliance is an essential element of the doctrine of estoppel by convention[143].

All parties must have conducted their relationship on the basis that the common assumption governed the relationship[144].

It has been held that the common assumption must be relied on "as the basis upon which the persons sharing such an assumption enter into a transaction"[145]. However, the concept of a "transaction" here is widely defined to mean merely "engaging in acts or omissions affecting their mutual legal relationship"[146]

Ambit of Reliance

The ambit of reliance is important because of its role in assessing detriment.
The authorities have not sought to limit the ambit of reliance to conduct affecting the mutual relationship of the parties.[147]

Reasonableness

The acts of reliance must be reasonable in the circumstances[148].

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§8 Departure From Assumption Causing Detriment

(1) Estoppel by convention arises upon a party seeking to depart from the common assumption.

(2) It arises if this departure would cause a party who has relied upon the common assumption to suffer detriment.

(3) The detriment for this purpose must be material.

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143 *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39 at [72]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [202].

144 *Moratic Pty Ltd v Gordon* (2007) 13 BPR 24,713 (Brereton J) at [32], approved in *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603. And see *Towry Law v Chubb Insurance* [2008] NSWSC 1352 (McDougall J) at [212]; *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300 (Brereton J) at [83]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3517]; *Unruh v Seeberger* [2007] HKCFA 9 at [137].

145 *Unruh v Seeberger* [2007] HKCFA 9 at [142].

146 *Unruh v Seeberger* [2007] HKCFA 9 at [142].

147 *Hamel-Smith v Pycroft* (Gibson J, High Ct (Eng), 5 February 1987, unreported).

148 *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3482]; *Standard Chartered Bank Australia Ltd v Bank of China* (1991) 23 NSWLR 164, 180; *Macquarie Bank Ltd v Lin* [2005] QSC 221 (McMurdo J).

(4) The detriment must arise from the reliance and be judged, in part, by a comparison between the position of the party with and without the assumption being adhered to.

(5) Reliance is not a cause of detriment unless, but for the relevant assumption, the party would have acted differently. This requires a second comparison, between the current position of the party (without the assumption being adhered to) and the hypothetical position they would have otherwise have adopted.

Departure from Common Assumption

An estoppel by convention only arises when one of the parties to the common assumption seeks to depart from that assumption[149]. It is important to fully define the assumption, as it may be conditional in nature or limited by time. Thus, the failure of the condition or the expiry of the time may mean that there was, in fact, no "departure" from the relevant assumption[150].

The question of detriment is to be judged at the time when this departure occurs[151].

Detrimental Reliance in Estoppel

An element which is common to all estoppels by conduct, including estoppel by convention[152], is the requirement of detrimental reliance. The leading explanation of the principles remains the judgment of Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*[153]:

> That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine. That purpose is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give

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149 *Grundt v Great Boulder Gold Mines Pty Ltd* (1937) 59 CLR 641 at 674-675; *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [494]; *Pacific National (ACT) Limited v Queensland Rail* [2006] FCA 91 (Jacobson J) at [667]..

150 *Wadlow v Samuel* [2006] EWHC 1492 (QB) at [68] *Mulherin v Bank of Western Australia* [2006] QCA 175 at [75]-[76].

151 *Elkin v Roxby* [2009] NSWSC 303 (McLaughlin AsJ) at [34] And see *Gillett v Holt* [2001] Ch 210 at 232 and *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [225]-[227].

152 *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39 at [75]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 (CA) at [202].

153 (1938) 59 CLR 641 at 674–5.

> protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong, and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make this original act or failure to act a source of prejudice.

This statement of principle remains authoritative in the field of estoppel by convention[154]. Because it has also guided the development of other doctrines of estoppel by conduct[155], a cross-fertilisation between the various doctrines operates in this area[156].

It seems that the test requires a comparison of three positions of the party seeking to rely upon the estoppel:

(a) the position which that party would be in, if no departure from the assumption is permitted (the assumed position);

(b) the position which that party would be in, if the proposed departure from the assumption is permitted (the true position);

(c) the position which that party would have been in, had they known the assumption was incorrect (the hypothetical position).

The element of detrimental reliance is established only if, by reason of the reliance, the person seeking to assert the estoppel would be materially worse off in the true position than both the assumed and the hypothetical positions. The authorities which support this analysis of the position are outlined below.

Detriment must be Material

The detriment need not consist of expenditure of money or other quantifiable financial detriment, so long as it is something substantial[157]. The detriment needs to be sufficient to allow the departure to be characterized as unconscionable[158].

