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PROMISSORY ESTOPPEL AND PROPRIETARY ESTOPPEL: A RESPONSE TO THE MYTH OF A UNIFYING APPROACH

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This article seeks to clarify whether the two major forms of equitable estoppel, namely promissory estoppel and proprietary estoppel, should be unified. It argues that the debate essentially centers on whether the two estoppels should be understood from a functional perspective, which supports unification on the basis that the two estoppels share a common function or purpose, as opposed to a technical perspective, which rejects unification on the grounds that the two estoppels are different in terms of their scope of operation and logical constraints. This paper argues that the technical perspective should be adopted because it reveals the theoretical impossibility and the practical problems of unifying the two estoppels.

INTRODUCTION

This article seeks to contribute to the debate on whether the two major forms of equitable estoppel, namely promissory estoppel and proprietary estoppel, should be unified. The choice of the two estoppels is deliberate—there have been uncertainties as to the relationship between the two estoppels and as to the scope and operation of each of them.[1] It has been said that much of the tensions between pragmatism, principle, and precedent have characterized the development of the two estoppels.[2] This paper suggests that the tension essentially centers on the issue of whether the two estoppels should be understood from a *functional perspective* as opposed to a *technical perspective*.

FUNCTIONAL PERSPECTIVE VS TECHNICAL PERSPECTIVE

The *functional perspective* focuses on the common purpose or function of the two estoppels, while the *technical perspective* examines the legal elements, logical constraints and scope of operation of each of them. It is argued that supporters for a unifying approach adopt the *functional perspective* to justify that the two estoppels could and should be unified based on their shared purpose or function, while those against unification adopt the *technical perspective* to argue that unifying the two estoppels is theoretically difficult if not impossible.

Proponents of a *functional perspective* usually argue that the two estoppels should be unified on the basis that they both work towards protecting against detrimental reliance,[3] making

[1] Ben McFarlane, 'Understanding Equitable Estoppel: From Metaphors to Better Laws' (2013) *Current Legal Problems* 267, 268-269.
[2] Maragret Halliwell, 'Estoppel: unconscionability as a cause of action' (1994) 14(1) *Legal Studies* 15, 20.
[3] Andrew Robertson, 'Towards a Unifying Purpose for Estoppel' (1996) *Monash University Law Review* 22, 1.

good expectations,[4] or restraining injustice arising from unconscionable conduct.[5] They claim that it is possible to unify the two estoppels under these broad concepts by resorting to a general formula for establishing an equitable estoppel. For example, Robertson argues that there are four essential elements underlying all equitable estoppel claims:

"First, the representee must have adopted an assumption as to his or her legal rights or the future conduct of the representor (assumption); secondly, the representee must have been induced by the conduct of the representor to adopt or maintain that assumption (inducement); thirdly, the representee must have acted or refrained from acting on the faith of the assumption, such that he or she will suffer detriment if the assumption is not adhered to (detrimental reliance); fourthly, the representee must have acted reasonably in adopting and acting upon the relevant assumption (reasonableness)."[6]

On the other hand, commentators who adopt the *technical perspective* reject a unifying approach on the grounds that such general formula for establishing an equitable estoppel is unworkable. Promissory estoppel and proprietary estoppel should be understood as each encompassing several irreducibly dissimilar principles. [7]

This paper follows the *technical perspective* and rejects a unifying approach for three reasons. Firstly, recognizing that the two estoppels serve a similar purpose does not necessarily mean that they could or should be unified. On the other hand, appreciating that promissory estoppel and proprietary estoppel are two distinct doctrines, and that each estoppel is comprised of different constituent formulations, is perfectly consistent with acknowledging that they all work towards a common goal. Indeed, preventing unconscionable conduct could possibly be a common purpose between the two estoppels: as will become apparent in Part II, unconscionability is an essential element under each of the formulation of the two estoppels.

Secondly, adopting the *functional perspective* masks the theoretical difficulty of reconciling the two estoppels into one doctrine. In particular, as will be elaborated in Part I, while general notions of 'promissory estoppel' and 'proprietary estoppel' are often used by judges and academics, it is inaccurate to treat the two estoppels as each comprising of one single doctrine. A close examination of the case laws shows that each estoppel embodies several irreducibly dissimilar formulations, with each formulation involving different legal elements. Therefore, the question of whether the two estoppels should be unified should be understood as whether *all the underlying formulations* of the two estoppels should be unified. Part II then illustrates that it is quite impossible to unify the different operating formulations under each of the equitable estoppel without losing each of their particular elements.

Finally, Part III argues that the failure to distinguish between the different formulations often leads to ambiguity in legal analysis and errors in legal application. This paper concludes that a unifying approach, as understood from a *technical perspective,* is both unworkable in principle and leads to legal errors in practice.

[4] Ibid.
[5] Mark Pawlowski, 'Unconscionability as a Unifying Concept in Equity' (2001) *Denning Law Journal* 16, 79; Andrew Robertson, 'Knowledge and Unconscionability in a Unified Estoppel.' (1998) *Monash University Law Review* 24, 115, 117.
[6] Pawlowski (n 5) 116.
[7] *McFarlane* (n 1) 268-269; John Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' (2011) *Modern Studies in Property Law* 175.

