High Court of Australia

Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387 (19 February 1988)

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WALTONS STORES (INTERSTATE) LTD. v. MAHER [1988] HCA 7; (1988) 164 CLR 387

F.C. 88/005

Estoppel

High Court of Australia

Mason C.J.(1), Wilson(1), Brennan(2), Deane(3) and Gaudron(4) JJ.

CATCHWORDS

Estoppel - Common law - Equity - Negotiations for lease - Exchange of parts requisite to concluded agreement - Terms agreed but parts not exchanged - Conduct of proposed tenant leading owner to believe exchange would occur - Act by owner to detriment in that belief - Whether proposed tenant estopped from denying lease - No signed note or memorandum of lease - Relevance - Conveyancing Act 1919 (N.S.W.), s. 54A(1).

HEARING

Canberra, 1987, May 7, 8.

Sydney, 1988, February 19. 19:2:1988

APPEAL from the Supreme Court of New South Wales.

DECISION

MASON C.J. AND WILSON J. The issue in this appeal is whether, in the light of the facts, the appellant is estopped from denying the existence of a binding contract that it would take

a lease of the respondents' premises at Nowra and, if so, whether the respondents can support the order made by the primary judge (Kearney J.), affirmed by the New South Wales Court of Appeal, that the appellant pay to the respondent damages in lieu of specific performance of an agreement for a lease.

2. Kearney J. found that exchange was a prerequisite to the creation of a concluded contract between the parties. The respondents did not appeal against this finding so that its correctness is not an issue in this Court. However, the existence of the finding has some relevance to the question of estoppel, an issue on which the respondents succeeded at first instance and in the Court of Appeal. The primary judge found that the appellant was estopped from denying that a concluded contract by way of exchange did exist between the parties, whereas Priestley J.A., with whom Glass and Samuels JJ.A. agreed, found that the appellant was estopped from denying the existence of a binding contract.

3. The justification, if there be one, for finding an estoppel depends on a course of events which commenced with discussions and correspondence between the solicitors for the parties in the first two weeks in November 1983. In the two preceding months the appellant, which was bound to give up possession of its existing commercial premises in Nowra in January 1984, had been negotiating with the respondents with a view to taking a lease of their property in the business district of Nowra. The respondents proposed to demolish an old building on the site and to erect a new building having an area of 14,000 square feet. The appellant required that plans and specifications be prepared to suit its purposes and that the new building be completed by 15 January 1984. On 21 October 1983 Dawson Waldron, solicitors for the appellant, sent to Morton & Harris, solicitors for the respondents, a form of Deed of Agreement for Lease to which was annexed a form of Lease. By their covering letter Dawson Waldron reserved the right to make amendments to the Lease and pointed out that a Schedule of Finishes remained to be annexed to the Deed. The parties had already agreed on the term of the Lease and the rent.

4. Discussions then ensued between the solicitors. On 1 November Mr Elvy of Morton & Harris informed Mr Roth of Dawson Waldron that the respondents had begun to demolish the old building on the site. Amendments to the Lease were discussed. On 2 November Mr Elvy requested an extension of time for completion of the work. This led ultimately to an agreement that the building should be available for fitting out by 15 January and completed by 5 February 1984.

5. The critical conversation took place between Mr Elvy and Mr Roth on 7 November. The primary judge accepted Mr Elvy's account of that conversation because it was in greater detail, there being substantial agreement between the solicitors as to what was said. Mr Elvy pointed out that "the agreement must be concluded within the next day or two otherwise it will be impossible for Maher to complete it." Mr Elvy said that unless agreement was reached Maher would be unable to organize labour and order supplies within the next couple

of days before suppliers stopped taking orders and shut down until late January. Mr Elvy also stated that Maher did not wish to demolish a new brick part of the old building until it was clear that there were no problems.

6. In response to Mr Elvy's inquiry Mr Roth said:

"I have received verbal instructions from Waltons

that the amendments are acceptable, even the plate

glass insurance. I'll do the amendments and send

them down to you in the DX tonight. In the

meantime I'll get formal instructions from

Waltons."

7. On the same day Dawson Waldron sent to Morton & Harris fresh documents incorporating the agreed amendments. The covering letter stated:

> "You should note that we have not yet obtained our
>
> client's specific instructions to each amendment
>
> requested, but we believe that approval will be
>
> forthcoming. We shall let you know tomorrow if any
>
> amendments are not agreed to.
>
> We also believe a Schedule of Finishes should be

annexed to the Deed prior to exchange."

At no time before the despatch of Dawson Waldron's letter of 19 January 1984 to Morton & Harris was there any indication by the appellant or its solicitors that the amendments or any of them were unacceptable or that the respondents would not exchange contracts.
8. On 11 November 1983 Morton & Harris forwarded to Dawson Waldron "by way of exchange" the documents executed by the respondents along with a Schedule of Finishes for approval and to be annexed to the Deed prior to exchange. The letter and documents were received by Dawson Waldron on or about 14 November.

9. Thereafter the respondents began to demolish the new brick portion of the old building. The primary judge found that the appellant became aware of this fact on 10 December, this finding being specifically affirmed by the Court of Appeal. As a result of a projected alteration in its retailing policy, having ascertained from Mr Roth that, as contracts had not been exchanged, it was not bound to proceed, the appellant decided not to commit itself to the proposed arrangements with the respondents and instructed Dawson Waldron to "go slow". In consequence of that instruction, Mr Roth made no response to the letter from Morton & Harris dated 11 November 1983 until 19 January 1984. In the meantime he retained possession of the documents executed by the respondent.

10. In early January the respondents commenced to build in accordance with the plans and specifications submitted to, and approved by, the appellant. By the time Dawson Waldron, in its letter dated 19 January, informed Morton & Harris that the appellant did not intend to proceed with the matter the building was complete as to 40 per cent approximately.

11. In the light of this history of events, especially the conversation on 7 November, Dawson Waldron's letter of the same day and Morton & Harris' letter of 11 November, it is impossible to sustain the finding that the respondents were labouring under a misapprehension that contracts had been exchanged when they embarked upon the demolition of the new brick portion of the building. At no time did Morton & Harris inform the respondents that the appellant had executed the documents or that exchange had actually taken place. On 14 November Morton & Harris wrote to the respondents stating that the amended Agreement for Lease duly executed by the respondents had been sent to Dawson Waldron for execution by the appellants and for exchange. The letter went on to note that the respondents would commence work in accordance with the Agreement immediately as it was to be completed on or by 5 February, the appellant having a right to rescind if it were not completed by 31 March. And that was where progress towards a completed agreement halted. Mr Elvy's evidence, as well as his correspondence, indicates that he regarded an exchange of contracts as an essential prerequisite to the creation of a binding contract between the parties and his letter of 14 November communicated his understanding to them. The

evidence does not reveal precisely what the solicitors had in mind by the references to exchange of contracts.

12. As Dawson Waldron did not inform Morton & Harris on 8 November or immediately thereafter that the amendments discussed on 7 November were not acceptable to the appellant, Mr Elvy and the respondents were entitled to assume, in consequence of the statement in Dawson Waldron's letter of 7 November, that the appellant accepted the amendments and that exchange of contracts was a mere formality. The primary judge certainly took this view of the matter. After stating that the respondents "believed that they had an agreement", his Honour continued:

> "They were entitled, in my view, to assume that the
>
> exchange would be duly completed by the
>
> (respondents) and in those circumstances properly
>
> considered that they were bound to proceed with the
>
> greatest expedition with the building project."

However, he went further when he said that when Morton & Harris sent the executed document "by way of exchange" on 11 November, the respondents:

> "... were entitled to infer the acceptance of the
>
> document so forwarded so as to hold reasonably the
>
> belief that a contract by way of exchange had in
>
> fact been concluded" (our emphasis).

13. No evidence was led from the respondents that they believed that exchange had taken place. However, Mr Maher gave this evidence in cross-examination:

> "Q. At the time you wrote that letter (a letter to the respondents' bank applying for finance), you were aware that it was important that Waltons should have signed the agreement, were you not? A. I thought it was a formality. I was under the impression that the leases were being registered by the Waltons people, and would be returned in due course.
>
> ...
>
> Q. You knew that it was important that there be a lease signed by Waltons before the bank would lend you money, didn't you? A. Yes.
>
> Q. Indeed you knew that if there was not a lease signed by Waltons the bank very well might not lend you money, didn't you? A. Quite right.

...

Q. As far as your understanding was, when you received this letter of 14th November, 1983, it was Mr Elvy telling you that it was all right to go ahead to commence work? A. That is how I read it.

Q. You thought that was the situation, even though in the same letter Mr Elvy told you that the agreement for lease had to be executed and exchanged? A. Yes that was being carried out by my solicitors, those salient points. There was a letter in evidence here from Waltons' solicitors that within 24 hours they would get back and everything would be okay. I have done everything as I set out and I have stuck by my guidelines.

Q. Would it be fair to say that after you received that letter of 14th November, 1983, you assumed that execution by the lessor and exchange of agreement, would take place? A. Most definitely.

Q. You knew that it was important that execution by

the lessor and exchange of agreement should take

place, didn't you? A. Yes everything would have to

be tied up.

Q. You were assuming that that would be done? A.

Yes.

