

IN DEFENCE OF THE RELIANCE THEORY OF EQUITABLE ESTOPPEL

INTRODUCTION

The High Court judgments in *Waltons Stores (Interstate) Limited v Maher*¹ presented equitable estoppel as a doctrine concerned with protecting a person (relying party) from the harm that results from their reliance upon the conduct of another (inducing party).² The doctrine is not concerned primarily with giving effect to expectations. Finn had anticipated this development and had demonstrated how a reliance theory of equitable estoppel accords with equity's jurisdiction to restrain a defendant from making unconscionable use of its legal rights.³ Equitable estoppel is a doctrine about extinguishing, qualifying or suspending the inducing party's legal rights to the extent necessary to prevent the continuance of unconscionable conduct.⁴ This necessitates a minimum equity approach to the formulation of relief. This means, in the present context, that the legal rights of the inducing party are qualified only to that extent necessary to avoid the unconscionable infliction of detriment upon the relying party. *Waltons Stores* and the High Court's subsequent decision in *Commonwealth v Verwayen*⁵ have given Finn's views the seal of orthodoxy.⁶ Robertson⁷ and Spence⁸ have been, in recent times, the principal defenders of the detrimental reliance theory.

The reliance theory is not without its critics, however. The broadest criticism of the detrimental reliance theory has consisted of an argument that, once people may

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1 (1988) 164 CLR 387.

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

3 P D Finn, 'Equitable Estoppel' in P D Finn, (ed), *Essays in Equity*, (1985), 59.

4 Ibid 67.

5 (1990) 170 CLR 394.

6 See in particular *Waltons Stores* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J), 423 (Brennan J); *Verwayen* (1990) 170 CLR 394, 413 (Mason CJ), 429 (Brennan J), 454 (Dawson J), 475–6 (Toohey J).

7 A Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805; 'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Sydney Law Review* 32; 'Reliance and Expectation in Estoppel Remedies' (1998) 18 *Legal Studies* 360.

8 M Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (1999).

become estopped in relation to representations as to their intentions as to future conduct and those estoppels may be used as the foundation for a cause of action, the distinction between estoppel and contract becomes an illusory one. These critics present equitable estoppel as a means of promise enforcement. The criticisms made by Birks⁹ and Mescher¹⁰ belong in this category. A narrower form of criticism is to be found in the work of Pratt.¹¹ Pratt has claimed that detrimental reliance is merely ‘evidence of induced expectations’ and the real reasons for giving effect to the relying party’s expectations ‘relate to the conduct of the promisor in encouraging them’.¹²

The main purpose of this article is to reply to these criticisms of the reliance theory. It is necessary, however, to preface my comments with an overview of the equitable estoppel doctrine as developed by the High Court in *Waltons Stores* and *Verwayen*.

THE WALTONS STORES DOCTRINE

The facts of *Waltons Stores (Interstate) Limited v Maher*¹³ are well known, so a brief summary will suffice. Waltons had negotiated with Maher to lease premises owned by Maher who had suggested a number of amendments to the form of lease put forward by Waltons. In November 1983, Waltons’ solicitor told Maher’s solicitor that the amendments were acceptable but that he would get formal instructions from Waltons and advise on the following day whether there was any disagreement on Waltons’ part. Several days later, Maher’s solicitor, not having heard further from Waltons’ solicitor, forwarded an executed lease by way of exchange. Thereafter, Maher demolished the building on the site and began work erecting a new building to Waltons’ specifications. Maher had been keen to start this work because Waltons had indicated that they desired to take possession of the completed premises by 15 January 1984. Waltons became aware that Maher was carrying out this work. Kearney J found that Waltons was estopped from denying that it had agreed to take a lease of the premises owned by Maher and ordered Waltons to pay damages in lieu of specific performance of an agreement to lease. The Court of Appeal and the High Court upheld the substance of this decision.

⁹ P Birks, ‘Equity in the Modern Law: An Exercise in Taxonomy’ (1996) 26 *University of Western Australian Law Review* 1, 63.

¹⁰ B Mescher, ‘Promise Enforcement by Common Law or Equity?’ (1990) 64 *Australian Law Journal* 536, 547.

¹¹ M Pratt, ‘Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel’ (1999) 21 *Adelaide Law Review* 209.

¹² *Ibid* 218.

¹³ (1988) 164 CLR 387.

In *Waltons Stores*, the intervention of equity occurred against a background of an *absence* of contractual obligations enforceable at common law. Equity was invoked to prevent a defendant from asserting that absence of contractual obligation so as to offend the conscience of equity. Finn described the *Waltons Stores* doctrine as one of a number of equitable doctrines which ‘are conditioned upon the explicit finding of unconscionable conduct in the person against whom they are invoked’.¹⁴ When we pass from describing the basic rationale of a doctrine to describing the conditions for its operation, we need to identify exactly what type of conduct is to be regarded as unconscionable. This is necessary in order to avoid an accusation that the litigants are at the mercy of the subjective value judgments of individual judges.

The *Waltons Stores* judgments contain clear statements as to the particular kind of conduct that offends the conscience of equity. Mason CJ and Wilson J said:

The appellant’s inaction, in all the circumstances, constituted clear encouragement or inducement to the respondents to continue to act on the basis of the assumption which they had made. It was unconscionable for it, knowing that the respondents were exposing themselves to detriment by acting on the basis of a false assumption, to adopt a course of inaction which encouraged them in the course they had adopted.¹⁵

Brennan J said:

The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation *or otherwise to avoid the detriment* which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.¹⁶

These statements emphasised that the inducing party’s unconscionable conduct consisted of a failure to prevent the relying party from suffering detriment. The inducing party had a duty to avoid detriment to the relying party because it had ‘encouraged or induced’ the relying party’s detrimental reliance. The primary focus was upon the relying party’s exposure to detriment and the inducing party’s role in inducing that exposure. Equity restrains or places conditions upon the inducing party’s legal right to refuse to fulfil the expectation. This need not always involve

¹⁴ P D Finn, ‘Unconscionable Conduct’ (1994) 8 *Journal of Contract Law* 37, 38.

¹⁵ (1988) 164 CLR 387, 407–8.

¹⁶ *Ibid* 423 (emphasis added).

requiring the inducing party to fulfil the expectation.¹⁷ The inducing party's duty is to do as much as is necessary to prevent the relying party from suffering detriment.