PART I: PROMISSORY ESTOPPEL AND PROPRIETARY ESTOPPEL

This section begins with some general points on the doctrine of estoppel, and the distinction between common law estoppel and equitable estoppel. It then moves to the particular discussion on the different formulations under the two forms of equitable estoppels, promissory estoppel and equitable estoppel. It seeks to illustrate that each formulation consists of different elements, provides a distinct basis for legal intervention, and requires different evidentiary proof; although it is possible that more than one formulation could be triggered by a given set of facts.

The purpose of this section is to provide a basis for the argument in Part II and Part III respectively that the *functional perspective* of unifying the two estoppels is theoretically unworkable and leads to errors in application. Hence, a *technical perspective* of understanding the two estoppels by carefully segregating and examining the different formulations under the two estoppels should be adopted.

THE DOCTRINE OF ESTOPPEL

The word 'estoppel' originated from the French word 'estoupe', meaning a 'punch' or 'cork' that stops something from coming out.[8] The essence of the doctrine of estoppel is thus straightforward: a party (A) is prevented from denying the truth of a particular state of affairs. That state of affairs may, or may not, exist, or have existed; what is important is that A cannot *contend* otherwise.[9]

COMMON LAW ESTOPPEL AND EQUITABLE ESTOPPEL

Estoppel exists under both common law and equity. As explained by Priestley JA in *Silovi Pty Ltd v Barbaro*, common law and equitable estoppel are separate categories; the former operates only upon a representation of *existing fact*, and the latter operates upon representations or promises as to *future conduct*.[10] However, this explanation, while reveals that the *type* of representations that are involved in the two estoppels are different, fails to appreciate the critical distinction between the two that affects how they operate differently.

The critical distinction, as McFarlane points out, lies on the fact that the common law estoppel operates as a true preclusionary principle but the equitable estoppel does not.[11] The effect of common law estoppel precludes one party from denying a particular fact, and this is *by itself* sufficient to give right to the other party.[12] In contrast, the effect (or more accurately, the sole effect) of equitable estoppel is not to preclude one party from denying a promise because this is not *per se* sufficient to give right to the other party.[13] Instead, the other party is required to prove some other facts *in addition to* the making of the promise (e.g. detriment, unconscionability, etc.) in order to establish his claim. As the common law estoppel is confined to the state of affairs established by the previous representations of facts, upon which the court would then determine the legal rights of the parties, it operates as a *rule of*

[8] K P Satheesan & V D Sebastian, 'Doctrine of Estoppel' (2002) Cochin University of Science and Technology Doctoral Dissertation 1, 27.
[9] *McFarlane* (n 1) 271.
[10] 13 NSWLR 466, 472.
[11] McFarlane (n 1) 272-273.
[12] Ibid.
[13] Ibid.

evidence. On the other hand, equitable estoppel operates as a *substantive doctrine*, giving rise to rights or equities that could be satisfied by a case-by-case granting of relief by the court.[14]

PROMISSORY ESTOPPEL

It is trite law that any arrangement between two parties to fulfill promised expectations is enforceable only if there is a contract.[15] On top of this, it has also been asserted that promissory estoppel will sometimes afford a defence in a contractual situation, but not a cause of action to enforce a gratuitous promise in the absence of consideration.[16]

However, promissory estoppel is supremely misunderstood.[17] It has been said that promissory estoppel is waning,[18] dying,[19] and traveling a road to irrelevancy.[20] Lord Hailsham once remarked that, 'the whole sequence of cases based on promissory estoppel...raise problems of coherent exposition which have never been systematically explored'.[21] This paper argues that such coherent exposition could be achieved by carefully segregating the doctrine into the three different formulations below. These formulations are derived from case laws in the UK and Hong Kong in which the doctrine of promissory estoppel has been invoked.

Formulation 1: Acceptance of Substitutive Performance

If B owed a duty to A, and A accepted particular conduct by B (either action or inaction) as fulfillment of that duty, then B's duty would be satisfied even if B's action (or inaction) would not have normally discharged that duty, provided that it would be inequitable for A to go back on such acceptance.

This formulation originates from *Central London Property Trust Ltd v High Trees House Ltd.*[22] Three key elements of the formulation are: (1) the existence of a duty owed by B to A, usually a contractual duty; (2) A's acceptance of a substitute performance by B to fulfill such duty; and (3) unconscionabiity of A's resilience from his acceptance of such substitutive performance.

McFarlane argues that the association of this formulation with promissory estoppel is 'somewhat odd'.[23] He points out that Denning J specifically stated that the formulation he was

[14] As will be seen below, however, some of the formulations under promissory estoppel and proprietary estoppel are very similar to those under common law estoppel, in particular, estoppel by representation. It is unfortunately not possible within the scope of this paper to address the difficult issues concerning these borderline cases.
[15] As to the requirements of a valid contract, see Joseph Chitty, *Chitty on contracts: General principles* (Vol. 1) (London: Sweet & Maxwell, 2012), para 2-001. See also section 13 of the Law Amendment and Reform (Consolidation) Ordinance (Cap 23).
[16] Promissory estoppel is often known to operate 'as a shield, not as a sword'. See *Chitty* (n 15) para 3-103.
[17] Eric Mills Holmes, 'The Four Phases of Promissory Estoppel' (1996) *Seattle University Law Review* 20, 45; See also *Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Ltd* [1972] A C 741, 758.
[18] Phuong N Pham, 'Waning of Promissory Estoppel' (1993) 79 *Cornell Law Review* 1263, 1264.
[19] Holmes (n 17) 45.
[20] Jay M. Feinman, 'The Last Promissory Estoppel Article' (1992) 61 *The Fordham Law Review* 303, 304.
[21] *Woodhouse* (n 17) 758.
[22] [1947] K B 130, 134-136.
[23] *McFarlane* (n 1) 281.

applying was *not* an example of estoppel.[24] Although Denning J did concede that such formulation is not an estoppel *in the strict sense* (which he meant estoppel by representation),[25] he noted that courts had been holding that a party would not be allowed in equity to go back on a promise intended to be binding, intended to be acted on, and in fact acted on.[26] He concluded that, 'it is in that sense…that *such a promise gives rise to an estoppel*…as a fusion of law and equity'.[27] Therefore, Denning J did recognize such formulation as a *special kind of estoppel* (later properly recognized as promissory estoppel), and was only clarifying that such estoppel is distinct from the common law estoppel by representation.