Q. If you had been told that exchange of the

agreement might not take place, if Mr Elvy had told

you that, would you have gone ahead and done the

work? A. Would I have started the work?

Q. Yes. A. Of course I would not."

In the light of these answers and the evidence to which we have referred, it would be difficult to sustain a finding that the respondents actually believed that contracts had been exchanged or that a binding contract had come into existence. There was no evidence that the respondents relied on Dawson Waldron's failure to notify amendments on 8 November as indicating that contracts had been exchanged. And, in any event, in the circumstances such a belief, if it existed, could scarcely be described as a reasonable belief in the absence of inquiry from, and confirmation by, Morton & Harris. The substance of the matter is conveyed in Mr Maher's answers to the first question and the last four questions set out above. The respondents thought that the signing of the Agreement, and for that matter exchange, was a formality, something that would occur as a matter of course.

14. Perhaps the difficulty of sustaining the passage in the primary judge's reasoning which we have underlined was a reason why Priestley J.A. concluded that the mistaken assumption adopted by the respondents was that there was a binding agreement between the parties. Be this as it may, the conclusion reached by the Court of Appeal, though not as specific as that of the primary judge, suffers from the same difficulty. The facts justify the weaker inference drawn by the primary judge that the respondents assumed that the

amendments were acceptable to the appellant so that the exchange of contracts was only a matter of formality. This assumption was a reasonable assumption because the terms of Dawson Waldron's letter of 7 November coupled with the failure to communicate any refusal by the appellant to agree to the amendments justified the inference that the appellant agreed to the amendments with the result that exchange would follow as a matter of course.

15. Kearney J. and the Court of Appeal considered that the appellant was under a duty to inform the respondents that their assumption that contracts had been exchanged or that there was a binding contract was incorrect. Kearney J. thought that the appellant, acting as a reasonable person would honestly and responsibly have done in the circumstances, should have told the respondents that it did not intend to exchange at all or until it made a final decision on its retailing strategy, when it discovered on 10 December that the demolition was proceeding further. The Court of Appeal was of the same opinion.

16. The estoppel set up by the respondents and found by the primary judge was a common law estoppel in the form of a representation by the appellant constituted by its silence in circumstances where it should have spoken. Likewise, the Court of Appeal based the estoppel on common law principles as explained by Dixon J. in Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507, at p 547 and Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641, at pp 674-676. Priestley J.A. regarded the present case as an instance of the third class of estoppel in pais enumerated by Dixon J. in Thompson, at p 547, that is, where a party is required to abide by an assumption made by the other "because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so".

17. Our conclusion that the respondents assumed that exchange of contracts would take place as a matter of course, not that exchange had in fact taken place, undermines the factual foundation for the common law estoppel by representation found by Kearney J. and the common law estoppel based on omission to correct a mistake favoured by the Court of Appeal. There is, as Mason and Deane JJ. pointed out in Legione v. Hateley [1983] HCA 11; (1983) 152 CLR 406, at p 432, a long line of authority to support the proposition that, to make out a case of common law estoppel by representation, the representation must be as to an existing fact, a promise or representation as to future conduct being insufficient: Jorden v. Money (1854) 5 HLC 185; 10 ER 868; Maddison v. Alderson (1883) 8 App Cas 467, at p 473; Chadwick v. Manning (1896) AC 231; George Whitechurch, Ltd. v. Cavanagh (1902) AC 117, at p 130; Craine v. Colonial Mutual Fire Insurance Co. Ltd. [1920] HCA 64; (1920) 28 CLR 305, at p 324; Yorkshire Insurance Co. Ltd. v. Craine [1922] HCA 32; (1922) 31 CLR 27, at p 38; Ferrier v. Stewart [1912] HCA 47; (1912) 15 CLR 32, at p 44. It was pointed out in Legione, at p 432, that, although in Thompson Dixon J. did not distinguish between an assumption founded upon a representation of existing fact and an assumption founded upon a representation as to future conduct, at the time the doctrine of consideration was thought to

be a significant obstacle to the acceptance of an assumption founded upon a representation (or promise) as to future conduct as a basis for common law estoppel by representation. That this was so appears most clearly from the judgment of Isaacs J. in Ferrier, at p 44. There, his Honour observed that estoppel refers "to an existing fact, and not to a promise de futuro, which must rest, if at all, on contract." However, he went on to say "But a person's conduct has reference to an existing fact, if a given state of things is taken as the assumed basis on which another is induced to act".

18. Because estoppel by representation is often treated as a separate category, it might be possible to confine the distinction between a representation as to existing fact and one as to future conduct to that category. The adoption of such a course would leave an estoppel based on an omission to correct a mistaken assumption free from that troublesome distinction. However, the result would be to fragment the unity of the common law conception of estoppel and to confine the troublesome distinction at the price of introducing another which is equally artificial. And the result would be even more difficult to justify in a case where, as here, the mistaken assumption as to future conduct arises as a direct consequence of a representation.

19. If there is any basis at all for holding that common law estoppel arises where there is a mistaken assumption as to future events, that basis must lie in reversing Jorden v. Money and in accepting the powerful dissent of Lord St. Leonards in that case. The repeated acceptance of Jorden v. Money over the years by courts of the highest authority makes this a formidable exercise. We put it to one side as the respondents did not present any argument to us along these lines.

20. This brings us to the doctrine of promissory estoppel on which the respondents relied in this Court to sustain the judgment in their favour. Promissory estoppel certainly extends to representations (or promises) as to future conduct: Legione, at p 432. So far the doctrine has been mainly confined to precluding departure from a representation by a person in a pre-existing contractual relationship that he will not enforce his contractual rights, whether they be pre-existing or rights to be acquired as a result of the representation: Ajayi v. Briscoe (1964) 1 WLR 1326, at p 1330; 3 All ER 556, at p 559; Bank Negara Indonesia v. Philip Hoalim (1973) 2 MLJ 3, at p 5; State Rail Authority of New South Wales v. Heath Outdoor Pty. Ltd. (1986) 7 NSWLR 170, at p 193, per McHugh J.A. But Denning J. in Central London Property Trust, Ltd. v. High Trees House, Ltd. (1947) KB 130, at pp 134-135, treated it as a wide-ranging doctrine operating outside the pre-existing contractual relationship; see the discussion in Legione, at pp 432-435. In principle there is certainly no reason why the doctrine should not apply so as to preclude departure by a person from a representation that he will not enforce a non-contractual right: Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd. (1968) 2 QB 839, at p 847, per Donaldson J.; Attorney-General v. Codner (1973) 1 NZLR 545, at p 553.

21. There has been for many years a reluctance to allow promissory estoppel to become the vehicle for the positive enforcement of a representation by a party that he would do something in the future. Promissory estoppel, it has been said, is a defensive equity (Hughes v. Metropolitan Railway Co. (1877) 2 App Cas 439, at p 448; Combe v. Combe (1951) 2 KB 215, at pp 219-220) and the traditional notion has been that estoppel could only be relied upon defensively as a shield and not as a sword: Perpetual Trustee Co. Ltd. v. Pacific Coal Co. Pty. Ltd. (1953) 55 SR(NSW) 495, at pp 508, 518-519 (reversed on appeal on other grounds, [1954] HCA 37; (1954) 91 CLR 486; (1955) 93 CLR 479); Gray v. Lang (1955) 56 SR(NSW) 7, at p 13; N.S.W. Rutile Mining Co. Pty. Ltd. v. Eagle Metal and Industrial Products Pty. Ltd. (1959) 60 SR(NSW) 495, at pp 503, 510, 517. High Trees itself was an instance of the defensive use of promissory estoppel. But this does not mean that a plaintiff cannot rely on an estoppel. Even according to traditional orthodoxy, a plaintiff may rely on an estoppel if he has an independent cause of action, where in the words of Denning L.J. in Combe v. Combe, at p 220, the estoppel "may be part of a cause of action, but not a cause of action in itself".

22. But the respondents ask us to drive promissory estoppel one step further by enforcing directly in the absence of a pre-existing relationship of any kind a non-contractual promise on which the representee has relied to his detriment. For the purposes of discussion, we shall assume that there was such a promise in the present case. The principal objection to the enforcement of such a promise is that it would outflank the principles of the law of contract. Holmes J. expressed his objection to the operation of promissory estoppel in this situation when he said "It would cut up the doctrine of consideration by the roots, if a promisee could make a gratuitous promise binding by subsequently acting in reliance on it": Commonwealth v. Scituate Savings Bank (1884) 137 Mass. 301, at p 302. Likewise, Sir Owen Dixon considered that estoppel cut across the principles of the law of contract, notably offer and acceptance and consideration: "Concerning Judicial Method" (1956) 29 Australian Law Journal 468, at p 475. And Denning L.J. in Combe v. Combe, after noting that "The doctrine of consideration is too firmly fixed to be overthrown by a side-wind", said (at p 220) that such a promise could only be enforced if it was supported by sufficient consideration. Moreover, it has been suggested that the enforcement of a promise given without consideration is by no means consistent with Hoyt's Pty. Ltd. v. Spencer [1919] HCA 64; (1919) 27 CLR 133 and Maybury v. Atlantic Union Oil Co. Ltd. [1953] HCA 89; (1953) 89 CLR 507: see Finn, "Equitable Estoppel" in Finn, (ed.), Essays in Equity (1985), 59, at p 75, and Greig and Davis, The Law of Contract (1987), pp 146-149, 175; but cf. Seddon, "A Plea for the Reform of the Rule in Hoyt's Pty. Ltd. v. Spencer" (1978) 52 Australian Law Journal 372, and Law Com. No. 154 pars 2.35 and 2.36.