Both the High Court and academic commentators such as Finn and Spence have made it clear that equitable estoppel is not a method for the enforcement of non-contractual promises.¹⁸ Brennan J, in *Waltons Stores*, suggested a number of points of distinction between contract law and equitable estoppel, including the following:

The measure of a contractual obligation depends on the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.¹⁹

This insistence that effect may be given to an equitable estoppel other than by fulfilment of the relying party's expectation is grounded upon the characterisation of the duty as a duty to avoid causing harm to those who rely upon one's conduct. Spence described the underlying duty as a 'duty to ensure the reliability of induced assumptions'.²⁰ His explanation of the duty leaves no room for doubt, however, that his concern is the prevention of detriment to the relying party:

The duty imposes a primary obligation upon the party inducing the assumption, in as much as he is able, to prevent harm to the relying party. The harm he must prevent is that the relying party is worse off *because the assumption has proved unjustified* than he would have been had it never been induced. If the relying party suffers harm and the inducing party might have done more to have prevented it, the duty imposes a secondary obligation upon the inducing party to put the relying party, not in the position in which he would be if the assumption were justified, but in the position in which he would have been had the assumption never been induced.²¹

It is submitted that Spence's description of the duty focuses the attention upon what is really a secondary and incidental aspect of the duty. The primary aspect of the duty is the prevention of the harm that befalls the relying party in the event that the inducing party exercises its legal right to refuse to make good the relying party's assumption. The rationale of the duty cannot be to make good an expectation, for the inducing party has every right, at law, to refuse to fulfil that expectation. That is

¹⁷ Ibid 405 (Mason CJ and Wilson J), 425 (Brennan J).

¹⁸ Ibid 424–5 (Brennan J); Finn, above n 3, 60, Spence, above n 8, 7.

¹⁹ (1988) 164 CLR 387, 425.

²⁰ Spence, above n 8, 6.

²¹ Ibid 7 (emphasis added).

why equitable estoppel has to be explained in terms of casting upon an inducing party, who refuses to fulfil the expectation, a duty to protect the relying party from any detriment that flows from the refusal. Equitable estoppel does not trespass upon contract law's jurisdiction to determine which promises are enforceable. It operates where the law of contract refuses to impose an obligation upon a person to fulfil another person's expectation. The effect of an equitable estoppel is to place conditions upon or 'to qualify'²² a person's legal rights as those rights are determined by the law of contract.

EQUITABLE ESTOPPEL AND THE MINIMUM EQUITY

Since the *Waltons Stores* doctrine justifies equitable intervention in terms of a need to avoid the detriment that follows from the relying party's reliance, one would expect the consequent relief to be formulated in terms of either preventing the anticipated detriment or compensating for the detriment actually suffered. In *Waltons Stores*, Mason CJ, Wilson and Brennan JJ recognised that placing conditions upon the inducing party's exercise of its legal rights so as to avoid detriment to the relying party may require giving effect to the relying party's expectation. The remedy awarded in *Waltons Stores* (damages in lieu of specific performance) certainly had the effect of placing the relying party as near as possible to the position it would have occupied had its expectation been fulfilled. The need to distinguish between contract and equitable estoppel required that relief which gave effect to the relying party's expectation was reserved for those cases in which this was the only means of preventing or overcoming the detriment. Relief that gave effect to the expectation could not be awarded as of right.²³ The High Court developed this idea further in its subsequent decision in *The Commonwealth v Verwayen* ('*Verwayen*').²⁴

In *Verwayen*, Mason CJ, Brennan, Dawson, Toohey and McHugh JJ expressed (in separate judgments) the idea that a court should grant the minimum relief necessary to relieve the relying party of its detriment.²⁵ Brennan J summarised the position eloquently:

The remedy is not designed to enforce the promise although, in some situations (of which *Waltons Stores v Maher* affords an example), the minimum equity will not be satisfied by anything short of enforcing the promise.²⁶

²² Finn, above n 3, 67.

²³ (1988) 164 CLR 387, 405 (Mason CJ and Wilson J), 425 (Brennan J).

²⁴ (1990) 170 CLR 394.

²⁵ Ibid 413 (Mason CJ), 429 (Brennan J), 454 (Dawson J), 475–6 (Toohey J), 504 (McHugh J).

²⁶ Ibid 429.

A court should award relief that gives effect to the relying party's expectation only where it is satisfied that to do so is the only appropriate means, or the most appropriate means at least, of preventing detriment to the relying party. In any other case, a court should order the inducing party to compensate the relying party for the loss it has suffered by reason of its reliance. This is a systematisation of a much older idea. Finn has suggested that the minimum equity idea had its origins in *Plimmer v Mayor of Wellington*.²⁷ The term 'minimum equity' was used by Scarman LJ in *Crabb v Arun District Council*²⁸ and then appropriated by a unanimous English Court of Appeal in *Pascoe v Turner*.²⁹ The English courts, in the cases mentioned, have articulated the minimum equity principle so as to allow considerable scope for judicial discretion. There is no definite rule apart from that it is for the court to determine 'in what way the equity can be satisfied'³⁰ or 'what is the minimum equity to do justice',³¹ taking into account all of the circumstances of the case. The majority in *Verwayen* sought to inject some certainty into the process by insisting that the prima facie entitlement is compensation for the reliance loss suffered or anticipated. Spence has defended this position, saying that, since equitable estoppel is not concerned with the enforcement of expectations, the fulfilment of the expectation should take place 'only as a last resort'.³²

Mason CJ went further than his colleagues in systematising the process of determining whether a departure from the reliance loss measure of relief was justified. His Honour said that the equitable estoppel principle required 'proportionality between the remedy and the detriment which is its purpose to avoid'.³³ His Honour thought that an award of relief on the expectation basis would be justified where the reliance was 'for an extended period' or where the detriment is 'substantial and irreversible' or 'cannot satisfactorily be compensated or remedied'.³⁴

Deane and Gaudron JJ differed from the other members of the court on the question of relief. Deane J thought that there ought to be a prima facie entitlement to expectation relief but that this entitlement was to be 'qualified in a case where such relief would exceed what could be justified by the requirements of good conscience and would be unjust to the estopped party'.³⁵ Gaudron J seems to have agreed with

²⁷ (1884) 6 App Cas 699; Finn, above n 3, 68.

²⁸ [1976] Ch 179, 198.

²⁹ [1979] 1 WLR 431, 438.