Secondly, as McFarlane has correctly pointed out, this formulation gives effect to A's actual *consent* in accepting the substitutive performance, rather than to A's *promise* to accept such performance.[28] Indeed, this paper finds Denning J's numerous references to 'promises' in his judgment confusing: whether there is a promise by A to B to accept such substitutive performance is not, and should not, be the emphasis of the formulation; what matters is that *A has accepted* B's conduct, which is different from what has been originally agreed to discharge B's duty. The 'promise', more accurately speaking a 'implicit promise', ultimately derives from, and is manifested through, A's actual acceptance to such substitutive performance. Burrows and Peel therefore calls this a 'maneuver' by Denning J to 'obscures the straightforward nature of the "acceptance of a substitutive performance" [formulation] by allowing the [formulation] instead to be seen as part of a unitary promissory estoppel doctrine.'[29]

The fact that this formulation does not operate upon a promise is perfectly consistent with the theme of this paper—promissory estoppel is comprised of several distinctive formulations, each involving different elements. What McFarlane considers as the so-called *true promissory estoppel*, i.e. the *Promise-Detriment Formulation* (which will be discussed below as *Formulation 3*), is only one of the three such formulations within promissory estoppel.[30]

Thirdly, McFarlane argues that this formulation is already recognized under the common law as the law on waiver, citing *Treitel's Law of Contract*, which states that:

"if the varied performance is actually made and accepted, neither party can claim damages on the ground that performance was not in accordance with the original contract."[31]

While it is unclear how the fact that this formulation overlaps with the law on waiver supports the argument that this formulation is not promissory estoppel,[32] a more direct rebuttal is that

[24] Ibid. See also *High Trees* (n 22) 134.
[25] Denning J pointed out that the representation in relation to reducing the rent was not a representation of an existing fact, but as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. See *High Trees* (n 22) 134.
[26] He cited *Hughes v Metropolitan Ry. Co.* (1877) 2 App Cas 439, 448; *Birmingham and District Land Co. v London & North Western Ry. Co.* (1888) 40 Ch D 268, 286; and *Salisbury (Marquess) v Gilmore* [1942] 2 K B 38, 51. See *High Trees* (n 22) 134-135.
[27] See *High Trees* (n 22) 134-135.
[28] *McFarlane* (n 1) 281.
[29] Andrew Burrows and Edwin Peel (Eds.) *Contract Formation and Parties* (Hong Kong: Oxford University Press, 2010), p 120.
[30] Of course, there could be cases where A has expressly made a promise to B that a substitutive performance is sufficient for the fulfillment of B's duty, and A later accepted such performance. In that case, both the *Promise-Detriment Formulation (Formulation 3)* and the *Acceptance of Substitutive Performance Formulation (Formulation 1)* could be used, each as a distinct legal basis on which B's promissory estoppel claim against A could be based.
[31] Edwin Peel (Eds.) *Treitel's Law of Contract* (Hong Kong: Sweet & Maxwell, 2011), para 3-097.
[32] It can, at best, show that such formulation is *unnecessary* or *redundant* given its common law counterpart, but it fails to offer a substantive explanation as to why such formulation is not a promissory estoppel.

McFarlane appears to have misconstrued Treitel's statements. After setting out the general principle, Treitel immediately distinguishes "varied performance" from all contractual variations and calls it *forbearances*.[33] Treitel's account of the law on waiver therefore appears to apply only to *forbearances*, as opposed to all *substitutive performances*, of legal obligations.

Furthermore, it is unlikely that this law on forbearances could apply to cases involving part payment of debts, given the longstanding common rule restriction in *Foakes v* Beer.[34] On the contrary, this formulation as an equitable rule has been recognized as a way out from this inconvenient common law rule.[35] This formulation is thus much broader than, and cannot be replaced by, the law on waiver.

Formulation 2: The Encouragement-Benefit Formulation

If A contests to have acquired the benefit of a right as a result of particular action or inaction by B, who so acted or refrained to act on the basis of a belief encouraged by A that, A would not acquire or enforce the right in question if B so conducted himself, then A would be estopped from taking or exercising the benefit of that right if such taking or exercising by A would be inequitable, having regard to the dealings which have taken place between the parties.