23. There is force in these objections and it may not be a sufficient answer to repeat the words of Lord Denning M.R. in Crabb v. Arun District Council [1975] EWCA Civ 7; (1976) Ch 179, at p 187, "Equity comes in, true to form, to mitigate the rigours of strict law". True it is

that in the orthodox case of promissory estoppel, where the promisor promises that he will not exercise or enforce an existing right, the elements of reliance and detriment attract equitable intervention on the basis that it is unconscionable for the promisor to depart from his promise, if to do so will result in detriment to the promisee. And it can be argued (see, for example, Greig and Davis, The Law of Contract, p 184) that there is no justification for applying the doctrine of promissory estoppel in this situation, yet denying it in the case of a non-contractual promise in the absence of a pre-existing relationship. The promise, if enforced, works a change in the relationship of the parties, by altering an existing legal relationship in the first situation and by creating a new legal relationship in the second. The point has been made that it would be more logical to say that when the parties have agreed to pursue a course of action, an alteration of the relationship by non-contractual promise will not be countenanced, whereas the creation of a new relationship by a simple promise will be recognized: see D. Jackson, "Estoppel as a Sword" (1965) 81 Law Quarterly Review 223, at p 242.

24. The direct enforcement of promises made without consideration by means of promissory estoppel has proceeded apace in the United States. The Restatement on Contracts 2d 90 states:

> "(1) A promise which the promisor should reasonably
>
> expect to induce action or forbearance on the
>
> part of the promisee or a third person and which
>
> does induce such action or forbearance is binding
>
> if injustice can be avoided only by enforcement
>
> of the promise. The remedy granted for breach
>
> may be limited as justice requires."

This general proposition developed from the treatment in particular situations of promissory estoppel as the equivalent of consideration. Thus in Allegheny College v. National Chautauqua County Bank (1927) 246 NY 369, Cardozo C.J. said (at p 374):

> "Certain ... it is that we have adopted the
>
> doctrine of promissory estoppel as the equivalent
>
> of consideration in connection with our law of
>
> charitable subscriptions."

See Farnsworth, Contracts (1982) 2.19; Gilmore, The Death of Contract (1974), p 129.

25. However, we need to view the development of the doctrine in the United States with some caution. There promissory estoppel developed partly in response to the limiting effects of the adoption of the bargain theory of consideration which has not been expressly adopted in Australia or England. It may be doubted whether our conception of consideration is substantially broader than the bargain theory (see Australian Woollen Mills Pty. Ltd. v. The Commonwealth [1954] HCA 20; (1954) 92 CLR 424, at p 456), though we may be willing to imply consideration in situations where the bargain theory as implemented in the United States would deny the existence of consideration: see Atiyah, Consideration in Contracts: A Fundamental Restatement (1971), pp 6-7, 27, fn 35; Treitel, "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) 50 Australian Law Journal 439, at pp 440 et seq. It is perhaps sufficient to say that in the United States, as in Australia, there is an obvious interrelationship between the doctrines of consideration and promissory estoppel, promissory estoppel tending to occupy ground left vacant due to the constraints affecting consideration.

26. The proposition stated in 90(1) of the Restatement seems on its face to reflect a closer connection with the general law of contract than our doctrine of promissory estoppel, with its origins in the equitable concept of unconscionable conduct, might be thought to allow. This is because in the United States promissory estoppel has become an equivalent or substitute for consideration in contract formation, detriment being an element common to both doctrines. Nonetheless the proposition, by making the enforcement of the promise conditional on (a) a reasonable expectation on the part of the promisor that his promise will induce action or forbearance by the promisee and (b) the impossibility of avoiding injustice by other means, makes it clear that the promise is enforced in circumstances where departure from it is unconscionable. Note that the emphasis is on the promisor's reasonable expectation that his promise will induce action or forbearance, not on the fact that he created or encouraged an expectation in the promisee of performance of the promise.

27. Some recent English decisions are relevant to this general discussion. Amalgamated Property Co. v. Texas Bank (1982) QB 84 in the Court of Appeal and Pacol Ltd. v. Trade Lines Ltd. (1982) 1 Lloyd's Rep 456, are instances of common law or conventional estoppel. However, the comment of Goff J. in Texas Bank at first instance (at p 107) is significant. His Honour observed:

> "Such cases are very different from, for example, a mere promise by a party to make a gift or to increase his obligations under an existing contract; such promise will not generally give rise to an estoppel, even if acted on by the promisee, for the promisee may reasonably be expected to appreciate that, to render it binding, it must be incorporated in a binding contract or contractual variation, and that he cannot therefore safely rely upon it as a legally binding promise without first taking the necessary contractual steps."

The point is that, generally speaking, a plaintiff cannot enforce a voluntary promise because the promisee may reasonably be expected to appreciate that, to render it binding, it must form part of a binding contract.

28. Crabb was an instance of promissory estoppel. It lends assistance to the view that promissory estoppel may in some circumstances extend to the enforcement of a right not previously in existence where the defendant has encouraged in the plaintiff the belief that it

will be granted and has acquiesced in action taken by the plaintiff in that belief. There the defendants, knowing of the plaintiff's intention to sell his land in separate portions, encouraged the plaintiff to believe that he would be granted a right of access over their land and, by erecting gates and failing to disabuse him of his belief, encouraged the plaintiff to act to his detriment in selling part of the land without reservation of a right of way. This raised an equity in favour of the plaintiff which was satisfied by granting him a right of access and a right of way over the defendants' land. The Court of Appeal deduced from the circumstances an equity in the plaintiff to have these rights without having to pay for them. As Oliver J. pointed out in Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd. (1982) QB 133, at p 153, the Court of Appeal treated promissory estoppel and proprietary estoppel or estoppel by acquiescence as mere facets of the same general principle, a point also made by Lord Denning M.R. in Texas Bank, at p 122, and seemingly accepted by the Privy Council in Attorney-General of Hong Kong v. Humphreys Estate Ltd. (1987) 1 AC 114, at pp 123-124. In Taylors Fashions Oliver J. also remarked (at p 153) that what gave rise to the need for the court to intervene was the defendants' unconscionable attempt to go back on the assumptions which were the foundation of their dealings. Indeed, Scarman L.J. in Crabb saw the question in terms of whether an equity had arisen from the conduct and relationship of the parties (at pp 193-194), concluding that the court should determine what was "the minimum equity to do justice to the plaintiff" (at p 198). See also Pascoe v. Turner [1978] EWCA Civ 2; (1979) 1 WLR 431, at p 438; 2 All ER 945, at p 951.

29. The decision in Crabb is consistent with the principle of proprietary estoppel applied in Ramsden v. Dyson (1866) LR 1 HL 129. Under that principle a person whose conduct creates or lends force to an assumption by another that he will obtain an interest in the first person's land and on the basis of that expectation the other person alters his position or acts to his detriment, may bring into existence an equity in favour of that other person, the nature and extent of the equity depending on the circumstances. And it should be noted that in Crabb, as in Ramsden v. Dyson, although equity acted by way of recognizing a proprietary interest in the plaintiff, that proprietary interest came into existence as the only appropriate means by which the defendants could be effectively estopped from exercising their existing legal rights.

30. One may therefore discern in the cases a common thread which links them together, namely, the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it": per Dixon J. in Grundt, at p 675; see also Thompson, at p 547. Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.

31. Before we turn to the very recent decision of the Privy Council in Humphreys Estate, which was not a case of proprietary estoppel, but one, like the present, arising in the course

of negotiations antecedent to the making of a contract, we should say something of equity's attitude to the enforcement of voluntary promises. So far equity has set its face against the enforcement of such promises and future representations as such. The support for the exercise of a general equitable jurisdiction to make good expectations created or encouraged by a defendant given by Lord Cottenham L.C. in Hammersley v. De Biel [1845] EngR 592; (1845) 12 Cl & Fin 45; 8 ER 1312, affirmed by the House of Lords in that case, was undermined by the insistence in Jorden v. Money on a representation of existing fact and destroyed by Maddison v. Alderson. See the discussion in Finn, "Equitable Estoppel", at pp 62 et seq.

32. Because equitable estoppel has its basis in unconscionable conduct, rather than the making good of representations, the objection, grounded in Maddison v. Alderson, that promissory estoppel outflanks the doctrine of part performance loses much of its sting. Equitable estoppel is not a doctrine associated with part performance whose principal purpose is to overcome non-compliance with the formal requirements for the making of contracts. Equitable estoppel, though it may lead to the plaintiff acquiring an estate or interest in land, depends on considerations of a different kind from those on which part performance depends. Holding the representor to his representation is merely one way of doing justice between the parties.