³⁰ *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699, 714; *Crabb v Arun District Council* [1976] Ch 179, 188 (Lord Denning MR).

³¹ *Pascoe v Turner* [1979] 1 WLR 431, 438.

³² Spence, above n 8, 69.

³³ (1990) 170 CLR 394, 413.

³⁴ *Ibid* 416.

³⁵ *Ibid* 445–6.

Deane J that expectation relief should be the primary form of relief, but her Honour noted that a major factor in justifying expectation relief is the possibility that the extent of the detriment may not always be ‘accurately or adequately predicted’.³⁶ Her Honour’s comments are probably best interpreted as recognition that the practicalities of reversing or preventing a detriment will, more often than not, involve the fulfilment of the expectation.

The strict reliance loss measure of relief would, on the facts of *Verwayen*, have been the financial loss (in the form of legal costs) incurred by Mr Verwayen between the date of the Commonwealth’s representation that it would not plead the statute of limitations defence and the date of its change of policy. Mason CJ and Brennan J were the only members of the court who would have limited the relief to that measure.³⁷ The significance of the *Verwayen* decision lies, however, in the observation of a majority of the High Court that the fulfilment of the relying party’s expectation ought not to be the remedial response of first choice in equitable estoppel cases.

The present High Court has shown signs of retreat from the *Verwayen* position,³⁸ but has not repudiated it. The *Verwayen* formulation of the minimum equity idea offers continuity between the basis for equitable intervention and the formulation of the relief. It is founded upon the argument that, if equitable estoppel is concerned with a duty to ensure that the relying party is no worse off as a result of relying upon the inducing conduct, the basic remedy ought to be compensation for the loss occasioned by the reliance. A court ought not to award relief in the form of conferral of the benefit unless that is the only available means of ensuring that the relying party is not left worse off by its reliance. This would seem to be the best means to ensure that there is proportionality between the relief and the detriment suffered by the relying party.

CRITICISMS OF THE DETRIMENTAL RELIANCE THEORY

Estoppel and Promise Enforcement

Birks³⁹ began his argument with the proposition that to say that an estoppel arises from a representation as to fact is to say that the representor is bound not to deny that fact. The representation is binding in that sense. If the representation relates to

³⁶ Ibid 487.

³⁷ (1990) 170 CLR 394, 417 (Mason CJ), 430 (Brennan J).

³⁸ *Giumelli v Giumelli* (1999) 196 CLR 101. See below nn 87-91 and accompanying text.

³⁹ Birks, above n 9.

one's future intention, that is, a promise, a person who is estopped from denying the content of the representation is bound by a promise.⁴⁰ This reasoning leads Birks to say that the term 'estoppel' has ceased to serve any purpose:

Estoppels have all along been binding promises. But, until recently, the rare word has also been useful for something else, namely to identify their peculiarity in being binding only for one purpose, for the purpose of being used as a shield in litigation ... Detrimental reliance promises, binding with limited effect, have become or are becoming binding with general effect. But, if that is right, there is no point at all in continuing to call them estoppels. In a jurisdiction where detrimental reliance promises are binding with general effect it has become true that promises are contracts when made by deed, supported by consideration or relied on to the detriment of the promisee.⁴¹

This analysis suits Birks' taxonomic aims. In his desire to systematise all private law causes of action into three types of events — wrongs, contracts and unjust enrichment⁴² — he has proposed to categorise estoppel as a contract event. Birks has little patience with the competing taxonomies of common law and equity. He has said that if common law and equity are competing for the same territory, they must fight to the death.⁴³ The territory for which common law contract and equitable estoppel are competing is the definition of what types of promises are enforceable. Birks would prefer to see a single law of promise enforcement, which extends the category of enforceable promises to situations where there has been detrimental reliance.

Mescher also has argued that equitable estoppel ought to be subsumed within a unified promise enforcement regime:

Today, equitable estoppel does more than intervene in a contract relationship: it has established an *alternative* means of promise enforcement. The courts have said that this is no encroachment upon the territory of contract law because equitable estoppel is not a cause of action, but a defence, whereas a plaintiff does have a cause of action in contract law when a contract has been broken. If equitable estoppel is found to be a cause of action, then both common law and equity are involved in the enforcement of promises; each jurisdiction being supported by different principles.⁴⁴

⁴⁰ Ibid 63.

⁴¹ Ibid.

⁴² Ibid 61.

⁴³ P Birks, 'Annual Miegunyah Lecture: Equity, Conscience and Unjust Enrichment' (1999) 23 *Melbourne University Law Review* 1, 23.

⁴⁴ Mescher, above n 10, 547.

Both Birks and Mescher, in equating the effect of an estoppel with that of a promise in a deed or supported by consideration, must be locating the actionable wrong in equitable estoppel in the inducing party's failure to perform its promise or otherwise make good the relying party's expectation. It is submitted, however, that this view of the actionable wrong does not follow automatically from the fact that estoppel may now be used as the foundation for a cause of action. The inducing party's failure to make good the relying party's expectation is merely the occasion upon which the estoppel arises. Both Finn⁴⁵ and Spence⁴⁶ located the wrong in the inducing party's assertion of a right to refuse to fulfil the relying party's expectation while allowing the relying party to suffer detriment. A majority of the members of the High Court in *Waltons Stores v Maher* also appear to have characterised the wrong in this way.⁴⁷

There are very good reasons, which are related to a fundamental characteristic of equity, why the wrong ought to be characterised in this way. Equity presupposes the operation of the rules of the common law. Equity intervenes only in a situation where, the common law position having been established, someone attempts to use his or her common law rights in a way that offends the conscience of equity. Equity seeks, with respect to a particular defendant, 'to purify and correct that defendant's conscience by forcing her or him to act in accordance with those dictates of reason and good conscience found by the Lord Chancellor to be applicable to that case'.⁴⁸

Finn emphasised the need for the concept of unconscionable conduct to have, in the context of any particular equitable doctrine, a definite content.⁴⁹ It has been seen how the High Court in *Waltons Stores* gave it content for the purposes of equitable estoppel. The requirement of unconscionable conduct has a vital role in that it requires a court to categorise a party's insistence upon its strict legal rights as being wrongful in a particular way.⁵⁰ Equitable estoppel operates where there is no legally enforceable contract to fulfil the relying party's expectation. It is not wrong at common law for the inducing party to refuse to fulfil the expectation. It has not made a contract to do so, so it is free to change its mind. The role of equitable estoppel is to prevent the inducing party from taking advantage of the fact that there is no contract in circumstances where it would be unconscionable for it to do so.