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154 *Torrens Re-Development & Research Pty Ltd v Oakworth Developments Pty Ltd* [2008] NSWSC 1096 (Windeyer J)at [43]. And see *Towry Law v Chubb Insurance* [2008] NSWSC 1352 (McDougall J)at [198]; *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39 at [72]; *Moratic Pty Ltd v Gordon* (2007) 13 BPR 24,713 (Brereton J) at [32], applied in *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603. *W & R Pty Ltd v Birdseye* [2008] SASC 321 (FC) at [116].

155 *GEC Marconi Systems Pty Ltd v BNP Information Technology Pty Ltd* (2003) 128 FCR 1 (Finn J)at [428].

156 See, eg, *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3519]; *Gillett v Holt* [2001] Ch 210 at 232-233.

157 *Gillett v Holt* [2001] Ch 210 at 343. *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3502]; *Tribond Pty Ltd v Atinon Pty Ltd* [2007] NSWSC 1079 (Young CJ in Eq) at [40], [44].

158 *Gillett v Holt* [2001] Ch 210 at 343.

Departure as Source of Detriment

The test of detriment involves considering the position of the party seeking to set up the estoppel at the time when a departure from the assumption has occurred.

One necessary comparison is between the position that party would be in if the assumption were adhered to and the position which would apply if the assumption were departed from. The critical question is whether, if the departure is allowed, the original change of position will operate as a detriment[159].

Reliance Must Be the Cause of Detriment

There is, however, a second comparison to be made.

For reliance to be the cause of detriment, it is necessary to establish that the party seeking to invoke the estoppel would have acted differently and avoided (or at least had a material chance of avoiding) the relevant detriment.[160]

In the case of estoppel by convention, it is commonly alleged that the existence of the assumption caused a party not to have insisted upon an express contractual term to confirm the assumption[161]. If this is established on the balance of probabilities, then a loss of a valuable chance to obtain such agreement would seem to be sufficient to establish the causal link to detriment[162].

On the other hand, if the detriment is exposure to a liability – and this liability could not have been avoided in any event then no detriment is suffered[163].

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§9 Unconscionable to Permit Departure

(1) Estoppel by convention arises only where it would be unjust or unconscionable for a party to be permitted to depart from the relevant assumption.

(2) In general, the satisfaction of the other elements of the doctrine will be sufficient to satisfy this requirement of unconscionability.

(3) This element may not be satisfied if circumstances have changed so as to remove the element of detriment which originally attracted the doctrine.

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159 *Grundt v Great Boulder Gold Mines Pty Ltd* (1937) 59 CLR 641 as explained in *Gillett v Holt* [2001] Ch 210 at 233. And see *Elkin v Roxby* [2009] NSWSC 303 at [34].

160 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [175], [183]ff; *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [74]; *Towry Law v Chubb Insurance* [2008] NSWSC 1352 (McDougall J) at [212].

161 Eg *Towry Law v Chubb Insurance* [2008] NSWSC 1352 (McDougall J) at [212].

162 *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3502]-[3510] and the cases there cited.

163 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [224].

(4) This element may not be satisfied if the convention was improperly induced by the party seeking to rely upon the estoppel.

(5) This element may not be satisfied if there is a sufficient disproportion between the detriment suffered and the effect of the estoppel.

(6) This element (it seems) does not give rise to a general discretionary power to decline relief.

Unconscionability

The doctrine of estoppel by convention is commonly expressed as requiring the court to be satisfied that it would be "unconscionable" or "unjust" for one party to depart from the common assumption[164].

In general, this element is itself satisfied by establishing the other elements of the doctrine - in particular the element of detriment[165]. This has led one text to suggest that the element "adds nothing to that test except a vituperative epithet and it should be discarded"[166].

There are a number of points to be made about this suggestion.

First, to the extent that this element of "unconscionability" might suggest that there is a broad discretionary decision to be made as to whether or not to apply the doctrine, then this does not reflect the orthodox position in the authorities and is to this extent misleading.

Secondly, one of the difficulties with the doctrine is that it has potentially very serious effects in a wide variety of cases. Accordingly, there is a real concern that the courts may be faced with an unorthodox use of the doctrine in a situation which falls outside the scope of its underlying principle. The inclusion of this element has the advantage of allowing a principled refusal of relief in these unorthodox cases.

Thirdly, even in the short history of the doctrine, a number of such unorthodox cases have arisen, and this element appears to serve a useful role in properly confining the ambit of the doctrine.