33. In Humphreys Estate the defendants representing the Hong Kong government negotiated with a group of companies ("HKL"), which included the respondent Humphreys Estate, for an exchange whereby the government would acquire 83 flats, being part of property belonging to HKL, and in exchange HKL would take from the government a Crown lease of property known as Queen's Gardens and be granted the right to develop that property and certain adjoining property held by HKL. The negotiations did not result in a contract, though the exchange of properties was agreed in principle but subject to contract. The government took possession of HKL's property and expended a substantial sum on it. HKL took possession of Queen's Gardens and demolished existing buildings and paid to the government $103,865,608, the agreed difference between the value of the two properties. HKL withdrew from the negotiations and sued to recover the amount paid and possession of the first property. The defendants claimed that HKL was estopped from withdrawing from the agreement in principle. The Privy Council rejected this claim on the ground that the government failed to show (a) that HKL created or encouraged a belief or expectation on the part of the government that HKL would not withdraw from the agreement in principle and (b) that the government relied on that belief or expectation (at p 124). Their Lordships observed (at pp 127-128):

"It is possible but unlikely that in circumstances

at present unforeseeable a party to negotiations

set out in a document expressed to be 'subject to

contract' would be able to satisfy the court that

the parties had subsequently agreed to convert the

document into a contract or that some form of

estoppel had arisen to prevent both parties from

refusing to proceed with the transactions envisaged

by the document."

34. The foregoing review of the doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required. Humphreys Estate suggests that this may be found, if at all, in the creation or encouragement by the party estopped in the other party of an assumption that a contract will come into existence or a promise will be performed and that the other party relied on that assumption to his detriment to the knowledge of the first party. Humphreys Estate referred in terms to an assumption that the plaintiff would not exercise an existing legal right or liberty, the right or liberty to withdraw from the negotiations, but as a matter of substance such an assumption is indistinguishable from an assumption that a binding contract would eventuate. On the other hand the United States experience, distilled in the Restatement (2d 90), suggests that the principle is to be expressed in terms of a reasonable expectation on the part of the promisor that his promise will induce action or forbearance by the promisee, the promise inducing such action or forbearance in circumstances where injustice arising from unconscionable conduct can only be avoided by holding the promisor to his promise.

35. The application of these principles to the facts of the present case is not without difficulty. The parties were negotiating through their solicitors for an agreement for lease to be concluded by way of customary exchange. Humphreys Estate illustrates the difficulty of establishing an estoppel preventing parties from refusing to proceed with a transaction expressed to be "subject to contract". And there is the problem identified in Texas Bank (at p 107) that a voluntary promise will not generally give rise to an estoppel because the promisee may reasonably be expected to appreciate that he cannot safely rely upon it. This problem is magnified in the present case where the parties were represented by their solicitors.

36. All this may be conceded. But the crucial question remains: was the appellant entitled to stand by in silence when it must have known that the respondents were proceeding on the assumption that they had an agreement and that completion of the exchange was a formality? The mere exercise of its legal right not to exchange contracts could not be said to amount to unconscionable conduct on the part of the appellant. But there were two other factors present in the situation which require to be taken into consideration. The first was the element of urgency that pervaded the negotiation of the terms of the proposed lease. As we have noted, the appellant was bound to give up possession of its existing commercial premises in Nowra in January 1984; the new building was to be available for fitting out by 15 January and completed by 5 February 1984. The respondents' solicitor had said to the appellant's solicitor on 7 November that it would be impossible for Maher to complete the building within the agreed time unless the agreement were concluded "within the next day or two". The outstanding details were agreed within a day or two thereafter, and the work of preparing the site commenced almost immediately.

37. The second factor of importance is that the respondents executed the counterpart deed and it was forwarded to the appellant's solicitor on 11 November. The assumption on which the respondents acted thereafter was that completion of the necessary exchange was a formality. The next their solicitor heard from the appellant was a letter from its solicitors dated 19 January, informing him that the appellant did not intend to proceed with the matter. It had known, at least since 10 December, that costly work was proceeding on the site.

38. It seems to us, in the light of these considerations, that the appellant was under an obligation to communicate with the respondents within a reasonable time after receiving the executed counterpart deed and certainly when it learnt on 10 December that demolition was proceeding. It had to choose whether to complete the contract or to warn the respondents that it had not yet decided upon the course it would take. It was not entitled simply to retain the counterpart deed executed by the respondents and do nothing: cf. Thompson, at p 547; Olsson v. Dyson (1969) 120 CLR 365, at p 376. 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. To express the point in the language of promissory estoppel the appellant is estopped in all the circumstances from retreating from its implied promise to complete the contract.

39. Also, as the other judgments demonstrate, there is no substance in the argument based on s.54A of the Conveyancing Act 1919 (N.S.W.).

40. We therefore think that the Court of Appeal was correct in its conclusion. We would dismiss the appeal.

BRENNAN J. In October and early November 1983, officers and agents of Waltons Stores (Interstate) Ltd. ("Waltons") were negotiating with Mr and Mrs Maher for the construction by the Mahers of store premises on land which they owned in Nowra to be leased to Waltons. Mr Roth of Dawson Waldron was the solicitor for Waltons and Mr Elvy of Morton & Harris was the solicitor for the Mahers. They adopted an unusual conveyancing procedure. A draft Deed of Agreement for Lease was to be drawn by the lessee's solicitor Mr Roth and, when the terms were agreed, an exchange of contracts was to be effected. Time was short. Waltons specified 15 January 1984 as the date by which the store building was to be available for fitting out and 5 February 1984 as the date by which the store building was to be completed. Waltons had sold their store premises in Nowra and were required to vacate those premises by mid-January 1984. The contract between Waltons and the Mahers needed to be concluded in time to allow Mr Maher to meet the specified dates for fitting out and completion. The work to be done by Mr Maher included the demolition of a substantial structure on the site before the erection of the store building could be commenced. On 7 November 1983, Mr Elvy told Mr Roth that "the agreement must be concluded within the next day or two otherwise it will be impossible for Maher to complete it". At that time, Mr Elvy was seeking some amendments to the draft Deed of Agreement for Lease. Although the amendments had been agreed as between the solicitors, Waltons had not then given its final approval. In addition, a schedule of finishes was required for annexure to the Deed. On 7 November, after Mr Elvy spoke to Mr Roth, Mr Roth wrote to Mr Elvy enclosing a redrafted Deed of Agreement for Lease which incorporated, to the extent necessary, all the amendments on which he and Mr Elvy had agreed. Mr Roth wrote:

> " You should note that we have not yet obtained our
>
> client's specific instructions to each amendment

requested, but we believe that approval will be

forthcoming. We shall let you know tomorrow if

any amendments are not agreed to.

We also believe that a Schedule of Finishes

should be annexed to the Deed prior to exchange."

Mr Roth did not inform Mr Elvy, either "tomorrow" or at any later time, that the amendments had not been agreed to.

2. Mr Elvy accordingly had his clients execute the Deed and prepare and sign a schedule of finishes. He sent these documents to Mr Roth on 11 November under cover of this letter:

" We thank you for your letter of the 7th November

and now return amended counterpart Deed of

Agreement for Lease signed by our clients, by way

of exchange. Would you kindly forward the

original Deed executed by your client.

We enclose also Schedule of Finishes signed by

our clients together with a copy thereof for

approval and annexure to the Deed and two (2)

copies of the floor plan for annexure to the copy

lease annexed to the Deed, prior to exchange.

> When returning the executed Deed you might
>
> forward to us a cheque in the sum of $2000.20 in
>
> order that we may attend to stamping of the
>
> Deed."

(It will be convenient hereafter to adopt the terminology of this letter, describing the document forwarded by Mr Elvy "by way of exchange" as the counterpart Deed and the document to be executed by Waltons as the original Deed). When Mr Elvy wrote this letter, he thought it was his responsibility to attend to the stamping of the original and counterpart Deeds. Subsequently he realized that that was Mr Roth's responsibility. If Mr Elvy had been responsible for stamping the original and counterpart Deeds, presumably both would have been sent to him after Waltons had executed the original Deed; if Mr Roth had been responsible for stamping the original and counterpart Deeds, presumably Mr Elvy would have had to return the executed original Deed for stamping after it had been delivered to him by way of exchange. The implications of the conveyancing procedure adopted by the solicitors were the subject of an important finding by the learned trial judge to which reference will presently be made. Mr Elvy's letter and the enclosures were received by Mr Roth on or about 14 November. Mr Roth did not deliver the original Deed executed by Waltons to Mr Elvy as he had requested. Waltons did not execute the Deed. Mr Elvy made no enquiry to find out when the executed original Deed would be delivered to him. Nor did Mr Roth return the counterpart Deed until it was sent accompanied by a letter dated 19 January 1984 which Mr Roth then wrote on his client's instructions. (He had not communicated with Mr Elvy since 11 November 1983.) The letter of 19 January 1984 read:

> " We refer to your letter of 11th November 1983 and
>
> regret to inform you that our client has
>
> instructed us that it does not intend to proceed
>
> with this transaction.

> We apologise for any inconvenience caused, and
>
> return the Deed of Agreement for Lease and
>
> Schedule of Finishes signed by your clients. The
>
> copies of the floor plan are also enclosed."