This formulation, originating from *Hughes v Metropolitan Railway Co*,[36] involves four key elements: (1) A's claim of having acquired the benefit of a right as a result of particular action or inaction by B; (2) A's previous encouragement to B that A would not acquire or enforce such benefit if B so acted or refrained from acting; (3) B's subsequent action or inaction in reliance of such belief; and (4) unconscionabiity of A's acquiring or exercising such benefit. Note that the encouragement from A to B must be *clear and unambiguous*: the mere failure by A to assert a right arising from particular conduct of B will not, by itself, be sufficient to count as an encouragement to B that such right will not be enforced by A if B acts in the same way in the future.[37]

McFarlane contends that this formulation is not a true promissory estoppel. Apart from arguing again that this formulation does not involve the making of a promise and can be found in parts of the common law on waiver,[38] McFarlane claims that this formulation is equivalent to the law relating to termination of bare licences of land.[39] It is, however, unclear how such a niche law on bare licences could extinguish or replace this formulation, which apparently covers cases not involving bare license. Indeed, if A has encouraged B to believe

[33] *Peel* (n 31) para 3-097.
[34] (1884) 9 App Cas 605. The decision established that where B owes a debt to A and A accepts a lower sum in discharge of A's duty, such part payment *cannot* discharge the whole debt in spite of A's acceptance.
[35] *D & C Builders Ltd v Rees* [1966] 2 Q B 617, 625A-C; *Re Kwong Ka Wai, ex p Fortis Insurance Co (Asia) Ltd* [2010] HKCFI 309 at [12].
[36] (1877) 2 App Cas 439, 448-449.
[37] In *Humphrey's Estate (Queen's Gardens) Ltd v Attorney General & Another* [1986] HKLR 669, 709, it was held that 'the conduct, promise or *encouragement* must be clear and unambiguous, and that *silence or inaction is usually insufficient* unless the person who failed to act owed a legal duty to take steps which the failure to take is to be relied upon to create an estoppel.' See also the Supreme Court of Canada case *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607, (1968) 68 DLR (2d) 354.
[38] For responses to these arguments, refer to the discussion of Formulation 1 above.
[39] McFarlane reasons that, if B enters A's land without authority, A acquires the rights to use reasonable force to remove B from the land and to claim damages from B. However, if A does so only after B has entered onto A's land, A's right, being a result from B's unauthorized presence on B's land, cannot be claimed unless A has given B a reasonable period to leave the land. See *McFarlane* (n 1) 285-286.

that he could enter onto A's land without being removed, there is no reason why B could not plead both promissory (and proprietary) estoppel and the law on bare licenses to justify his continuous presence on A's land.

Formulation 3: The Promise-Detriment Formulation

Where A and B were in a relationship involving enforceable or exercisable rights, A by words or conducts, conveyed or was reasonably understood to convey a clear and unequivocal promise or assurance to B that A would not enforce or exercise some of those rights, and later B reasonably relied upon that promise and altered his position on the faith of it, then A would be estopped from acting inconsistently with the promise if it is inequitable for A do so.[40]

This is perhaps the most well-known and uncontroversial formulation under promissory estoppel.[41] The leading authority in Hong Kong on this branch of promissory estoppel is the decision of the Court of Final Appeal in *Luo Xing Juan v Estate of Hui Shui See*.[42] The key elements summarized in the case are: (1) a pre-existing relationship between A and B involving exercisable rights; (2) A's clear and unequivocal promise to B that A would not enforce some of such rights; (3) B's altering of position on the basis of his reasonable reliance of A's promise; and (4) unconscionability of A's enforcement of such rights.[43]

While the promise needs not be express, the meaning of the promise conveyed by the promisor's words or conduct must be clear and unequivocal.[44] The court will seek to ascertain the meaning in *substance* of the promise, which has to be conveyed with a clarity similar to that needed to *vary a contract.*[45]

On the other hand, the requirement on relationship seems to have relaxed after *Luo Xing Juan*, where a cohabiting relationship with the prospect of a marriage, coupled with the fact that the man had the power to act in a manner adverse to the plaintiff woman's interests in a property, was found to be sufficient relationship for the purpose of the formulation.[46] Such reasoning was later adopted by a Court of First Instance case *Hong Kong Hua Qiao Co Ltd v Cham Ka Tai*.[47]

[40] *Luo Xing Juan v Estate of Hui Shui See* (2009) 12 HKCFAR 1 at [55].
[41] See *Chitty* (n 15) para 3-086 and John McGhee, Edmund Henry Turner Snell, and Paul Vivian Baker, *Snell's Equity* (Thomson Professional Pub Cn, 2000), 370-71. See too *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 810; and *Tam Mei Kam v Deloitte Touche Tohmatsu* [2010] HCA 679 and 742/2007 at [35].
[42] *Luo Xing Juan* (n 41) at [55]. Its formulation was subsequently applied in numerous cases, see e.g. *Hong Kong Hua Qiao Co Ltd v Cham Ka Tai* [2013] HKCFI 1198; HCA 2619/2005 (30 July 2013) at [92], *Kwan So Ling v Woo Harry Kee Yiu* [2013] HKCFI 1389; HCA 1311/2011 (28 August 2013) at [54].
[43] In *Luo Xing Juan* (n 41), Ribeiro PJ merged the third and fourth elements into one. This paper is of the view that 'unconscionability' should be separated as an independent element because of its overarching nature.
[44] *Luo Xing Juan* (n 41) at [59]-[60].
[45] Ibid.
[46] Ibid.
[47] [2013] HKCFI 1198; HCA 2619/2005 (30 July 2013) at [93]-[96].