⁴⁵ Finn, above n 3, 67.

⁴⁶ Spence, above n 8, 7.

⁴⁷ (1988) 164 CLR 387, 407-8 (Mason CJ and Wilson J), 423 (Brennan J).

⁴⁸ P Loughlan, 'The Historical Role of the Equitable Jurisdiction' in P Parkinson (ed), *The Principles of Equity* (1996) 10.

⁴⁹ Finn, above n 14, 38.

⁵⁰ Contrast the view of Birks that unconscionable conduct is the 'fifth wheel on the coach': Birks, above n 9, 63.

The reliance theory respects the traditional division of labour between common law and equity. The common law enforces promises but only certain types of promises, that is, those evidenced by a deed or for which the promisee has given consideration. The promisee is entitled, as a general rule, to be placed as near as possible to the position that it would have been in had the promise been performed. Equity is concerned with ensuring that the party whose expectations have been disappointed is no worse off than it would have been had it never relied upon that expectation. Equitable relief is contingent upon the other party being responsible, in some way, for the relying party's choice to develop the expectation and rely upon it.

When equitable estoppel is seen in this light, the spectre of an apocalyptic struggle with the common law of contract fades away. Equitable estoppel does not provide a parallel means of promise enforcement, but a means of ameliorating the position of a person who has relied upon an expectation, which expectation was derived from a non-contractual, and thus non-enforceable, promise or representation.

Estoppel as Evidence of Induced Expectations

Pratt has presented equitable estoppel as protecting the relying party's entitlement to rely upon its expectation as to the inducing party's future conduct and, thereby, protecting the relying party's entitlement to the expectation itself.⁵¹ While Pratt does not go as far as Birks or Mescher in advocating that estoppel be subsumed within contract, he differs from the advocates of the detrimental reliance theory in insisting that a binding promise or representation is essential to equitable estoppel. Pratt believes that protection of reliance presupposes the existence of a binding promise or representation, which promise or representation justifies the reliance.⁵² Pratt's argument is a complex one, so a comprehensive refutation will not be attempted in these pages. There are two matters arising from Pratt's argument that call for further comment, however.

The first matter is concerned with the reason for attributing responsibility for the relying party's loss to the inducing party. Pratt observed that the means by which the detrimental reliance theory attributes responsibility to the inducing party for the relying party's detriment involves a very loose approach to causation. He said of a case in which B acts upon A's encouragement to incur expenditure in the fitting out of premises prior to the grant to B of a lease of those premises:

⁵¹ Pratt, above n 11, 218.

⁵² M Pratt, 'Defeating Reasonable Reliance' (1999) 18 *University of Tasmania Law Review* 181, 193.

Promises are not cudgels ... B's status quo was not disturbed with a gun to her head. It was *she* who chose to alter her position by acquiring the fittings. Estoppel protects her in this choice by entitling her not to be made worse off by A's conduct.⁵³

B's reliance was the product of her own choice. Pratt suggested that the real reason for protecting B against the consequences of her choice was A's conduct in encouraging B to assume that she would be given a lease.⁵⁴

The *Waltons Stores* judgments acknowledged that the relying party had a choice as to whether it would rely, but found the inducing party's moral culpability for the relying party's loss in the inducing party's failure to correct the relying party's false expectation.⁵⁵ Gaudron J explained the matter in the following way:

Whatever the actual knowledge or belief of the appellant as to the state of mind of the respondents once it came to the appellant's knowledge that demolition work had commenced it ought then to have been aware that there was a real possibility or likelihood that the respondents had commenced work in the reasonable expectation that exchange would take place. That being so, the appellant came under a duty to inform the respondents that the situation had materially changed.⁵⁶

The point to be made here is that, in a *Waltons Stores*-type scenario, the inducing party, who becomes aware of the relying party's expenditure, must take the opportunity to cure the relying party of its mistaken belief that the lease (or other transaction) is a foregone conclusion. This idea can be traced back to the House of Lords' decision in *Ramsden v Dyson*,⁵⁷ in which Lord Cranworth LC said:

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully

⁵³ Pratt, above n 11, 217.

⁵⁴ Ibid.

⁵⁵ (1988) 164 CLR 387, 407–8 (Mason CJ and Wilson J), 429–30 (Brennan J), 462–3 (Gaudron J).

⁵⁶ Ibid 462.

⁵⁷ (1866) LR 1 HL 129.

passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.⁵⁸

The inducing party's moral culpability does not, in the situation envisaged by Lord Cranworth LC, depend upon the inducing party being responsible for the initial creation of the relying party's expectation. The inducing party's acquiescence in the relying party's reliance upon a unilaterally developed expectation would be enough. The reliance theory attributes responsibility to the inducing party on the basis that the inducing party stood by while the relying party exposed itself to detriment.

Pratt does not believe that this observation undermines his argument. He has said that the conduct of the inducing party, which justifies the relying party's reliance, need not consist of an express promise.⁵⁹ Pratt appears to be open to the possibility that acquiescence in the relying party's detrimental reliance could be conduct that encourages the relying party's expectation. The relevance of the acquiescence to the inducing party's moral culpability lies in its role in the encouragement of the relying party's expectation rather than its role in the infliction of loss upon the relying party. The relying party is entitled to rely upon its expectation because the inducing party encouraged the maintenance of that expectation.

The problem with Pratt's argument is that, by saying that the inducing party's encouragement of the expectation justifies the relying party's entitlement to rely, it insists that the basis for equitable estoppel liability is the binding nature of the encouragement. If the basis for liability is characterised in this way, it is difficult to see how one can avoid doing away with the division of labour between the common law of contract and equitable estoppel. It is not the role of equity to add to the list of situations in which promises or representations become binding upon the promisor or representor and, in doing so, outflank the common law. Equitable estoppel must let the common law decide what types of promises or representations are binding. The common law's characterisation of a representation as either binding or not binding is presupposed by equity. The role of equitable estoppel must be limited to preventing the maker of a non-contractual promise or representation from inflicting loss upon those who have relied upon the promise or representation. It follows that, given a choice between explaining equitable estoppel in terms of the binding character of the promise or representation and explaining it in terms of the inducing party's failure to act to prevent the relying party from suffering loss as a result of that reliance, we must choose the latter explanation.