The contents of this letter reached Mr Maher on 22 or 23 January 1984. By that time, Mr Maher had demolished the structure which had been standing on the site, had poured two-fifths of the concrete slab and had laid sixty to seventy per cent of the brickwork required to build a store in accordance with Waltons' requirements. Mr Maher had put this work in hand shortly after he received Mr Elvy's letter of advice dated 14 November 1983:

> " We refer to the writer's recent several
>
> attendances on Mr. Maher, and confirm that the
>
> amended Agreement for Lease duly executed by you
>
> both has been forwarded to the Lessee's
>
> Solicitors for execution by the Lessor and
>
> exchange of Agreement.
>
> We note that you will commence work in accordance
>
> with the Agreement for Lease immediately as the
>
> work to be completed by you on the property is
>
> required to be completed on or by the 5th
>
> February 1984.

> In the event that for any reason the Lessors work
>
> is not completed by the 31st March 1984, the
>
> Lessee may by notice in writing rescind the
>
> Agreement.
>
> Following return of the exchanged Agreement we
>
> shall arrange for the same to be stamped."

3. Mr Elvy wrote this letter, as the text shows, without having received the original Deed executed by Waltons. In his evidence, Mr Maher said in reference to his solicitor's letter to him:

> " In my thinking it confirmed that everything was
>
> proceeding correctly and on receipt of that I
>
> ordered the Kato Excavators to demolish the
>
> rather substantial building which was in very
>
> very good order."

The reason why Mr Maher commenced the work was his expectation that a binding agreement would be brought into existence. As he said:

> " We took for granted they would complete their

part of the bargain and we duly set all our

efforts into motion to do the job for them, in

the limited time that was available to us."

Mr Maher expected that execution and delivery of the original Deed would take place as a matter of course, as appears from the following passage of his evidence:

" Q. Would it be fair to say that after you

received (Mr Elvy's) letter of 14th November,

1983, you assumed that execution by the lessor

and exchange of agreement, would take place? A.

Most definitely.

Q. You knew that it was important that execution

by the lessor and exchange of agreement should

take place, didn't you? A. Yes everything would

have to be tied up.

Q. You were assuming that that would be done?

A. Yes.

Q. If you had been told that exchange of the

agreement might not take place, if Mr Elvy had

told you that, would you have gone ahead and done

the work? A. Would I have started the work?

Q. Yes. A. Of course I would not."

4. The evidence revealed why Waltons withdrew from the arrangement and why time had been allowed to pass before Mr Roth advised Mr Elvy of Waltons' decision. Mr Rose, a property consultant who was retained by Waltons, had given Mr Roth instructions "to go slow on the transaction". Mr Rose explained "that meant that we did not want to get ourselves into a legally binding position". The reason for these instructions lay in a marketing report which suggested a need for Waltons to change its retailing strategy in a number of country centres including Nowra. That report was under consideration by the directors of Waltons and, as no decision had been made on whether to proceed to lease the proposed building, Mr Rose "did not want anything done to jeopardize the potential contractual situation between Waltons and Mahers". He was seeking to keep the arrangements with the Mahers on foot until a decision was made by Waltons.

5. Waltons knew that Mr Maher was proceeding with the building. On 10 December 1983, the manager of the Waltons store in Nowra reported to his group manager that demolition work had commenced on the site. By 10 or 11 January 1984, Waltons' officers knew that Mr Maher was proceeding with construction. Nobody had told Mr Maher that Waltons had had a change of heart. Although Mr Gosling, who was the property manager for Waltons in New South Wales, gave evidence that he had doubts whether the building under construction was being built for Waltons, he admitted that he did not try to resolve those doubts. The only reasonable inference open on the evidence is that Waltons knew that Mr Maher was building the store in conformity with the terms of the Deed which he had executed.

6. After Waltons refused to proceed in the transaction, Mr and Mrs Maher commenced proceedings in the Supreme Court of New South Wales claiming:

" 1. A declaration that there is in existence ...

a valid and enforceable agreement for the taking

of a Lease ... in accordance with (the draft

lease including the proposed amendments)

2. ...

3. An order for specific performance ...

4. Alternatively to 1-3 above ... damages for

breach of agreement to take the said Lease."

7. The threshold difficulty which faced Mr and Mrs Maher was establishing the alleged agreement for the taking of a lease. Kearney J. made this finding:

" From the earliest conversation between Mr Rose

and Mr Maher reference was made to their

respective solicitors and to the necessity for

the solicitors to carry out the necessary

documentation in order to bring into existence a

legally binding contract. It is plain from the

solicitors' correspondence and telephone

conversations that they proceeded upon both the

express and implicit understanding that the

preliminary agreement reached between the parties

in broad terms would be consummated only through

the medium of exchange."

His Honour therefore held that the parties did not intend to be bound contractually "at any stage prior to exchange effective between their solicitors". The finding that there was no binding contract was accepted on appeal.

8. However, Mr and Mrs Maher succeeded on the ground that, although there was no contract actually binding on Waltons, Waltons was bound by an estoppel which required that Waltons' liability to the Mahers should be determined as though there were a binding contract. Kearney J. made the declaration sought and gave judgment in favour of Mr and Mrs Maher for damages in lieu of specific performance, the assessment of the damages being referred to the Master. An appeal to the Court of Appeal was dismissed.

9. In the Courts below, the conclusion that Waltons was bound by an Agreement for Lease although it had abstained from executing and delivering the original Deed was put on somewhat different bases. Kearney J. found -

" that (Mr and Mrs Maher) believed that they had an

agreement. They were entitled, in my view, to

assume that the exchange would be duly completed

by (Waltons) and in those circumstances properly

considered that they were bound to proceed with

the greatest expedition with the building project

for (Waltons)." (Emphasis added.)

His Honour further held -

> " that the circumstances do establish the requisite elements to create an estoppel against (Waltons) denying that a concluded agreement by way of exchange did in fact exist between the parties."
>
> (Emphasis added.)

10. In the Court of Appeal, Priestley J.A. (with whom Glass and Samuels JJ.A. agreed) founded his judgment on another basis. His Honour stated his opinion to be -

> " that certainly by the time (Mr and Mrs Maher) began actual building in Berry Street at the beginning of January (Waltons) had caused the respondents to assume that the fact was that notwithstanding they had never been notified of the exchange of agreements (and notwithstanding that no exchange of agreements had occurred) the deal that had been agreed between Mr Maher and Mr Elvy on the one hand and representatives

of the appellant on the other was an agreement

binding both the respondents and the appellant."

(Emphasis added.)

11. In these three passages there are three distinct bases advanced for holding Waltons estopped from denying the existence of the contract sued upon. The first basis is an expectation by Mr Maher that Waltons would duly complete the exchange; the second basis is an assumption by Mr Maher that Waltons had duly completed the exchange; the third basis is an assumption by Mr Maher that there was a binding contract in existence whether or not an exchange had been completed. An expectation that Waltons would exchange contracts - the first basis - is radically different from an assumption that contracts had been exchanged - the second basis. The relevant assumption of fact which Mr Maher must have made if he expected that Waltons would exchange contracts is that contracts had not been exchanged. The first basis rests on an expectation as to what Waltons would do; it could be supported, if at all, only upon the principles of equitable estoppel. The second and third bases rest on assumptions as to an existing state of affairs; they could be supported, if at all, upon the principles of estoppel in pais. Estoppel in pais and equitable estoppel address different problems, though there are elements common to both.

12. The nature of an estoppel in pais is well established in this country. A party who induces another to make an assumption that a state of affairs exists, knowing or intending the other to act on that assumption, is estopped from asserting the existence of a different state of affairs as the foundation of their respective rights and liabilities if the other has acted in reliance on the assumption and would suffer detriment if the assumption were not adhered to: Craine v. Colonial Mutual Fire Insurance Co.Ltd. [1920] HCA 64; (1920) 28 CLR 305, at pp 327-328 (affirmed on other grounds by the Privy Council - 31 CLR 27, at p 38); Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507, at p 547; Newbon v. City Mutual Life Assurance Society Ltd. [1935] HCA 33; (1935) 52 CLR 723, at p 734; Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641, at pp 657, 674, 676. In Thompson v. Palmer Dixon J. said, at p 547:

" The object of estoppel in pais is to prevent an

> unjust departure by one person from an assumption
>
> adopted by another as the basis of some act or
>
> omission which, unless the assumption be adhered
>
> to, would operate to that other's detriment.
>
> Whether a departure by a party from the
>
> assumption should be considered unjust and
>
> inadmissible depends on the part taken by him in
>
> occasioning its adoption by the other party."

The effect of an estoppel in pais is not to create a right in one party against the other; it is to establish the state of affairs by reference to which the legal relationship between them is ascertained. A classical statement of the doctrine as it is understood at least in this country is to be found in the judgment of Dixon J. in Grundt v. Great Boulder, at pp 674-675:

> " The principle upon which estoppel in pais is
>
> founded is that the law should not permit an
>
> unjust departure by a party from an assumption of
>
> fact which he has caused another party to adopt
>
> or accept for the purpose of their legal
>
> relations. ... (The rules governing estoppel)
>
> work out the more precise grounds upon which the

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

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

13. The scope of estoppel in pais does not extend to compel adherence to representations of intention. The limitation which Jorden v. Money (1854) 5 HLC 185 (10 ER 868) placed on the doctrine of estoppel in pais was that it "does not apply to a case where the representation is not a representation of a fact, but a statement of something which the party intends or does not intend to do": pp 214-215 (p 882). See also Maddison v. Alderson (1883) 8 AppCas 467, at p 473; George Whitechurch, Limited v. Cavanagh (1902) AC 117, at p 130; Ferrier v. Stewart [1912] HCA 47; (1912) 15 CLR 32, at pp 44-45.