PROPRIETARY ESTOPPEL

The taxonomy presented here differs to some extent from Gray and Gray's classic three-fold classification, which divides proprietary estoppel into: (1) the *common expectation* cases, (2) the *imperfect gift* cases, and (3) the *unilateral mistake* cases.[48] According to Gray and Gray,

"these cases alike present the essential characteristics of proprietary estoppel, but each class of case in its turn gives a heightened emphasis to one or other of the constituent elements of representation, reliance and unconscionable disadvantage."[49]

Both the UK and Hong Kong courts have adopted an approach similar to Gray and Gray's by treating proprietary estoppel as a single doctrine comprising of three essential elements: *assurance*, *reliance* and *detriment.*[50] This section attempts to show that such a generalized doctrine of proprietary estoppel is unhelpful and misleading. Consistent with the view in the discussion of promissory estoppel above, it argues that proprietary estoppel should be understood as encompassing three irreducibly dissimilar formulations, with each formulation involving different elements.

The following formulations are derived from case laws in the UK and Hong Kong in which the doctrine of proprietary estoppel is invoked.

Formulation 4: A's Acquiescence or "Standing By" to B's Mistaken Belief

If B acted to his detriment in his mistaken belief that he had an interest in land which in fact belonged to A, and A realized the true position of his own rights but did not correct B, A would be estopped from re-claiming such interest.[51]

The acquiescence scenario, which some older cases refer to in terms of 'lying by' or 'standing by',[52] is clearly covered by the formulation articulated by Lord Cranworth LC in *Ramsden v Dyson*:

"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."[53]

The key elements of the formulation are: (1) B made a mistake as to his legal rights; (2) B did some act of reliance on his mistaken belief; (3) A knew of the existence of his own right which was inconsistent with the right claimed by B; (4) A knew of B's mistaken belief; and (5) A encouraged B in his act of reliance, either actively or by abstaining from asserting his legal right.[54]

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[48] Kevin J. Gray, and Susan Francis Gray, *Elements of Land Law* (Oxford University Press, 2009), p 1202.
[49] Ibid.
[50] *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 144 (per Oliver J); *Thorner v Major* [2009] 1 WLR 776, 786 (per Lord Walker); *Chan Gordon v Lee Wai Hing* [2011] 2 HKLRD 506 at [28] (per DHCJ Au-Yeung).
[51] See also Mee (n 7) 182.
[52] See e.g. *The Earl of Oxford's Case* (1615) Chan Rep 1, 21 ER 485; and *Dann v Spurrier* (1802) 7 Ves 231, 235-36.
[53] *Ramsden v Dyson* (1866) LR 1 HL 129, 140-141.
[54] Although unconscionability was not expressly mentioned by Lord Cranworth LC in his original formulation, it has been frequently accepted in later cases as an essential element. See e.g. *Kong Colin*

Formulation 5: Representation as to B's Existing Legal Rights

If A made a representation to B to the effect that B had an interest in A's land, and B later acted to his detriment on the basis of such representation, then A will be estopped from resiling from such representation.[55]

The key elements of the formulation are succinctly described in *Mo Ying v Brillex Development Ltd*: (1) A induced, encouraged or allowed B to believe that he had some right or benefit over A's property; (2) in reliance upon this belief, B acted to his detriment to the knowledge of A; and (3) it is unconscionable for A to deny B the right or benefit which B expected to receive.[56]

The most straightforward application of this formulation will be in cases where A makes a clear verbal representation that B has some right or benefit in A's land. Where conduct is relied upon, the onus is on B to establish the precise acts and conduct alleged, and to show that the acts and conduct were of such an unequivocal nature as to involve the particular representation relied upon as the foundation of the estoppel.[57]

Formulation 6: The Promise-Detriment Formulation

If A by words or conducts, conveyed or was reasonably understood to convey a clear and unequivocal promise or assurance to B that B would acquire an interest in A's land, and later B reasonably relied upon that promise and altered his position on the faith of it, then A would be estopped from going back on the promise if it would be inequitable or unconscionable for A to do so.

This above echoes Lord Kingsdown's formulation in *Ramsden v Dyson*,[58] and now makes up the most prominent branch of proprietary estoppel. The formulation is consisted of three elements: (1) A made an assurance to B, either by words or by conduct, that B would acquire an interest in A's land; (2) B in reasonable reliance on the assurance altered his position; (3) it is unconscionable for A to assert his interest in land which is the subject matter of the assurance.

Surprisingly, traditional equitable discourse has tended not to acknowledge openly the role of promise in proprietary estoppel.[59] Even though Gray and Gray's third category 'common expectation' appears to correspond to this formulation, Gray and Gray refer the formulation

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Chung Ping v Kong Wing On [2015] HKCFI 261; HCMP 2045/2012 (24 February 2015) at [44]; *Southwell v Blackburn* [2014] EWCA Civ 1347 at [7]-[11].

[55] See also Mee (n 7) 182.

[56] [2014] HKCFI 771; [2014] 3 HKLRD 224; HCA 111/2011 (5 May 2014) at [145].

[57] Spencer Bower, *The Law Relating to Estoppel by Representation* (Bloomsbury Professional, 2004), p 44, applied in *Shun Lung Investment Ltd v Incorporated Owners of Lee On Building* [2013] HKDC 770; DCCJ 4806/2011 (26 June 2013) at [25].

[58] *Ramsden* (n 54) 170-171: 'if a man, under a verbal agreement with a landlord for a certain interest in land…under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation.'