⁵⁸ Ibid 140–1; see also 168 (Lord Wensleydale).

⁵⁹ Pratt, above n 52, 191.

The second matter relates to Pratt’s attempt to discredit the reliance theory on the basis that the courts have, in most of the successful equitable estoppel cases, awarded relief that gave effect to the relying party’s expectation.⁶⁰ Pratt regarded this as evidence of a flaw in the reliance theory. That flaw is that the nature of the wrong (ie allowing the relying party to suffer detriment by reason of its reliance) does not inform the measure of the relief.⁶¹ The statistics seem to support Pratt’s argument. Robertson⁶² found that, between the High Court’s decision in *Verwayen* in 1990 and the end of 1995, there had been 26 reported cases in which a plea of equitable estoppel had been successful. The court gave effect to the relying party’s expectation in 24 of these cases.⁶³ Pratt observed that this trend has been continued in more recent decisions.⁶⁴

Robertson’s faith in the reliance theory was not diminished by his findings, however. He maintained that at least 17 of the 24 cases of expectation relief could be explained in terms of the minimum equity approach to relief, that is, the inducing party will be required to give effect to the expectation where that is the only way in which harm to the relying party may be prevented.⁶⁵

Pratt was not convinced. He disputed whether even the outcome in *Waltons Stores* could be explained on this basis.⁶⁶ He dismissed Robertson’s insistence that most cases of expectation relief are consistent with the minimum equity idea as an explanation that ‘permits the exceptions to swallow the rule.’⁶⁷

⁶⁰ Pratt, above n 11, 212.

⁶¹ *Ibid* 212–3.

⁶² Robertson, ‘Satisfying the Minimum Equity’ above n 7.

⁶³ *Ibid* 828–9.

⁶⁴ Pratt, above n 11, 212–3. Notable among these more recent decisions is that of the High Court in *Giumelli v Giumelli* (1999) 196 CLR 101.

⁶⁵ Robertson, above n 7, 835. In a subsequent article, Robertson suggested that only three of the 24 cases could be said to have been wrongly decided in the sense that compensation ought to have been awarded rather than relief in the expectation measure. Those cases were *Kintominas v Secretary, Department of Social Security* (1991) 30 FCR 475; *Leda Commercial Properties Pty Ltd v DHK Retailers Pty Ltd* (1993) ANZConvR 162; *Re Neal; ex parte Neal v Duncan Properties Pty Ltd* (1993) 114 ALR 659. See Robertson, above n 2, 46. Since the High Court’s decision in *Giumelli*, however, Robertson has retreated from dogmatic insistence upon a reliance-based approach to relief. See below nn 92–4 and accompanying text.

⁶⁶ Pratt, above n 11, 214.

⁶⁷ *Ibid*.

Pratt seemed to overlook the possibility that the cases that are litigated do not represent a broad cross-section of all of the situations in which equitable estoppel may arise. The cases that are litigated are those in which the parties fail to settle their differences out of court. One obvious reason for their failure to do so would be a disagreement about or a difficulty in ascertaining the measure of the plaintiff's detriment. Since this is a real possibility, we cannot dismiss the reliance theory on the basis that the overwhelming majority of successful pleas of equitable estoppel have led to expectation relief. We have to look behind the relief awarded to see whether it is explicable in terms of Robertson's theory that the award of expectation relief is the only means available to prevent the relying party from suffering detriment. A finding that many of the cases can be explained this way would not prove Robertson's theory, although it would increase its plausibility. If, on the other hand, there is any case at all in which the court stopped short of giving effect to the relying party's expectation and awarded relief according to a strict reliance loss measure, then this would demonstrate conclusively that it is not the rationale of equitable estoppel to give effect to expectations.

EQUITABLE ESTOPPEL REMEDIES SINCE *WALTONS STORES V MAHER*

In *Waltons Stores*, the Mahers had suffered detriment by relying upon the assumption that Waltons would enter into a lease. The detriment consisted of their expenditure upon demolition of an old building and their commencement of construction of a new building to Waltons' specifications. The remedy was damages in lieu of specific performance. The Mahers were placed in the position that they would have been in had the contract eventuated. It is conceded that it is difficult to explain this relief merely in terms of reversal of a reliance loss. It is true that *Waltons Stores* was a case in which the plaintiff was relying upon the existence of a unique (or very rare, at least) opportunity. The plaintiff's true loss was more than mere wasted expenditure. It was the loss of a business opportunity of a type that would arise at infrequent intervals. Waltons' retreat from its initial willingness to enter into a lease left the plaintiff with a building constructed to the specifications of a particular tenant. The chances of this building being applied more or less immediately to some other use would have been minimal. A reasonable approximation of the money value of this loss would have been difficult, but not impossible. The High Court appeared to be content, however, to say that giving effect to the expectation was one way of reversing the reliance loss and whether that course was to be taken depended upon the circumstances of the case.⁶⁸ The relief awarded by the trial judge was within the range of relief that his Honour could have awarded, so the appeal was dismissed.

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(1988) 164 CLR 387, 405 (Mason CJ and Wilson J), 429 (Brennan J).

The decision in *Silovi Pty Ltd v Barbaro*,⁶⁹ which also involved an agreement to grant a lease, is a better example of a case in which relief that gave effect to the relying party's expectation was the only means of reversing that party's detriment. The tenants, who operated a plant nursery, received the owners' assurances that they would adhere to the terms of the lease, even though the lease (for a term of ten years) had not been registered. The tenants spent a considerable sum of money planting Cocos palms, installing irrigation and otherwise tending those plants. Two years after this entry into possession, the owners sought to sell the land to the defendant company, which announced that it would not honour the lease. Powell J made an order (which was upheld by the Court of Appeal), which had the effect of giving the tenants 'a personal licence ... coupled with an interest in the nature of a *profit à prendre*'.⁷⁰

Here, the effect of the order was to fulfil, for all practical purposes, the tenants' expectation. The relief seems, at first appearance, to have been measured by the benefits of which the tenants had been deprived by the owners' failure to fulfil their expectation rather than the detriment they suffered by reason of their reliance upon that expectation. One would have expected the minimum equity to be fulfilled by an award of compensation to the tenants in respect of their wasted expenditure in planting and tending the Cocos palms. This conclusion ignores, however, the true nature of the tenants' loss. The true detriment suffered by the tenants was loss of time. The evidence was that Cocos palms take ten years to reach maturity. Paying the tenants compensation measured by their expenditure would not have placed them in the position that they would have been had they never been induced to assume that they would have a lease over the land. They would have had to start again at another location. They had lost two years in their business plan. The relief awarded in *Silovi v Barbaro* was consistent with an approach to relief based upon compensation for detriment.