14. It has been said that estoppel in pais is merely a rule of evidence and not a cause of action (Seton v. Lafone (1887) 19 QBD 68; Low v. Bouverie (1891) 3 Ch 82; In re Ottos Kopje Diamond Mines, Limited (1893) 1 Ch 618) but that proposition needs some explanation. If the estoppel relates to the existence of a contract between the parties, the legal relationship between the parties is ascertained by reference to the terms of the contract which has been assumed to exist. If, in the assumed state of affairs, the contract confers a cause of action on the party raising the estoppel, the cause of action may be enforced. The source of legal obligation in that event is the assumed contract; the estoppel is not a source of legal obligation except in the sense that the estoppel compels the party bound to adhere to the assumption that the contract exists. Thus in Laws Holdings Pty.Ltd. v. Short (1972) 46 ALJR 563, a company which had led a supplier of goods to assume that it was the purchaser of goods in fact received by an associated company of similar name was held bound by a contract between itself and the supplier which its conduct had led the supplier to assume to exist. And in Spiro v. Lintern (1973) 1 WLR 1002; (1973) 3 All ER 319, a husband whose wife had made a contract in her own name for the sale of the husband's property without his authority was estopped from denying that she had made the contract with his authority. Specific performance was decreed against him. The assumed state of affairs to which a party may be bound to adhere may be more than a state of mere facts; it may include the legal complexion of a fact as well as the fact itself, that is, a matter of mixed fact and law. Thus in Sarat Chunder Dey v. Gopal Chunder Laha (1892) LR 19 Ind App 203 the subject of the estoppel was the validity of a conveyance, and in Yorkshire Insurance Co. v. Craine (1922) 2 AC 541 the subject of estoppel was the validity of a claim lodged out of time under a policy of fire insurance.

15. Equitable estoppel, on the other hand, does not operate by establishing an assumed state of affairs. Unlike an estoppel in pais, an equitable estoppel is a source of legal obligation. It is not enforceable against the party estopped because a cause of action or ground of defence would arise on an assumed state of affairs; it is the source of a legal obligation arising on an actual state of affairs. An equitable estoppel is binding in conscience on the party estopped, and it is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the

assumption or expectation which he has been induced to adopt. Perhaps equitable estoppel is more accurately described as an equity created by estoppel. The origin of equitable estoppel in the general principles of equity is illustrated by Chalmers v. Pardoe (1963) 1 WLR 677; (1963) 3 All ER 552. Pardoe held a lease of land from the Native Land Trust Board of Fiji. Chalmers wished to build a residence on part of the land and he did so, Pardoe agreeing to treat that part of the land as if Chalmers were the lessee. Pardoe intimated that he would take the steps necessary to procure that Chalmers become the tenant of the land on which the residence was built. Chalmers and Pardoe fell out and Pardoe declined to proceed. Chalmers would have been entitled to an equitable charge on the land if it were not for the provision of a statute relating to native land which, in the absence of a prior consent by the Board, made the transaction illegal. Sir Terence Donovan, speaking for the Privy Council, said (at pp 681-682; p 555):

> " The claim is based on the general equitable
>
> principle that, on the facts of the case, it
>
> would be against conscience that Pardoe should
>
> retain the benefit of the buildings erected by
>
> Chalmers on Pardoe's land so as to become part of
>
> that land without repaying to Chalmers the sums
>
> expended by him in their erection. ...
>
> There can be no doubt upon the authorities
>
> that where an owner of land has invited or
>
> expressly encouraged another to expend money upon
>
> part of his land upon the faith of an assurance
>
> or promise that that part of the land will be

made over to the person so expending his money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended. ... It was said in Plimmer v. Wellington Corpn. ((1884) 9 AppCas 699) that the court must look at the circumstances in each case to decide in what way the equity can be satisfied."

And in Crabb v. Arun District Council [1975] EWCA Civ 7; (1976) Ch 179, at pp 187-188, Lord Denning M.R. said:

" The basis of this proprietary estoppel - as indeed of promissory estoppel - is the interposition of equity. ... The early cases did

not speak of it as 'estoppel'. They spoke of it as 'raising an equity'. If I may expand what Lord Cairns L.C. said in Hughes v. Metropolitan Railway Co. (1877) 2 AppCas 439, 448: 'it is the first principle upon which all courts of equity proceed,' that it will prevent a person from insisting on his strict legal rights - whether arising under a contract, or on his title deeds, or by statute - when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties."

Scarman L.J. in the same case said, at pp 192-193:

" If the plaintiff has any right, it is an equity arising out of the conduct and relationship of the parties. In such a case I think it is now well settled law that the court, having analysed and assessed the conduct and relationship of the parties, has to answer three questions. First,

is there an equity established? Secondly, what

is the extent of the equity, if one is

established? And, thirdly, what is the relief

appropriate to satisfy the equity?"

16. Estoppel based on Mr Maher's expectation that Waltons would complete an exchange of contracts - the first basis of estoppel - is therefore governed by principles distinct from the principles governing estoppel based on an assumption that contracts had been exchanged or that a binding contract was in existence whether or not an exchange had been completed - the second and third bases. However, as will appear, equitable estoppel and an estoppel in pais which relates to an assumption of an existing contract may lead to the grant of similar remedies.

The first basis: Waltons would exchange

17. Waltons made no contract with the Mahers that Waltons would execute and deliver the original Deed. It seems likely that on and immediately after 11 November, Waltons intended to do so. At that stage, Waltons knew it had to move out of its existing premises in mid-January and the purpose of the proposed Agreement was to furnish Waltons with a store in which it would conduct its business - the store which Mr Maher was to build. The necessity for Waltons to conclude an agreement before Mr Maher would commence the building of the store was stated by Mr Elvy to Mr Roth on 7 November. Then Mr Elvy's letter of 11 November assumed that Waltons would execute and deliver the original Deed the executed counterpart of which was sent to Mr Roth by way of exchange. When Mr Roth received the letter enclosing the executed counterpart Deed, he and his clients had two options: to retain it or to return it to Mr Elvy. It could be retained only on the terms on which it had been received, namely, by way of exchange. The continued retention of the executed counterpart Deed was justified only if Waltons intended and continued in its intention to execute and deliver the original Deed. It seems clear from the passage of Mr Maher's evidence earlier recited that

the Mahers - more precisely, Mr Maher, the active co-owner of the property - expected that an exchange would be duly completed. That is, Mr Maher expected that Waltons would execute and deliver the original Deed of Agreement for Lease and would thereby make a binding contract. Mr Maher either assumed that a contract had been made or expected that, the matter having passed beyond the stage of negotiations, Waltons would execute and deliver the original Deed and was not free at that stage to withdraw. Kearney J. found that the Mahers "believed that they had an agreement" because they had assumed "that the exchange would be duly completed". In reliance on that assumption or expectation Mr Maher proceeded to clear the site and build the store. Waltons discovered that Mr Maher was performing the work required under the proposed contract, and it must have known that Mr Maher would not have commenced that work if he had not assumed that a contract had been made or expected that Waltons was bound to enter into a contract. Waltons intended that he should act on that assumption or expectation by continuing to build the store in order that Waltons should enjoy the option of completing the exchange and proceeding to take the lease if it should appear expedient to do so. It was not disputed in this Court that the Mahers would suffer detriment if Mr Maher's expectation were to go unfulfilled.

18. Is this sufficient to create an equity in the Mahers of the kind to which Danckwerts L.J. referred in Inwards v. Baker (1965) 2 QB 29, at p 38, that is -

> " an equity created by estoppel, or equitable
>
> estoppel, as it is sometimes called, by which the
>
> person who has made the expenditure is induced by
>
> the expectation of obtaining protection, and
>
> equity protects him so that an injustice may not
>
> be perpetrated"?

The protection which equity extends is analogous to the protection given by estoppel in pais to which Dixon J. referred in Grundt v. Great Boulder, that is, protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted. In E.R. Ives Investment Ltd. v. High (1967) 2 QB 379, Danckwerts L.J. said (at p 400) that the principle of equitable estoppel -

" goes back at least as far as the observations of

Lord Kingsdown in Ramsden v. Dyson ((1866) LR 1

HL 129), which were approved by the Privy

Council in Plimmer v. Wellington Corporation."

In Ward v. Kirkland (1967) Ch 194 Ungoed-Thomas J. noted (at p 235):

" This equity has been differently expressed from

time to time. ... It has ... been expressed from

time to time as operating by a form of estoppel.

The foundation of it, however, in all these

instances, is the recognition by the court that

it would be unconscionable in the circumstances

for a legal owner fully to exercise his legal

rights."

In Olsson v. Dyson (1969) 120 CLR 365, Kitto J. explained Dillwyn v. Llewelyn [1862] EngR 908; (1862) 4 De GF & J 517 (45 ER 1285) as founded on the recognition of unconscionable conduct by the party bound by the equity. Dillwyn v. Llewelyn was a case of an incomplete gift of land by a father to a son followed by the father's approval of the son's erection of a building on the land. It was the father's conduct after making the incomplete gift which made it unconscionable for him not to fulfil the expectation of title in reliance on which, to the

father's knowledge, the son had laid out his money. The equity which bound the father was to be satisfied by fulfilling the son's expectation.