[59] Until 1986, proprietary estoppel was still equated with the acquiescence formulation and so seen as incapable of applying if the criteria for the application of that formulation were not met: see e.g. *Coombes v Smith* [1986] 1 WLR 808, 817. As Mee pointed out, a possible reason for not speaking in terms of 'promise' is the idea that a claim in proprietary estoppel could successfully be founded on something less than a promise (as well as on a promise). See Mee (n 7) 183.

as applying to the situation where A and B have consistently dealt with each other in such a way as to reasonably cause B to rely on a 'shared supposition' that he would acquire rights of some kind in A's land.[60] However, Gray and Gray's account seems to align more with *estoppel by convention*, where both parties act on a common assumption of facts or law.[61] Under *Formulation 6*, such supposition on the part of B is created by A's promise or assurance, and whether A 'shares' this supposition (or, instead, plans to break his promise) does not seem to matter.[62]

Note that *Formulation 6* is inapplicable to cases where A has merely made a representation to B about A's *current intentions*—as held in *Thorner v Major*, B's claim will fail if B cannot show that B reasonably understood A to have made a *commitment* to B (which is different from a mere *intention* to make a commitment in the future).[63] Hoffmann LJ in *Walton v Walton* explains that, a contract imposes an immediate duty on A, one which 'subject to the doctrine of frustration, must be performed come what may'.[64] In contrast, equitable estoppel is a backward exercise: it looks at all the circumstances which have already occurred, and decides whether or not it would be inequitable, in light of such circumstances, if the promise is not to be performed.[65] Therefore, *Formulation 6* does not operate upon a promise that is intended to be legally binding.[66] The precise content of A's duty cannot be identified until A defaults on the promise, and hence may vary depending on the extent of B's prospective detriment and other occurrences that actually happened.[67]

PART II: THEORETICAL IMPOSSIBILITY OF UNIFYING THE TWO ESTOPPELS

As discussed in Part II, promissory estoppel encompasses the *Acceptance of Substitutive Performance Formulation (Formulation 1),* the *Encouragement-Benefit Formulation (Formulation 2)* and the *Promise-Detriment Formulation (Formulation 3).* On the contrary, proprietary estoppel involves the *Acquiescence Formulation (Formulation 4),* the *Representation Formulation (Formulation 5)* and the *Promise-Detriment Formulation (Formulation 6).* Therefore, the question of whether the two estoppels should be unified should be understood as *whether these six formulations should be unified*. This section seeks to argue that it is in principle impossible to reconcile these formulations without losing their particular elements, and hence the two estoppels cannot and should not be unified.

THE FORMULATIONS UNDER PROMISSORY ESTOPPEL ARE IRREDUCIBLY DISSIMILAR

The most obvious difference between *Formulation 3* and the other two formulations is that it applies only in cases where A has made a *promise* to B. Note that contrary to what Denning J proffered in *High Trees*,[68] not *any promise* intending to be binding and acted on is covered under this formulations—but only *promises to forego A's existing rights against B.* Such

[60] *Gray & Gray* (n 49) p. 1204.
[61] *Unruh v Seeberger* (2007) 10 HKCFAR 31, 78-86.
[62] Mee (n 7) 183.
[63] [2009] 1 WLR 776, 798.
[64] Unrep, 14 April 1994 (CA), at [19]-[22],
[65] Ibid.
[66] As held by Wilson LJ in *Sutcliffe v Lloyd* [1996] 72 P & CR 196, B's promise-based proprietary estoppel claim should not fail simply because A had not suggested to B that A's promise was legally binding.
[67] See *Jennings v Rice* [2002] EWCA Civ 159 at [51].
[68] *High Trees* (n 22) 134.

limitation is said to be essential to avoid undermining the doctrine of consideration, in the sense that the doctrine cannot operate as a cause of action to enforce *gratuitous, positive promises*—it can only be used as a defence against A's action to enforce the rights which he has previously promised to forego.[69]

Another difference between *Formulation 2* and *Formulation 3* is that, under *Formulation 2*, A's right is a *direct result of* B's action or inaction inequitably encouraged by A, whereas under *Formulation 3*, A's right *exists independently of B's action or inaction*, and is only *later forgone* by A's promise. *Formulation 2* is hence very similar to the doctrine of unjust enrichment in that they both aim to prevent one party from being unjustly benefited at the expense of another.[70]

Formulation 2 is also clearly different from the *Formulation 1* because B's action or inaction is not a performance of any existing legal obligation owed to A. Contrary to the suggestion of Denning J in *High Tree* therefore,[71] *Formulation 2* cannot apply in a case where A accepts a lower sum from B in discharge of a debt owed by B to A: if A later seeks to enforce the full debt, A is not asserting any right acquired *as a result* of B's action or inaction induced by A's encouragement—A's right to the debt has *all along existed* before such encouragement was made.

THE FORMULATIONS UNDER PROPRIETARY ESTOPPEL ARE IRREDUCIBLY DISSIMILAR

Hopkins suggests that the unification of the distinctive formulations under proprietary estoppel can be achieved by centering on their role in enabling claims to the informal acquisition of property rights in land.[72] However, this claim is mistaken because these distinctive formulations are in theory impossible to be reconciled.