Silovi v Barbaro established a theme of impossibility of accurate assessment of the relying party's loss as a basis for giving effect to an expectation: *Blazely v Whiley*⁷¹ is a more recent manifestation of this theme. The defendants in that case had resided in a house owned by the plaintiffs (the male defendant's uncle and his wife) for a period of approximately 19 years. They had been paying sums of money to the plaintiffs on a regular basis, these sums being alleged by the plaintiffs to be rent. The defendants, on the other hand, believed, on the basis of statements made by the male plaintiff to the female defendant, that they were purchasing the house from the plaintiffs. The house was located next to the plaintiffs' business premises. The

⁶⁹ (1988) 13 NSWLR 466.

⁷⁰ *Ibid* 475 (Priestley JA).

⁷¹ (1995) 5 Tas R 254.

plaintiffs used the rear of the block on which the house stood for storage associated with the business and appeared to use the defendants as unpaid security guards. The plaintiffs eventually sought to recover possession of the house and the defendants counter-claimed for specific performance. Wright J found that there had been no contract for the sale of the house to the defendants, but that the defendants could obtain relief under the equitable estoppel doctrine.

The detriment suffered by the defendants was multi-faceted. Wright J thought that their detriment included the exposure of the defendants and their family to the noisy environment of a road haulage depot, the defendants' expenditure upon improvements to the property and, possibly, any difference between the sum of money paid by the defendants to the plaintiffs and the sum that would represent a reasonable rent for the premises.⁷² Wright J referred to *Waltons Stores* and said that the appropriate measure of relief is that which is necessary to prevent or avoid the detriment that would be suffered by the defendants.⁷³ There was no question of the plaintiffs being required to transfer the house to the defendants without the defendants having to pay a sum of money. The defendants had always understood that they would have to pay for the house. The question was what credit should they have been given for the sums they had paid and the detriment they had undergone already. Wright J considered that the taking of accounts between the parties would be unlikely to achieve an accurate result, so resorted to what he described as a 'very broad axe approach',⁷⁴ being the sale of the property and the equal division of the proceeds of sale between the plaintiffs and the defendants. The result of this approach was to give the defendants an interest in the house, but the interest given was commensurate with their detriment rather than with their expectation. His Honour's approach to the formulation of relief was consistent with the *Verwayen* manifestation of the minimum equity idea.

After *Verwayen*, the High Court did not have another opportunity to pronounce upon these issues until 1999, when it was required to hear an appeal in the case of *Giumelli v Giumelli*.⁷⁵ This case, which originated in Western Australia, involved an informal arrangement between family members involved in farming activity. The parties to family arrangements of this type enter into them without any contemplation that they will be engaged in legal proceedings one day. It is only events such as the divorce of parties or some other acrimonious family

⁷² Ibid 276.

⁷³ Ibid 277.

⁷⁴ Ibid 279.

⁷⁵ (1996) 17 WAR 159 (Supreme Court of Western Australia, Full Court); (1999) CLR 101 (High Court of Australia).

dispute that bring these matters before the courts. When the parties do have to resort to the courts, there are likely to be difficulties in defining the relevant expectation and the relevant detriment.

The plaintiff in *Giumelli* was the son of the defendants. The plaintiff was involved (and from 1973 was a partner) in a family business concerned with the working of some land as an orchard. The defendants owned the land. The defendants had led the plaintiff and his brothers to believe that the whole of the land would be theirs one day. The plaintiff had, with the knowledge and consent of the defendants, built a house on a portion of this land. The defendants promised to the plaintiff, on at least two occasions, that the land on which the house stood would be transferred to him. The judgments of the appellate courts gave most attention to the most recent of these promises, the so-called ‘third promise’. This promise was made against the background of the plaintiff’s separation from his first wife. The defendants promised that if the plaintiff would return to the property and assist them in developing a new orchard there, they would ensure that the land was subdivided and the appropriate lot transferred to him. It was around about this time that the plaintiff turned down an offer of employment by Alcoa on the basis that he believed, on the strength of the defendants’ promise, that continuing to work in the family business would be in the interests of his long-term security. A plan of subdivision and other necessary documentation was drawn up. The plaintiff received regular assurances that the new lot, created by the plan, would be transferred to him. Almost three years later (the lot still not having been transferred to the plaintiff) the plaintiff left the property and ceased to be a partner in the family business.

In the Full Court of the Supreme Court of Western Australia, Ipp J (with whom Franklyn J agreed) recognised that this case could have been argued on the basis of equitable estoppel or the principle in *Muschinski v Dodds*.⁷⁶ His Honour proceeded to decide the case on the basis of the latter principle.⁷⁷

Rowland J, on the other hand, decided the case on the basis of equitable estoppel. His Honour identified the plaintiff’s detriment as

the change of circumstance in reliance on the promise by foregoing another career path, returning to the farm and developing, in particular, the promised orchard area which would, but for the promise, *remain an asset outside his ownership* and, of course, outside the ownership of the partnership.⁷⁸

⁷⁶ (1985) 160 CLR 583, particularly 620 (Deane J).

⁷⁷ (1996) 17 WAR 159, 168; See pp 173–5 as to his Honour’s application of the principle in *Muschinski v Dodds* to the facts of the case.

⁷⁸ *Ibid* 166 (emphasis added).