When the role of unconscionability in this context was first questioned in 1987, Peter Gibson J in ***Hamel-Smith v Pycroft***[167] responded in this way:

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164 eg. *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548n at 550; Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd (2008) 66 ACSR 594 (WACA) at [26]; *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [209]-[211], [223], [238]; *Mulherin v Bank of Western Australia* [2006] QCA 175.

165 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [227].

166 *KR Handley Estoppel by Conduct and Election* (2006) at 132 and see *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [516], [678].

167 (Gibson J, High Ct (Eng), 5 February 1987, unreported).

> Mr Haynes criticized the importation of notions as to what was unconscionable into estoppel by convention. Such notions, he said, were appropriate only to promissory or proprietary estoppels. But in *Keen v. Holland* the Court of Appeal specifically accepted the reasoning of the judge below in rejecting a claim of estoppel by convention on the ground that it was not unconscionable for the party against whom the estoppel was claimed to insist on his legal rights. In my judgment questions of what is just and conscionable inevitably arise in this area, as Mr Levy fairly conceded. Thus this court is not so rigid and inflexible as to insist on the parties being held to an assumed and incorrect state of fact or law when there is no injustice in allowing a party to resile therefrom.

Change of Circumstances

As noted above, the test of detriment is ordinarily applied at the point where one party to the convention seeks to depart from it. The estoppel then ordinarily applies on an "all or nothing" basis to the relevant legal relationship.

But the position may become more complicated if there is a change of circumstances.

Where the circumstances have developed in such a way that, perhaps by the time of trial, no injustice would result from the opposite party *then* resiling from the common assumption, the element of unconscionability no longer exists and the estoppel may not be given continued effect[168].

The change of circumstances may arise in a variety of different ways.

There may have been a mutual abandonment of the assumption. If all relevant parties to the common assumption have communicated to each other their intention to resile from that assumption, it may cease to be unconscionable for any party to depart from it[169]. This can arise from the conscious entry by the parties into a written agreement which was inconsistent with the convention[170].

The financial effect of a departure from the assumption may be of a fluctuating nature. By the time of trial, the detriment which the departure originally caused may have been removed or overtopped by countervailing benefits so as to cease to make it unconscionable for the assumption to be departed[171].

There may be a difference in effect between different types of departure from the assumption. So, after a party has given reasonable notice of an intention to insist

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168 *Unruh v Seeberger* [2007] HKCFA 9 at [155]. And see *Norwegian American Cruises v Paul Mundy Ltd (the 'Vistafjord')* [1988] 2 Lloyd's Rep 343 (CA) at 352 and *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSLWR 603 (CA) at [232].

169 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [214]. And see *Gloyne v Richardson* [2001] 2 BCLC 669 at [40]-[41].

170 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194 (CA) at [30], [116]; [2006] QCA 194 (CA) at [30], [116]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [228].

171 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at [209]-[211], [223], [238].

upon the strict legal position, it may be that future departures from the assumption will be found not to be unconscionable[172].

Misconduct Leading to Common Assumption

Within the common law doctrine of estoppel by representation, there is an established line of authorities which denies a party the benefit of an estoppel if their *own* misstatement or concealment was the original cause of the relevant representation[173].

Issues of this kind have already begun to emerge in the context of estoppel by convention. In ***Official Trustee in Bankruptcy v Tooheys Ltd***[174], Sheller JA recognized that this principle had potential application in this context. In ***Alpha Wealth Finance Services Pty Ltd v Frankland River Olive Co Ltd***[175] Buss JA (with whom Steyther P agreed) expressly held that the element of unconscionability was not satisfied where (inter alia) the common assumption was induced by the party seeking to rely on the estoppel[176].

As a matter of principle, this would seem to be correct. If it can be shown that the only reason parties proceeded upon a particular, mistaken assumption about their legal rights was some misstatement or concealment by the party now seeking to rely upon the estoppel, it would be odd if the courts were powerless to deny relief.

Disproportionate Remedy

The remedy in estoppel by convention is a common law estoppel remedy, which in an orthodox case is triggered by detriment of any material kind and results in an "all or nothing" remedy.

The potential for injustice in cases where there is a gross disproportion between detriment and remedy is beginning to be recognized in the context of other common law estoppels[177]. Whilst one potential solution to this problem is through the adoption of a more flexible remedy[178], there is also a potential solution to this problem through the element of "unconscionability". Where the detriment is sufficiently disproportionate to the estoppel remedy sought, and an offer to rectify the detriment is forthcoming, a court may be persuaded that the element of unconscionability is not satisfied. In ***Alpha Wealth Finance Services Pty Ltd v Frankland River Olive Co***

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172 *Hamel-Smith v Pycroft* (Gibson J, High Ct (Eng), 5 February 1987, unreported); *Norwegian American Cruises v Paul Mundy Ltd (the 'Vistafjord')* [1988] 2 Lloyd's Rep 343 (CA) at 352; *Troop v Gibson* [1986] 1 EGLR 1 (CA); *Hiscox v Outhwaite* [1992] 1 AC 562, 575.