Formulation 4 is very different from *Formulation 5* and *Formulation 6* because it does not require the active making of a representation (which is required in *Formulation 5*) or promise (which is required in *Formulation 6*)—the mere *failure to act* on the part of A is sufficient. As Lord Walker argued in *Thorner v Major*, such 'acquiescence' or 'standing-by' cases could only be brought under the same umbrella of 'proprietary estoppel' with other formulations, i.e. based on assurance, reliance, and detriment, if A's 'conduct in standing by in silence serves as the element of *assurance*'.[73] Some commentators indeed tried to argue that A's failure to act could be seen as a *representation by silence* due to the fact that he was under a duty to speak (so that this category could at least be subsumed within *Formulation 5*).[74] Yet in such a case it would be wholly artificial and practically difficult to find any representation, much less a promise, having been made by A to B. This is particularly so in light of the fact that in principle, under *Formulation 4*, nothing needs to be communicated from A to B, meaning that

[69] *Combe v Combe* [1951] 2 K B 215, 220-221.
[70] In *Owen Sound Public Library Board v Mial Developments Ltd* (1979) 102 DLR (3d) 685, it was said that the formulation prevents A to 'take advantage of a default induced by its own conduct'. Indeed, in some cases, it was said that both unjust enrichment and promissory estoppel are proper alternative causes of action to a breach of contract claim. See e.g. *Duane Morris v. Todi*, 2002 WL 31053839 (Pa. Com. Pl. 2002). For a recent Hong Kong case involving the pleadings of both, see *Lieu Tseng Van v Jiuzhou Development Co Ltd* [2012] HKCFI 944; HCA 1645/2009 (19 June 2012) 889.
[71] Denning J cited *Hughes* (which is a case concerning the application of *Formulation 2*) in support of his application of promissory estoppel in *High Trees* (which involves the application of *Formulation 1*). See *High Trees* (n 22) 134-135.
[72] Nick Hopkins, 'Proprietary estoppel: a functional analysis' (2010) 4(3) *Journal of Equity* 201-224.
[73] *Thorner v Major* (n 51) 794.
[74] Bower (n 58) p 48. See also *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890, 903F (per Lord Wilberforce).

it can apply in a case where B is not even aware of A's existence. In such case, it is difficult, if not impossible, to say that B has relied on A's promise or representation.[75] Even if the court succeeds in finding that B has relied on some tacit assurance (perhaps by the conduct of A), it is unclear how the court is able to ascertain the exact terms of such assurance when there is factually no communication from A to B at all.

A further difference between *Formulation 4* and *Formulation 5* is that in *Formulation 5,* A is *directly responsible* for B's belief that B has rights over A's land. This means that, unlike in *Formulation 4*, it is not crucial that A has been aware of his own rights. The basis for legal intervention is that, having made a representation as to the state of B's rights, A should not be permitted to resile from that representation if B has acted to his detriment on the basis of it. As explained by Lord Scott in *Cobbe v Yeoman's Row Management Ltd*:

"an "estoppel" bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a 'proprietary' estoppel…if the right claimed is a proprietary right, usually a right to or over land."[76]

There is hence a clear overlap between *Formulation 5* with the common law doctrine of *estoppel by representation*. After *Taylor Fashions v London Victoria Trustees Ltd*, however, this formulation has been accepted as falling under the ambit of proprietary estoppel.[77]

Formulation 5 and *Formulation 6* are also different. In the former, the representation is made in relation to B's *existing* rights; in the latter, the promise is made in relation to B's *future* rights.

THE FORMULATIONS UNDER PROMISSORY ESTOPPEL AND THAT UNDER PROPRIETARY ESTOPPELS ARE IRRECONCILABLE

As between promissory estoppel and proprietary estoppel, with the exception of one apparent overlap of the *Promise-Detriment Formulation (Formulation 3 and Formulation 6)*, all the rest of the formulations are different.

Specifically, although both *Formulation 1* and *Formulation 4* do not involve the active making of promises or representations on the part of A, they are dissimilar in terms of their operation: *Formulation 1* holds A to his acceptance of B's substitutive performance of B's existing legal duty owed to A, whilst *Formulation 4* gives effect to B's mistaken belief in B's legal rights in A's land.

Formulation 2 is also different from *Formulation 5*. In *Formulation 2*, A acquired certain benefits *as a result* of B's action or inaction earlier encouraged by A and is now estopped from exercising such benefits. In *Formulation 4*, A did not acquire any benefits. Instead, A made representation to B that B was to acquire certain benefits (i.e. interest in A's land), and is now estopped from denying such benefits to B.

Lastly, even though the *Promise-Detriment Formulation (Formulation 3 and Formulation 6)* appear under both promissory estoppel and equitable estoppel, *Formulation 3* applies only where A and B are in a relationship involving enforceable or exercisable rights, and gives

[75] See also *McFarlane* (n 1) 296.
[76] *Cobbe* (n 4) 1761.
[77] *Taylor Fashions* (n 51). It is not possible within the scope of this paper to address the difficult issues that arise concerning the borderline cases involving potentially both estoppel by representation and *Formulation 5*.

effect only to *negative* promises, i.e. promises not to enforce such rights. On the other hand, *Formulation 6* does not have the same restrictions—it gives effect to A's positive promise that B will acquire interests in A's land, and such promise can arise in the absence of any pre-existing relationship between A and B.

The fact that *Formulation 3* under promissory estoppel is confined to enforcing negative promises, while *Formulation 6* under proprietary estoppel could enforce also positive promises explains why proprietary estoppel can be used as a cause of action yet promissory estoppel cannot (i.e. that promissory estoppel can only be used 'as a shield, not as a sword').[78] That the two estoppels are distinct is also recognized in *Luo Xing Juan,* which holds that regardless of whether the facts of a given case are enough to establish proprietary estoppel, they may still satisfy the requirements for a promissory estoppel.[79]

PART III: PRACTICAL PROBLEMS RESULTING FROM A UNIFYING APPROACH

It is now apparent from the discussion in Part II that the formulations under proprietary estoppel and promissory estoppel are technically distinct from each other, and hence impossible to be reconciled. It is curious how judges have still managed to disregard the disparities between the formulations in their legal analysis.