There can be no doubt that the plaintiff's choice involved the undertaking of a risk that he might be worse off in order to procure a particular benefit for himself. The defendants' assurances that he would receive title to the lot were a significant factor in his decision to undertake that risk. The risk did not pay off. While it was difficult, perhaps impossible, to quantify the actual financial loss to the plaintiff resulting from his choice and the subsequent non-fulfilment of the promise, it is clear that he was, to borrow the words of Spence, 'worse off because the assumption [had] proved unjustified than he would have been had it never been induced'.⁷⁹ He had sown without reaping. This is what his Honour appeared to be saying when he said that the plaintiff's detriment was the loss of the property.⁸⁰

His Honour, in the course of formulating the relief, referred with apparent approval to the comments of Mason CJ in *Verwayen* that equity does only what is necessary to prevent the detriment.⁸¹ His Honour then said that the detriment is to be prevented by giving effect to the promise 'unless to do so would be unfair or unjust to the promisor or if the detriment suffered is not commensurate with the unfulfilled promise'.⁸² His Honour thought that there was 'no appreciable difference' between the plaintiff's detriment and the effect of the promise.⁸³ Therefore, Rowland J agreed with the order proposed by Ipp J that the defendants hold the property on trust to convey the lot to the plaintiff.⁸⁴

It will be recalled that the 'expectation relief unless...' view adopted by Rowland J was not a majority view in *Verwayen*. There can be no doubt, however, that the adoption by his Honour of the stricter approach espoused by the majority in *Verwayen* would have led to the same result. The plaintiff's detriment involved both his wasted effort and his foregoing of any opportunity of employment elsewhere. There was no way of knowing what the plaintiff's fortunes would have been had he chosen to cut his ties with the family business and accept employment with Alcoa. Any assessment of his loss in money terms would have been purely conjectural. The situation would appear to fall within the category of 'substantial and irreversible detriment ... which cannot satisfactorily be compensated or remedied' envisaged by Mason CJ.⁸⁵

⁷⁹ Spence, above n 8, 7.

⁸⁰ (1996) 17 WAR 159, 166.

⁸¹ Ibid.

⁸² Ibid; See *Commonwealth v Verwayen* (1990) 170 CLR 394, 445–6 (Deane J), 487 (Gaudron J).

⁸³ (1996) 17 WAR 159, 166.

⁸⁴ Ibid 167 (Rowland J), 176 (Ipp J).

⁸⁵ *Commonwealth v Verwayen* (1990) 170 CLR 394, 416.

When *Giumelli* went to the High Court, Gleeson CJ, McHugh, Gummow and Callinan JJ, who were parties to a joint judgment,⁸⁶ took care to define the issue that was before them. They characterised the order of the court below as akin to an order for conveyance.⁸⁷ The question for the High Court was whether an order that had the effect of requiring a conveyance of part of the property was appropriate in the circumstances of the case. The Court having expressed the view that the case fell within the principle in *Plimmer v Mayor of Wellington*, their Honours appeared to endorse the broad discretionary approach to relief articulated in that case.⁸⁸ They rejected the parents' argument that it was not open to the Full Court to grant relief that went beyond the reversal of the son's detriment. They said that *Verwayen* was not authority for limiting the relief available to the reliance loss.⁸⁹

Their Honours proceeded to survey the full range of the views expressed by the members of the High Court in *Verwayen* and came to this conclusion:

The upshot is that the respondent [son] is correct in his submissions that the reasoning in the judgments in *Verwayen* does not foreclose, as a matter of doctrine, the making in the present case of an order of the nature made by the Full Court.⁹⁰

Their Honours, having decided that relief in the expectation measure was a possibility, noted that the Full Court had not taken account of the interests of third parties, notably those of the plaintiff's brother, in making the order that it did. Their Honours believed that awarding the plaintiff a money sum representing the value of his claim to the lot was adequate to ensure 'conscientious conduct' on the part of the defendants.⁹¹ Therefore, the plaintiff received an award that corresponded to the expectation measure but did not consist of an actual conveyance of the property.

While Robertson's faith in the reliance theory had not been shaken by his survey of the cases decided between 1991 and 1995, he seems to have modified his views in the light of the High Court's decision in *Giumelli*. He has said that *Giumelli* reveals the present High Court's 'lack of enthusiasm' for strict adherence to the reliance-based approach.⁹² His assessment of the High Court's approach to the determination of relief was:

⁸⁶ Kirby J wrote a short concurring judgment.

⁸⁷ (1999) 196 CLR 101, 112.

⁸⁸ *Ibid* 113.

⁸⁹ *Ibid* 120.

⁹⁰ *Ibid* 125.

⁹¹ *Ibid*.

⁹² A Robertson, 'Reliance Conscience and the New Equitable Estoppel' (2000) 24 *Melbourne University Law Review* 218, 229.

The Court thus substituted expectation relief in monetary form for expectation relief in specie. The Court did not reject the reliance-based approach to relief, but the Court's failure to consider whether compensation calculated on a reliance basis was more appropriate suggests a move away from the approach articulated in *Verwayen* and adopted by Spence.⁹³

Robertson has now stated the view that, since it is difficult to assess compensation for reliance in most cases, it is appropriate to use the expectation measure relief as the starting point.⁹⁴ While this is a fair interpretation of the High Court's decision, it would be wrong to say that the strict reliance-based approach to the determination of relief has been ruled out unequivocally. The issue at hand in *Giumelli v Giumelli* did not require the High Court to decide between the reliance loss measure and the expectation measure as the starting point for determining relief in equitable estoppel cases. Their Honours merely had to dismiss the proposition that *Verwayen* precluded the award of relief in the expectation measure. *Verwayen* clearly did not preclude relief in that measure.

Therefore, those who, like Pratt,⁹⁵ claim that *Giumelli* demonstrates that the real concern of equitable estoppel is to give effect to the relying party's expectation go too far. The moderate position derived from *Giumelli* by Robertson is less satisfactory than the strict reliance-based approach because it involves a discontinuity between the matter that informs the intervention of equity and the matter that informs the measure of relief. If the infliction of detriment informs the intervention of equity, then those who assert that the avoidance of that detriment ought not to inform the measure of relief should bear the onus of establishing that conclusion.

The type of case in which a court ought to confine itself to a strict reliance loss measure of relief is typified by *Morris v Morris*,⁹⁶ a case that preceded *Waltons Stores* by a number of years. The plaintiff in that case had sold his home unit and used the proceeds to construct a second storey on his son's house with a view to living there, the son and his wife continuing to occupy the existing parts of the

⁹³ Ibid.

⁹⁴ Ibid 230.

⁹⁵ Pratt, above n 11, 212, fn 18.