19. The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy an equity varies according to the circumstances of the case. As Robert Goff J. said in Amalgamated Property Co. v. Texas Bank (1982) QB 84, at p 103:

> " Of all doctrines, equitable estoppel is surely
>
> one of the most flexible."

Sometimes it is necessary to decree that a party's expectation be specifically fulfilled by the party bound by the equity; sometimes it is necessary to grant an injunction to restrain the exercise of legal rights either absolutely or on condition; sometimes it is necessary to give an equitable lien on property for the expenditure which a party has made on it: see Snell's Principles of Equity, 28th ed. (1982), p 562. However, in moulding its decree, the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct. What, then, is unconscionable conduct? An exhaustive definition is both impossible and unnecessary, but the minimum elements required to give rise to an equitable estoppel should be stated.

20. Some indication of what constitutes unconscionable conduct can be gleaned from the instances in which an equity created by estoppel has been held to arise. If cases of equitable estoppel are in truth but particular instances of the operation of the general principles of equity, there is little purpose in dividing those cases into the categories of promissory and proprietary estoppel which are not necessarily exhaustive of the cases in which equity will intervene. Like Scarman L.J. in Crabb v. Arun District Council, at p 193, I do not find it generally helpful to divide into classes the cases in which an equity created by estoppel has been held to exist. However, the familiar categories serve to identify the characteristics of the circumstances which have been held to give rise to an equity in the party raising the estoppel. In cases of promissory estoppel, the equity binds the holder of a legal right who induces another to expect that that right will not be exercised against him: see, for example, Hughes v. Metropolitan Railway Co. (1877) 2 AppCas 439, at p 448; Birmingham and District Land Company v. London and North Western Railway Co. (1888) 40 ChD 268; Ajayi v. R.T. Briscoe (Nigeria) Limited (1964) 1 WLR 1326, at p 1330; (1964) 3 All ER 556, at p 559; Bank Negara Indonesia v. Philip Hoalim (1973) 2 MLJ 3. In cases of

proprietary estoppel, the equity binds the owner of property who induces another to expect that an interest in the property will be conferred on him: see Ramsden v. Dyson (1866) LR 1 HL 129, at p 170; Plimmer v. Wellington Corporation (1884) 9 AppCas 699; Inwards v. Baker. In cases where there has been an imperfect gift of property the equity binds the donor of the property when, after the making of the imperfect gift, he does something to induce the donee to act on the assumption that the imperfect gift is effective or on the expectation that it will be made effective: see Dillwyn v. Llewelyn; Olsson v. Dyson, at p 376.

21. In all cases where an equity created by estoppel is raised, the party raising the equity has acted or abstained from acting on an assumption or expectation as to the legal relationship between himself and the party who induced him to adopt the assumption or expectation. The assumption or expectation does not relate to mere facts, whether existing or future. (An assumption as to a legal relationship may be an assumption that there is no legal relationship, as in the cases where A builds on B's land assuming it to be his own.) Though the party raising the estoppel may be under no mistake as to the facts, he assumes that a particular legal relationship exists or expects that a particular legal relationship will exist between himself and the party who induced the assumption or expectation. The assumption or expectation may involve an error of law. Thus a promissory or a proprietary estoppel may arise when a party, not mistaking any facts, erroneously attributes a binding legal effect to a promise made without consideration. But, if the party raising the estoppel is induced by the other party's promise to adopt an assumption or expectation, the promise must be intended by the promisor and understood by the promisee to affect their legal relations. In Combe v. Combe (1951) 2 KB 215 Denning L.J., the chief modern proponent of equitable estoppel, emphasized this element (at p 220):

> " The principle, as I understand it, is that,
>
> where one party has, by his words or conduct,
>
> made to the other a promise or assurance which
>
> was intended to affect the legal relations
>
> between them and to be acted on accordingly,
>
> then, once the other party has taken him at his

> word and acted on it, the one who gave the
>
> promise or assurance cannot afterwards be allowed
>
> to revert to the previous legal relations as if
>
> no such promise or assurance had been made by
>
> him, but he must accept their legal relations
>
> subject to the qualification which he himself has
>
> so introduced, even though it is not supported in
>
> point of law by any consideration but only by his
>
> word." (Emphasis added.)

22. However, his Lordship's enunciation of the principle does not bring out the basic object of the doctrine which, like the object of estoppel in pais, is to avoid the detriment which the promisee would suffer if the promisor fails to fulfil the promise. It will be necessary to return to consider the basic object of the doctrine, but for the moment it is important to observe that the doctrine has no application to an assumption or expectation induced by a promise which is not intended by the promisor and understood by the promisee to affect their legal relations. The point is illustrated by the judgment of the Privy Council in Attorney-General of Hong Kong v. Humphreys Estate (1987) 1 AC 114. There, an agreement in principle had been reached between the Government of Hong Kong and a property developer for an exchange of property, the agreement being "subject to contract". Both parties had nevertheless so far acted on the agreement in principle that, it was submitted, it was "impossible for the government to go back and unthinkable that HKL (the property developer) would not go forward". Lord Templeman, speaking for their Lordships, accepted (at p 124) "that there is no doubt that the government acted in the confident and not unreasonable hope that the agreement in principle would come into effect". The detailed terms of the contract had been sufficiently indicated by the parties' dealings with each other as to enable a court to make an order that the agreement in principle be carried into effect on terms acceptable to both parties. But the "subject to contract" requirement remained unsatisfied and a claim founded on equitable estoppel failed. Lord Templeman said, at p 124:

" Their Lordships accept that the government acted to their detriment and to the knowledge of HKL in the hope that HKL would not withdraw from the agreement in principle. But in order to found an estoppel the government must go further. First the government must show that HKL created or encouraged a belief or expectation on the part of the government that HKL would not withdraw from the agreement in principle. Secondly the government must show that the government relied on that belief or expectation. Their Lordships agree with the courts of Hong Kong that the government fail on both counts."

To found an estoppel it was not sufficient to show that the government expected that, as a matter of probability, HKL would not withdraw from the agreement; it was necessary to show an expectation that HKL was "bound to proceed": see p 126. Lord Templeman said (at pp 127-128):

" It is possible but unlikely that in circumstances

> at present unforeseeable a party to negotiations
>
> set out in a document expressed to be 'subject to
>
> contract' would be able to satisfy the court that
>
> the parties had subsequently agreed to convert
>
> the document into a contract or that some form of
>
> estoppel had arisen to prevent both parties from
>
> refusing to proceed with the transactions
>
> envisaged by the document. But in the present
>
> case the government chose to begin and elected to
>
> continue on terms that either party might suffer
>
> a change of mind and withdraw."

It follows that an assumption or expectation by one party which does not relate to what the other party is bound to do or not to do gives no foundation for an equitable estoppel, though the assumption or expectation relates to the prospect of the other party conducting himself in a particular way. The risk that the other party who, being free to conduct himself in whatever way he chooses, may choose to conduct himself in a way different from that assumed or expected rests with the party who adopts the assumption or expectation.

23. Parties who are negotiating a contract may proceed in the expectation that the terms will be agreed and a contract made but, so long as both parties recognize that either party is at liberty to withdraw from the negotiations at any time before the contract is made, it cannot be unconscionable for one party to do so. Of course, the freedom to withdraw may be fettered or extinguished by agreement but, in the absence of agreement, either party ordinarily retains his freedom to withdraw. It is only if a party induces the other party to believe that he, the former party, is already bound and his freedom to withdraw has gone that it could be unconscionable for him subsequently to assert that he is legally free to withdraw.

24. It is essential to the existence of an equity created by estoppel that the party who induces the adoption of the assumption or expectation knows or intends that the party who

adopts it will act or abstain from acting in reliance on the assumption or expectation: see per Lord Denning M.R. in Crabb v. Arun District Council, at p 188. When the adoption of an assumption or expectation is induced by the making of a promise, the knowledge or intention that the assumption or expectation will be acted upon may be easily inferred. But if a party encourages another to adhere to an assumption or expectation already formed or acquiesces in the making of an assumption or the entertainment of an expectation when he ought to object to the assumption or expectation - steps which are tantamount to inducing the other to adopt the assumption or expectation - the inference of knowledge or intention that the assumption or expectation will be acted on may be more difficult to draw.

25. 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 assumption or 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.

26. If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed. A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise. When these elements are present, equitable estoppel almost wears the appearance of contract, for the action or inaction of the promisee looks like consideration for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting. Lord Westbury in Dillwyn v. Llewelyn, at p 521 (p 1286), assimilated the relationship arising from equitable estoppel to the relationship arising in contract:

> " if A. puts B. in possession of a piece of land,
>
> and tells him, 'I give it to you that you may
>
> build a house on it,' and B. on the strength of

that promise, with the knowledge of A., expends a

large sum of money in building a house

accordingly, I cannot doubt that the donee

acquires a right from the subsequent transaction

to call on the donor to perform that contract and

complete the imperfect donation which was made."

(Emphasis added.)

Similarly, Lord Kingsdown in Ramsden v. Dyson, at p 170, virtually equated the equitable obligation with the obligation arising from contract:

" If a man, under a verbal agreement with a

landlord for a certain interest in land, or, what

amounts to the same thing, 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." (Emphasis added.)