173 *George Whitechurch Ltd v Cavanagh* [1902] AC 117, 145; *Porter v Moore* [1904] 2 Ch 367.

174 (1993) 29 NSWLR 641. This principle received some attention in the dissenting judgment of Anderson J in *W & R Pty Ltd v Birdseye* [2008] SASC 321 (FC) at [237], but the principle was there raised in support of a broad discretion to deny relief - a proposition rejected by the majority.

175 (2008) 66 ACSR 594 (WACA) at [186].

176 And see Torrens at [42].

177 eg *Scottish Equitable plc v Derby* [2000] 3 All ER 793.

178 *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA)at [79].

Ltd[179], this was one of a number of considerations which led Buss JA (with whom Steyther P agreed) to conclude that the element of unconscionability had not been satisfied.

General Discretion

It was suggested by Anderson J in ***W & R Pty Ltd v Birdseye***[180], that the element of unconscionability imports a broad discretion in the court to deny relief upon equitable grounds (eg. lack of clean hands). This suggestion was rejected by other members of the Full Court[181].

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§10 Defences

(1) Estoppel by convention may be excluded by the operation of statute.

(2) Estoppel by convention may be excluded by a subsequent contract.

(3) Estoppel by convention may not be relied upon when to do so would be contrary to public policy.

Exclusion by Statute

As with all estoppel doctrines, estoppel by convention does not "*lie in the face of a statute*"[182].

The question of whether any doctrine of estoppel has been excluded by statute is rarely determined by an *express* statutory provision[183]. Ordinarily, the court must enquire whether, on the true construction of the statute, it was intended that the provisions apply to the *actual* state of affairs which exist. In this event, parties cannot by contract or estoppel modify the operation of the statute. An intention to exclude the doctrine of estoppel is commonly found in statutes which serve a wider public policy[184].

Exclusion by Subsequent Contract

There is no doubt that a party may, by *subsequent* contract, validly exclude any rights which may arise by estoppel.

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179 at [186].

180 [2008] SASC 321 (FC) at [235]-[237].

181 [2008] SASC 321 (FC) at [53], [106] cf *Alpha Wealth Finance Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 (WACA) at [186].

182 This issue has frequently arisen in the context of estoppels by convention, eg, *Keen v Holland* [1984] 1 WLR 251 (CA); *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [81] ff; *Qld Alumina v Alinta DQP Pty Ltd* [2007] QCA 387 at [82].

183 Indeed, no relevant Queensland legislation contains such a provision.

184 *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [84].

But what if the contract itself was induced by a common assumption of the parties? Can a purely pre-contractual convention govern the effect of a subsequent written agreement? And does an "entire agreement" clause in the contract have any relevant effect?

In England, these questions have received little attention since ***Keen v Holland***[185]. In that case, which was decided shortly after the *Texas Bank* case, the Court of Appeal appears to have concluded that the doctrine of estoppel by convention simply did not extend to pre-contractual conventions about the legal effect of a proposed contract'[186]. This analysis of the decision was recently reaffirmed in ***PW & Co v Milton Gate Investments Ltd***[187].

In Australia, the issue has been more controversial. Even in cases where an "entire agreement" clause has been embodied in a wholly written agreement, the legal effect of a pre-contractual convention remains uncertain.

There is a substantial body of Australian authority at first instance which accepts that clauses of this kind can be effective to exclude an estoppel by convention arising from pre-contractual dealings[188], depending on their ambit[189].

However, Australian appellate courts have reserved their judgment on this issue[190]. The reason for their reservation arises from the concern that estoppel may properly be viewed as an unconscionability-based doctrine. It appears to be accepted, in the context of promissory estoppel, that it would be unconscionable for a party to enforce a contractual right, if the contract itself was induced by a prior promise that the right would not be enforced[191]. In this situation, the mere existence of an "entire

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185 [1984] 1 WLR 251 (CA).

186 [1984] 1 WLR 251 (CA) at 261-2. Chitty on Contracts (30th Ed) 2008 at 3-114.

187 [2004] Ch 142 (Neuberger J) at [162]ff.