⁹⁶ [1982] 1 NSWLR 61; McLelland J did not refer to the concept of estoppel by name in this case. He did say, however, that he was applying the principle in *Chalmers v Pardoe* [1963] 1 WLR 677. A number of scholars have classified the case as an equitable estoppel case; P D Finn, above n 3, 68, R P Austin, 'The Melting Down of the Remedial Trust' (1988) 11 *University of New South Wales Law Journal* 66, 84, Robertson, above n 7, 807; Spence, above n 8, 16.

house. When the relationship between the parties broke down to the end that the plaintiff could no longer live in the house, McLelland J awarded the plaintiff an equitable charge over the land to secure the payment to the plaintiff of the sum of \$28 000 (being the amount of the plaintiff's expenditure) plus interest from the date of the commencement of the proceedings.⁹⁷ The underlying rationale of this equitable intervention was that the defendants could retain the increase to their wealth brought about by the plaintiff's expenditure so long as they acted to ensure that the plaintiff was no worse off than he would have been had he never spent the money.⁹⁸ Austin described the charge as 'a secured right to recover the cost of [the plaintiff's] reliance'.⁹⁹ The cost of the plaintiff's reliance was capable of precise assessment in money terms.

It is possible to find more recent examples of the approach employed in *Morris v Morris*. Robertson has cited *The Public Trustee, as Administrator of the Estate of Percy Henry Williams (deceased) v Wadley*¹⁰⁰ as an example of a strict application of a reliance loss measure of relief.¹⁰¹ The respondent in that case was the daughter of the deceased Mr Williams. Between 1979 and 1992, Mr Williams had made numerous statements in the presence of the respondent to the effect that he would leave his house to her in his will. During the same period, the respondent performed housework for her father. The trial judge (Slicer J) was satisfied that the respondent did the housework partly because of affection for her father but also because she expected to receive a reward for her services in the form of the inheritance of the house.¹⁰² Mr Williams died intestate, thus defeating the respondent's expectation. Although the trial judge found that the respondent was entitled to compensation measured by half the value of the house, the majority of the Full Court (Crawford and Zeeman JJ) valued the respondent's entitlement at \$15 000.¹⁰³ Robertson made this observation:

This was clearly a difficult case. The extent of the plaintiff's detriment could not be measured precisely even in terms of wasted hours, and

⁹⁷ [1982] 1 NSWLR 61, 64.

⁹⁸ *Ibid* 63–4.

⁹⁹ Austin, above n 96, 84.

¹⁰⁰ Unreported, Supreme Court of Tasmania, Full Court, 27 June 1997
<<http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/tas/supreme%5fct/unrep890.html>> at 4 February 2000 (copy on file with author).

¹⁰¹ Robertson, 'Estoppel and the Minimum Equity Principle: *The Public Trustee, as Administrator of the Estate of Percy Henry Williams (deceased) v Wadley*' (1998) 13 *Journal of Contract Law* 178, 179; Robertson, 'Reliance and Expectation in Estoppel Remedies', above n7, 367.

¹⁰² *The Public Trustee v Wadley*, 5 (Crawford J) (quoting Slicer J).

¹⁰³ *Ibid* 10 (Crawford J), 18 (Zeeman J).

converting those hours wasted over a period of years to a specific amount of present day compensation clearly posed great difficulties. It is, therefore, all the more remarkable that the court was prepared to adopt a strict interpretation of the minimum equity approach to relief, and to attempt to fashion a remedy which was proportional to the detriment suffered.¹⁰⁴

It is clear that the trial judge and the dissenting judge in the Full Court (Wright J), who agreed with the trial judge's order, were concerned with the proportionality of the remedy to the respondent's detriment and were under no illusion that they were required to give effect to the respondent's expectation.¹⁰⁵ Neither of them was prepared to grant relief in the full expectation measure, that is, the full value of the house. *Wadley* was a case in which precise calculation in money terms of the relying party's detriment was difficult, but an approximation was possible. It differed, in this respect, from *Waltons Stores* and *Silovi v Barbaro*. In those cases, any assessment of the relying party's detriment in money terms would have involved the court in a certain amount of crystal ball gazing.

The fact that it is possible to find even one case in which a court has used a reliance loss measure of relief is significant. If equitable estoppel were truly concerned with protecting people's expectations, there would have to be an "all-or-nothing" approach to the remedy. *Wadley* was a case in which monetary relief was clearly adequate to prevent the relying party from being any worse off than she would have been had she never relied upon her expectation. Robertson has taken the argument further, saying that a prima facie restriction of the relief to a reliance loss measure is most conducive to the expansion of the doctrine.¹⁰⁶ A court faced with a set of facts like those in *Wadley* and with a choice between expectation relief and no relief at all would be inclined to choose the latter. Courts would be forced to define a minimum level of detriment that a relying party must suffer before that party is entitled to any relief at all.¹⁰⁷

¹⁰⁴ Robertson, 'Estoppel and the Minimum Equity Principle', above n 101 181; See also Robertson, 'Reliance and Expectation in Estoppel Remedies', above n7, 367.

¹⁰⁵ *The Public Trustee v Wadley*, 1–2 (Wright J).

¹⁰⁶ Robertson, 'Reliance and Expectation in Estoppel Remedies', above n 7, 365.

¹⁰⁷ See, for example, *Puie v Public Trustee of Queensland* [1986] QConvR 54–215, 57–454.

CONCLUSION

Wherever equity intervenes, it does so to restrain the unconscionable assertion of legal rights. The question whether a person has an entitlement to the fulfilment of an expectation is a matter for the common law of contract. Equity does not seek to second-guess the common law. The question for equity is whether the person whose expectation has been disappointed is entitled to be protected from any detriment that has been incurred on the faith of that expectation. The High Court in *Waltons Stores, Verwayen* and *Giumelli*, along with commentators like Finn, Robertson and Spence, have found the answer to that question in the conduct of the other person who induces the detrimental reliance. The focus upon an entitlement to be protected from harm (rather than an entitlement to the expectation) flows naturally from equity's traditional ameliorative role. The fresh start for equitable estoppel, which is based on the protection of expectations and has been envisaged by Birks, Mescher and Pratt, overlooks the fundamental tenet of equity jurisprudence that equity limits itself to ameliorating the harsh effects of the common law. This fresh start can be achieved only by way of a complete re-evaluation of the relationship between common law and equity.

The entitlement to be protected from harm finds its most natural remedial expression in the *Verwayen* manifestation of the minimum equity idea. The reason for equitable intervention is to prevent the relying party from being worse off. It follows that the base for determining the relief ought to be compensation measured by the relying party's wasted expenditure or the value of its wasted work. Where measurement of the detriment is impossible or impracticable, a court may give effect to the relying party's expectation. While this approach to the formulation of relief has not enjoyed universal acceptance in Australian courts, it is superior to any other approach to the formulation of relief in offering continuity between the reasons for equitable intervention and the measure of the remedial response.