Mee observes that one source of the failure to properly distinguish between the independent formulations stems from *Ramsden v Dyson*.[80] In *Ramsden*, Lord Kingsdown sets out the *Promise-Detriment Formulation (Formulation 6)* while Lord Cranworth LC establishes the *Acquiescence Formulation (Formulation 4)*—yet the two Lordships are often said to differ simply *in their interpretation of the facts*.[81] In fact, on the facts of *Ramsden v Dyson*, this difference was critical: the tenants were not arguing that they had acted on the basis that they *already had* a long-term lease; they were rather claiming that they *had believed A would grant* such a lease.[82] In such a case, only *Formulation 6* could have been relied on by the tenants, and the issue would then have been whether the landlord's failure to correct the tenants' mistaken belief as to A's commitment to grant a lease to the tenants constituted a clear and unequivocal assurance to the tenants. The outcome of the case may have been different because it would have been more difficult for the tenants to prove that A had made a clear and unequivocal promise to grant them a lease, as opposed to proving that A had merely acquiesced to their mistake as to their legal rights, when all A had 'done' was remaining silent as to the tenants' mistake.

The failure to recognize the differences between the formulations has often led to the estoppels being applied too broadly or narrowly.

For example, in *Cobbe v Yeoman's Row Management Ltd,* both Lord Walker and Lord Scott thought that a proprietary estoppel claim could be made out only if B acts in reliance of a

[78] See also n 16. Some commentators argued that such distinction is not justified and that promissory estoppel should also be capable of enforcing positive promises, see Christopher Knowles, and Mischa Balen, 'What's Special About Land? The Relationship Between Promissory and Proprietary Estoppel' (2013) 24(1) *King's Law Journal* 111-118.
[79] *Luo Xing Juan* (n 41) at [52].
[80] *Ramsden* (n 54) 170-171. See *Mee* (n 7) 186-187.
[81] See e.g. *Plimmer v Mayor, Councillors and Citizens of the City of Wellington* (1884) 9 App Cas 699 (PC) 711 (per Sir Arthur Hobhouse): 'there was no disagreement among the judges on the principles of law laid down in [Ramsden v Dyson].'; and *Taylor Fashions* (n 51) 144 (per Oliver J): 'Lord Kingsdown dissented on the facts. There was no…disagreement between their Lordships as to the applicable principle.'
[82] *Ramsden* (n 54) 129-133.

mistaken belief as to B's existing rights.[83] As *Thorner v Major* clarifies, such a restriction does not apply to the *Formulation 6*.[84] The restriction is, however, key to *Formulation 4* because it centers on A's failure to assert his current right. In *Crabb v Arun District Council*, Denning J cited cases applying *Formulation 2* (e.g. *Birmingham & District Land Co v* London) to find that a proprietary estoppel could arise in the absence of a promise by A.[85] In *Crabb*, however, B was not seeking to prevent A from exercising a right resulted from B's conduct: B was hoping to enforce an obligation upon A to grant B a right of way over A's land, given B's change of position on the basis of his reasonable reliance on such belief.[86] Under this scenario, only *Formulation 6* could be invoked and hence the claim should succeed only if A has *expressly or impliedly promised* B to grant such right.[87]

Fortunately, in a recent Hong Kong case *Shun Lung Investment Ltd v Incorporated Owners of Lee On Building*,[88] Wilson Chan J recognizes the importance of a clear understanding of the respective formulations. He first analyzes the facts of the case separately under the *Formulation 4* and *Formulation 5.*[89] He then notes that under *Formulation 4,* it is A's knowledge of his true legal position as to his property which creates the conditions for recovery under proprietary estoppel, rather than any promise, representation or assurance by the person alleged to be estopped or detrimental reliance.[90]

It would, therefore, be a huge error to attempt to find one general doctrine representing all the distinctive formulations underlying the two estoppels. Oliver J in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* struggled to bring together the different formulations under proprietary estoppel, by a test at such a high level of generality that is in fact of no practical use:

"whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial – requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behavior."[91]

CONCLUSION

This article concludes that promissory estoppel and proprietary estoppel should not be unified. It argues that the two estoppels should be understood from a *technical perspective* as each encompassing irreducibly dissimilar formulations. The *functional perspective*, which arbitrarily seeks to unify the two estoppels based on some vague notions of 'unconscionability' or 'detrimental reliance', should be rejected because it fails to recognize the theoretical impossibility and the practical problems of unifying the two estoppels.

[83] *Cobbe* (n 4) 1768 (per Lord Scott); 1776 (per Lord Walker).
[84] *Thorner* (n 51) 793-794 (per Lord Rodger).
[85] [1976] Ch 179, 188.
[86] Ibid 180-183.
[87] Note that it is *Formulation 6* and not *Formulation 3* that should be at play because B was seeking to enforce a *positive* promise from A to grant him a right of way. For further example of the misinterpretation of the formulation at play, see *Inwards v Baker* [1965] 2 QB 29, 36-37.
[88] *Shun Lung* (n 57).
[89] *Shun Lung* (n 57) at [17]-[23].
[90] Ibid.
[91] *Taylor Fashions* (n 51) 151-152.