188 *Johnson Matthey Ltd v AC Rochester Overseas Corp* (1990) 23 NSWLR 190 (McLelland J) at 196. See also *Seabridge Australia Pty Ltd v JLW (NSW) Pty Ltd* (1991) 29 FCR 415 at 421; *Skywest Aviation Pty Ltd v Commonwealth of Australia* (1995) 126 FLR 51 (Miles CJ); *Australian Co-operative Foods Ltd v Norco Co-operative Ltd* (1999) 46 NSWLR 267 (Bryson J) at [52] ; *C G Mal Pty Ltd v Sanyo Office Machines Pty Ltd* [2001] NSWSC 445 (Young CJ in Eq) at [54]; *Arnot v Hill-Douglas* [2006] NSWSC 429 (Young CJ in Eq) at [141]; *Franklins Pty Ltd v Metcash Trading Ltd* [2007] NSWSC 242 (Palmer J) at [96]; and *Chint Australasia Pty Limited v Cosmoluce Pty Limited* [2008] NSWSC 635 (Einstein J) at [141].

189 *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [543].

190 In *Branir Pty Ltd v Owston Nominees (No.2) Pty Ltd* (2001) 117 FCR 424 (FFC) at [444]ff, the various authorities are discussed, with the Full Federal Court expressing a preference for allowing estoppel to operate. In *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [214], the conflict of authority was discussed but not resolved. In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194 (CA), which was not an "entire agreement" case, McPherson JA appears to have endorsed the reasoning in *Johnson*; Holmes JA refers to the conflict of authorities between *Johnson* and *Whittet* but does not decide the question; Jerrard JA does not deal with the matter.

191 The issue of principle is squarely considered by McHugh J in *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 (CA) at (the

agreement" clause could not affect the position – unless, of course, it can be shown on the facts to rebut any allegation of reliance upon the promise. Why should the logic of this analysis not apply equally to estoppel by convention? Does its "common law" character mean that it is more vulnerable to exclusion by contract?

Similar issues arise in relation to all wholly written agreements, to which the parol evidence rule applies. In the decisions at first instance, the balance of authority suggests that the parol evidence rule operates to exclude any estoppel by convention arising from prior conduct[192]. Australian appellate decisions again have not yet resolved this question[193].

Approaching the matter as one of principle, there are a number of points to be made.

First, if one accepts that estoppel by convention is an unconscionability-based doctrine, then it is difficult to understand how the terms of a contract which are found to have been induced by the unconscionable conduct can exclude it.

Secondly, whilst the English position that estoppel by convention by definition does not extend to pre-contractual conventions does not suffer from this same conceptual difficulty, there is a problem in justifying in principle such an exception to the doctrine. Why should it matter whether the relevant assumption in relation to the transaction is made at, during or after the entry into the contract, provided the assumption was intended by both parties to govern the contract and resulted in detrimental reliance?

Thirdly, in Australia at least, the practical relevance of this question may not be significant. Given the broadening scope of rectification to embrace mistakes as to the legal effect of agreed contractual language - and the narrowing scope of estoppel by convention (eg. requiring clear and convincing proof in this category of case[194]) - the threat to the sanctity of contract from this quarter may be not be great.

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matter being assumed but not determined by other members of the court) and Hodgson JA in *Lahoud v Lahoud* [2006] NSWCA 169 at [111]. See also *Bank Negara Indonesia v Haolim* [1973] 2 MLJ 3 (PC); *Wright v Hamilton Island Enterprises Ltd* [2003] QCA 36; *City and Westminster Properties* (1934) Ltd v Mudd [1959] Ch 129 at 145-7 and *Brikom Investments Pty Ltd v Carr* [1979] QB 467.

192 Estoppel by convention was held to be excluded in *Johnson Matthey Ltd v AC Rochester Overseas Corp* (1990) 23 NSWLR 190 (McLelland J) at 195. See also *Seabridge Australia Pty Ltd v JLW (NSW) Pty Ltd* (1991) 29 FCR 415 at 421; *Cafdawn Pty Ltd v Waltons Stores (Interstate) Ltd* (Beaumont J, Fed Ct, unreported,28 March 1991) at para.20; *Bentham v Australia and New Zealand Banking Group Ltd* (McLelland J, Sup Ct NSW, unreported, 26 June 1991); *Van der Sluys v Anaconda Nickel NL* [2002] NSWSC 673 (Brownie AJ) at [100] . To the contrary are *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146 (Rolfe J) at 154; *Grace v Hamilton Island Enterprises Ltd* (Thomas J, Sup Ct Qld, unreported, 17 March 1998) and *Pacific National (ACT) Limited v Queensland Rail* [2006] FCA 91 (Jacobson J) at [719].

193 See above.

194 *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146 (Rolfe J) at 154.

No Exclusion by Earlier Contract

The considerations which have troubled the courts in relation to an estoppel by convention asserted in relation to *subsequent* written agreements do not apply to such an estoppel asserted in relation to a *prior* written agreements[195]. Estoppels by convention which modify the meaning of existing contracts are commonplace.

Indeed, even the presence of "no waiver" causes in contracts do not exclude the operation of an estoppels arising from subsequent conduct[196].

Public Policy

Just as considerations of public policy may render a contract unenforceable, similar considerations provide a defence to an estoppel by convention[197].

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§11 Remedy

(1) Estoppel by convention is not itself a cause of action.

(2) Estoppel by convention operates, as a common law estoppel, to preclude a party from contending for some state of facts or rights where it would be unconscionable to do so.

(3) Once the elements of the doctrine have been satisfied, an orthodox application of the doctrine would not give the court a residual discretion to mould the remedy (unlike the remedy for equitable estoppels).

(4) This preclusionary effect only operates in respect of the particular transaction or relationship in which the assumption was adopted.

(5) Estoppel by convention is most frequently used defensively, to preclude a claimant from relying upon facts or rights to establish a cause of action.

(6) Estoppel by convention can also be used, at least to some extent, in establishing facts or rights to found a cause of action. However, the extent to which this is permissible remains controversial.

(7) The authorities have recognized that estoppel by convention may be used in the following ways to establish a cause of action:

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195 *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300 (Brereton J) at [84]. Concerns about this question were previously expressed by the Queensland Court of Appeal in *Queensland Independent Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40.

196 Eg *Nadrak Pty Ltd v Permanent Custodians Ltd* (Bryson J, Sup Ct NSW, unreported, 16 March 1994); *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [756].

197 *Kenneth Allison Ltd v A.E. Limehouse & Co* [1992] 2 AC 105 (HC) at 126; *Unruh v Seeberger* [2007] HKCFA 9 at [10].

(i) to establish a fact which affects the legal relationship between the parties;

(ii) to establish the existence or meaning of a contractual term;

(iii) to establish the identities of the parties to a relevant contract or legal relationship;

(iv) to establish the continuing operation of a relevant contract or legal relationship;

(v) to establish the inapplicability of a legal rule which would have an invalidating effect upon a legal right;

(8) It seems that a cause of action founded upon the formation of a legal relationship (eg a contract) may also be established by estoppel by convention.

Not a Cause of Action

Estoppel by convention is a common law estoppel[198] and so is not itself a cause of action[199].

Preclusionary Effect

On an orthodox approach, the effect of an estoppel by convention is to "operate as a rule of evidence and preclude the estopped party from denying the truth of the assumed state of affairs"[200]. The remedy is not discretionary, and has been described as having an "all or nothing" character[201].

However, at appellate level in Australia, there is some support for the view that the "trend towards unification of common law estoppel and equitable estoppel may mean that the remedy available to the party benefiting from the estoppel is now limited to rectifying the detriment which he or she suffers as a result of reliance on the estoppel"[202]. Australian courts have not yet taken this step[203].

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198 *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [64], [78]; *Santos v Delhi Petroleum Pty Ltd* [2002] SASC 272 (FC) at [444].

199 *Unruh v Seeberger* [2007] HKCFA 9 at [152]; *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ. 274 at [34], [38]; *The Bell Group Ltd (In Liq) v Westpac Banking Corporation [No 9]* [2008] WASC 239 (Owen J) at [3458].

200 *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3458]

201 MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd [2005] NSWCA 39 at [71]; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 454 (Dawson J).

202 *Equuscorp Pty Ltd v Wilmoth Field Warne* (2007) 18 VR 250 (CA) at [79]; *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3512]-[3513].

203 The question was raised but not resolved in *The Bell Group Ltd (in liq) v Westpac Banking Corporation* [2008] WASC 239 (Owen J) at [3512]-[3513].

Confined to Subject Transaction or Relationship

An estoppel by convention can only be deployed in the particular legal relationship governed by the convention[204].

This limitation is neatly illustrated by ***J C Equipment Hire Pty Ltd v The Registrar of the Workers Compensation Commission of NSW***[205]. That case concerned a worker's compensation claim where the parties had accepted, when dealing with a lump sum impairment claim under one statute, that the worker had suffered a 16% impairment. The question was whether this convention also governed the claim for damages arising under other provisions. The NSW Court of Appeal confirmed that an estoppel by convention "only applies for the purpose of the transaction or relationship in respect of which the convention was adopted"[206]. On analysis of the events, the assumption was only adopted by the parties for the particular statutory claim being discussed.

Defensive Use of the Estoppel

The most frequent use of an estoppel by convention is as a "shield" – to preclude another party from asserting an essential element of a cause of action.

For example, in the *Texas Bank* case, the lender (the party relying upon the estoppel) was not suing on the relevant guarantee, but was proposing to use the proceeds of a sale of securities to discharge the guarantor's debt. When sued for a declaration that there was no such debt, the estoppel was deployed defensively. When considering the case, however, there was a divergence of views amongst the court as to whether the estoppel could have been used by the lender to found a cause of action on the guarantee[207]. It was a question of this kind which remains controversial.

Establishing A Cause of Action by Estoppel

The current position in England, in relation to estoppel by convention, was recently explained by the Court of Appeal in ***Smith Kline Beecham v Apotex Europe***[208]:

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204 *Unruh v Seeberger* [2007] HKCFA 9 at [155]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [232].

205 (2008) 70 NSWLR 704 (CA).

206 (2008) 70 NSWLR 704 (CA) at [76].

207 Denning MR and Brandon LJ held that the estoppel could be used to found a cause of action (at 122, 131), whilst Eveleigh LJ held the opposite view (at 126).

208 [2006] 4 All ER 1078 (CA) at [103], [110]-[112]. See also *Haden Young Limited v Laing O'Rourke Midlands Limited* [2008] EWHC 1016 (TCC) at [163]ff; *White v Riverside Housing Association Ltd* [2005] EWCA Civ. 1385 at [65]-[66]; *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ. 274 at [54]; *Intense Investments Ltd v Development Ventures Ltd* [2006] EWHC 1586 (TCC) at [110]ff; But compare *Kvaerner Construction Ltd v Eggar (Barony) Ltd* (unreported, QBD (TCC), 20 July 2000) at [151]; *Mitsui Babcock Engineering Limited v John Brown Engineering Ltd* (1996) 51 Con LR 129

> An estoppel cannot be used as a key element of a claim (sword not shield) and in particular it cannot operate to create a legal relationship when there was none at the outset....
>
> [110] It is as well to remember here the fundamental nature of an estoppel. An estopped party is precluded from asserting that a particular fact or set of facts or state of affairs is so. Thinking of it in procedural terms, an estoppel inherently must be raised by way of a riposte. The claimant pleads his case basing himself on alleged facts x, y, and z. The defendant then raises an estoppel saying: "you may not assert these facts by reason of an estoppel arising from representation, convention or whatever."
>
> [111] The pleaded case here does not fit that essential nature, as can be tested by the procedural model. If the Canadian companies applied to the court to enforce the existing undertakings without asserting the estoppel in their claim, the court would simply dismiss the application as bad on its face. There would be no need for GSK to assert that which they are alleged to be estopped from contending, namely that the Canadian companies are not to be treated as parties to the order. Even if GSK did not appear to argue the point, the claim would fail without the estoppel.
>
> [112] Thus it is essential to the Canadian companies' case that the estoppel be pleaded as part of the claim. The pleading is not a mere anticipation of a reply to a defence. This shows that what is relied upon is not an estoppel at all – it is a naked attempt to create a legally binding agreement when there never was one and never any intention to create one. That an estoppel cannot do, see for instance by way of a recent example, *Baird Textiles.*

The reason for this approach is not based solely upon the logic of the estoppel remedy. As was recently explained in ***Haden Young Limited v Laing O'Rourke Midlands Limited***[209], the concern is that any different approach might undermine the protective rules which restrict the circumstances giving rise to a contract:

> I consider that the application of the principles of estoppel to a case such as this raises considerable difficulties. The general principle of contract mean that parties are free to negotiate and agree on the terms of the contracts by which they are to be bound. If parties negotiate but do not agree upon all the terms which are essential for a contract to come into existence between them, then they general principles of contract formation would be negated if, despite this, they are bound by the terms of a contract they did not agree to make.

The Australian approach to this question is rather different.

In ***Waltons Stores (Interstate) Ltd v Maher***[210], the NSW Court of Appeal accepted that a plaintiff could use a common law estoppel to establish a contract which would found a cause of action. When the matter reached the High Court, the factual basis for this finding was not accepted by some members of the court[211]. However, no

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209 [2008] EWHC 1016 (TCC) at [181].

210 (1986) 5 NSWLR 407, 416, 418, 420 (affirmed (1988) 164 CLR 387).

211 Eg (1988) 164 CLR 387 at 398.

members of the High Court questioned the proposition that a common law estoppel could be used for this purpose[212].

Whilst *Waltons Stores* was not an estoppel by convention case, the approach taken by the court in relation to common law estoppels would appear to be applicable to the present context by analogy.

Some support for that view was provided by the Victorian Court of Appeal in the estoppel by convention case of ***Riseda Nominees Pty Ltd v St Vincent's Hospital (Melbourne) Ltd***[213]. In that case, it was held that the *Texas Bank* case:

> "does suggest that the existence of a binding contract, or by parity of reasoning the validity of an assignment, may be an assumption of fact giving rise to a conventional estoppel."

The objection to this approach based upon the "riposte" theory of how common law estoppels work is difficult to sustain, once one appreciates that even under English law, claims based on estoppel can be brought against non-parties to a contract.

The objection to this approach based upon a concern about the sanctity of contract is more potent. But given that *Waltons Stores* is most unlikely to be reversed or narrowed in Australia, the real concern is to focus upon the particular elements of estoppel which have the potential to outflank the law of contract in a damaging way (eg. the rules about certainty). If these elements have an appropriate level of control, the potency of this objection is substantially reduced.

In a number of less controversial circumstances, the courts have also recognized that a cause of action can be founded upon elements established by estoppel by convention.

Interpretation

A claim on a contract may be founded upon a term, or an interpretation of a term, arising by an estoppel by convention[214].

Parties

A claim on a contract may be extended to an additional party by use of an estoppel by convention[215].

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212 Indeed, it was expressly accepted by three members of the Court that this analysis was correct at 415 (Brennan J), 443 (Deane J), 464 (Gaudron J).

213 [1999] 2 VR 70, 77.

214 *Whitehouse v BHP Steel Ltd* [2004] NSWCA 428. The facts of this case reflect the hypothetical claim considered in the Texas Bank case, where the lender actually sued on the guarantee. And see *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ. 274 at [88]; *Hamel-Smith v Pycroft* (Gibson J, High Ct (Eng), 5 February 1987, unreported); *Moratic Pty Ltd v Gordon* (2007) 13 BPR 24,713 (Brereton J); *Waterman v Gerling Australia Insurance Company Pty Ltd* (2005) 65 NSWLR 300 (Brereton J).

215 *Baird Textiles Holdings v Marks & Spencer Plc* [2001] EWCA Civ. 274 at [89]-[90].

Continuing Operation of a Terminated Contract

In ***W & R Pty Ltd v Birdseye*** [216], a purchaser sought specific performance of a contract for the sale of land. The contract was held to have been validly terminated by the vendor, but the purchaser was entitled to rely upon subsequent dealings to establish an estoppel by convention which precluded the vendor from relying upon the termination[217].

Contract Which is Void

In ***Equuscorp Pty Ltd v Wilmoth Field Warne***[218], a firm of solicitors sued their client to recover fees under a fee agreement. The fee agreement was held to be void under statute. The subsequent conduct of the parties was held to create an estoppel by convention which precluded the client from contending that it was void, save to the extent that the statute was found to exclude the operation of estoppel.

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§12 Application to Other Parties

(1) An estoppel by convention generally binds successors and assigns of the parties to the relevant relationship.

(2) The estoppel may also bind parties who derive their title through a party to the estoppel.

Assigns

The general principle in the law of estoppels is that it continues to operate between the successors or assigns of the original parties. This principle has been expressly imported into the doctrine of estoppel by convention[219].

Derivative Titles

The question of whether an estoppel by convention which binds a sub-lessor also binds a sub-lessee who derives its title from the sub-lessor after the estoppel arose was considered in ***PW & Co v Milton Gate Investments Ltd***[220]. The estoppel was upheld.

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216 [2008] SASC 321 (FC)

217 See also *Community Association DP No.270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527 (McDougall J) at [174]-[187]; *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39 at [76].

218 (2007) 18 VR 250 (CA).

219 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142 (Neuberger J) at 196; *Public Trustee v Smith* [2008] NSWSC 397 (White J) at [85]..

220 [2004] Ch 152 at [196].

Conclusion

This review of the authorities reveals that, in many respects, there remains significant divergences in the authorities at appellate level dealing with estoppels by convention.

These divergences tend to lie at the points which are most likely to threaten the certainty and stability of contractual relations.

The trend that appears to be emerging is not to limit the potential scope of the doctrine of estoppel by convention by blunt general rules (eg recognizing the absolute primacy of the parol evidence rule). Rather, it is to fashion particular requirements for the doctrine that, in principle, align closely with the law of contract (eg the test of certainty).

JD McKenna
18.v.09