And in The New South Wales Trotting Club Ltd. v. The Council of the Municipality of the Glebe (1937) 37 SR (NSW) 288, Jordan C.J. said (at p 308) that:

" if a person lays out money in improving land

which he knows to belong to another, and does so,

to the knowledge of the other, on the faith of an

express or implied promise from that other that

he is to have some interest in the land, a Court

of Equity, so far as it can, will compel the

other to give effect to the promise. It is

pointed out in Canadian Pacific Railway Co. v.

The King ((1931) AC 414, at p 428), that this

type of case depends on contract express or

implied."

27. But there are differences between a contract and an equity created by estoppel. A contractual obligation is created by the agreement of the parties; an equity created by estoppel may be imposed irrespective of any agreement by the party bound. A contractual obligation must be supported by consideration; an equity created by estoppel need not be

supported by what is, strictly speaking, consideration. 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.

28. In Combe v. Combe Denning L.J. limited the application of promissory estoppel, as he expounded the doctrine, to ensure that it did not displace the doctrine of consideration. His Lordship's solution of the problem was to hold that the promise should not itself be a cause of action, but merely the foundation of a defensive equity. He said (at p 220):

> " Seeing that the principle never stands alone
>
> as giving a cause of action in itself, it can
>
> never do away with the necessity of consideration
>
> when that is an essential part of the cause of
>
> action. The doctrine of consideration is too
>
> firmly fixed to be overthrown by a side-wind."

29. The remedy offered by promissory estoppel has been limited to preventing the enforcement of existing legal rights. In Crabb v. Arun District Council Lord Denning M.R. said, at p 188, that if a person -

> " by his words or conduct, so behaves as to lead
>
> another to believe that he will not insist on his
>
> strict legal rights - knowing or intending that

> the other will act on that belief - and he does
>
> so act, that again will raise an equity in favour
>
> of the other; and it is for a court of equity to
>
> say in what way the equity may be satisfied."

If the object of the principle were to make a promise binding in equity, the need to preserve the doctrine of consideration would require a limitation to be placed on the remedy. But there is a logical difficulty in limiting the principle so that it applies only to promises to suspend or extinguish existing rights. If a promise by A not to enforce an existing right against B is to confer an equitable right on B to compel fulfilment of the promise, why should B be denied the same protection in similar circumstances if the promise is intended to create in B a new legal right against A? There is no logical distinction to be drawn between a change in legal relationships effected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one. Why should an equity of the kind to which Combe v. Combe refers be regarded as a shield but not a sword? The want of logic in the limitation on the remedy is well exposed in Mr David Jackson's essay "Estoppel as a Sword" in (1965) 81 Law Quarterly Review 84,223 at pp 241-243.

30. Moreover, unless the cases of proprietary estoppel are attributed to a different equity from that which explains the cases of promissory estoppel, the enforcement of promises to create new proprietary rights cannot be reconciled with a limitation on the enforcement of other promises. If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.

31. If the object of the principle of equitable estoppel in its application to promises were regarded as their enforcement rather than the prevention of detriment flowing from reliance on promises, the courts would be constrained to limit the application of the principles of equitable estoppel in order to avoid the investing of a non-contractual promise with the legal effect of a contractual promise. In Ajayi v. R.T. Briscoe (Nigeria) Limited, the Privy Council sought to qualify the enforceability of a non-contractual promise in this way (at p 1330; p 559):

> " The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position."

32. The qualifications proposed bring the principle closer to a principle the object of which is to avoid detriment occasioned by non-fulfilment of the promise. But the better solution of the problem is reached by identifying the unconscionable conduct which gives rise to the equity as the leaving of another to suffer detriment occasioned by the conduct of the party against whom the equity is raised. Then the object of the principle can be seen to be the avoidance of that detriment and the satisfaction of the equity calls for the enforcement of a promise only

as a means of avoiding the detriment and only to the extent necessary to achieve that object. So regarded, equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side-wind. Equitable estoppel complements the tortious remedies of damages for negligent mis-statement or fraud and enhances the remedies available to a party who acts or abstains from acting in reliance on what another induces him to believe.

33. As an element in unconscionable conduct is the inducing of the other party to adopt an assumption or expectation as to the parties' legal relations, the question arises whether silence is capable of inducing the adoption of the assumption or expectation. In Thompson v. Palmer Dixon J., in reference to estoppel in pais said (at p 547):

> " Whether a departure by a party from the
>
> assumption should be considered unjust and
>
> inadmissible depends on the part taken by him in
>
> occasioning its adoption by the other party. He
>
> may be required to abide by the assumption
>
> because it formed the conventional basis upon
>
> which the parties entered into contractual or
>
> other mutual relations, such as bailment; or
>
> because he has exercised against the other party
>
> rights which would exist only if the assumption
>
> were correct ... or because knowing the mistake
>
> the other laboured under, he refrained from
>
> correcting him when it was his duty to do so; or

> because his imprudence, where care was required
>
> of him, was a proximate cause of the other
>
> party's adopting and acting upon the faith of the
>
> assumption; or because he directly made
>
> representations upon which the other party
>
> founded the assumption."

The same observations hold good, mutatis mutandis, with respect to the adoption of an assumption or expectation which founds an equitable estoppel. Clearly an assumption or expectation may be adopted not only as the result of a promise but also in certain circumstances as the result of encouragement to adhere to an assumption or expectation already formed or as the result of a party's failure to object to the assumption or expectation on which the other party is known to be conducting his affairs. In the present case the question is whether Waltons, knowing that Mr Maher was labouring under the belief that Waltons was bound to the contract, was under a duty to correct that belief. The evidence was capable of supporting an inference that Waltons knew the belief under which Mr Maher was labouring when Waltons became aware that Mr Maher was doing the work specified in the Deed. Waltons deliberately refrained from correcting what Waltons must have regarded as an erroneous belief. Was it Waltons' duty to do so? Ungoed-Thomas J. said in Ward v. Kirkland, at p 239:

> " unconscionable behaviour can arise where there is
>
> knowledge by the legal owner of the circumstances
>
> in which the claimant is incurring the
>
> expenditure as much as if he was himself
>
> requesting or inciting that expenditure. It

> seems to me that abstention as well as a request
>
> or incitement can fall within the principle from
>
> which the claimant's equity arises."

Silence will support an equitable estoppel only if it would be inequitable thereafter to assert a legal relationship different from the one which, to the knowledge of the silent party, the other party assumed or expected: see Ramsden v. Dyson, at pp 140-141; Svenson v. Payne [1945] HCA 43; (1945) 71 CLR 531, at pp 542-543; Willmott v. Barber (1880) 15 ChD 96, at pp 105-106. What would make it inequitable to depart from such an assumption or expectation? Knowledge that the assumption or expectation could be fulfilled only by a transfer of the property of the person who stays silent, or by a diminution of his rights or an increase in his obligations. A person who knows or intends that the other should conduct his affairs on such an assumption or expectation has two options: to warn the other that he denies the correctness of the assumption or expectation when he knows that the other may suffer detriment by so conducting his affairs should the assumption or expectation go unfulfilled, or to act so as to avoid any detriment which the other may suffer in reliance on the assumption or expectation. It is unconscionable to refrain from making the denial and then to leave the other to bear whatever detriment is occasioned by non-fulfilment of the assumption or expectation.

34. In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a diminution of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

35. This is such a case, as a brief recapitulation of the facts will show. The terms of the proposed contract had been agreed between the solicitors and set out in the counterpart Deed executed and delivered to Waltons' solicitor by way of exchange. In the days immediately following Mr Roth's receipt of the executed counterpart Deed, Waltons could properly have had the document returned and could have withdrawn from the negotiations. But the counterpart Deed was not returned; it was retained presumably on the terms on which it had been delivered, that is, by way of exchange. The retention of the counterpart Deed and the absence of any demur as to the schedule of finishes or terms of the Deed was tantamount to a promise by Waltons that it would complete the exchange. That would not have sufficed to raise an equitable estoppel unless the Mahers acted on the promise to their detriment. But, after Waltons knew that Mr Maher had commenced work and (as it must have known) that Mr Maher had done so in the expectation that Waltons would execute and deliver the original Deed, Waltons remained silent in order to have the benefit of the proposed contract if and when Waltons should decide to execute and deliver the original Deed. As Waltons (by its solicitor) knew that Mr Maher (by his solicitor) had said that he would commence the work only if an agreement was concluded, Waltons must have known that Mr Maher either assumed that the contract had been made or expected that it would be made and that Waltons was not free to withdraw. Waltons intended that Mr Maher should continue to build the store in reliance on that assumption or expectation. Then, if not before, the time had come for Waltons to elect between terminating the negotiations or allowing Mr Maher to continue on the footing that Waltons was bound to enter into the proposed contract. Waltons' silence induced Mr Maher to continue either on the assumption that Waltons was already bound or in the expectation that Waltons would execute and deliver the original Deed as a matter of obligation. It was unconscionable for Waltons subsequently to seek to withdraw after a substantial part of the work was complete, leaving the Mahers to bear the detriment which non-fulfilment of the expectation entailed. Having elected to allow Mr Maher to continue to build, it was too late for Waltons to reclaim the initial freedom to withdraw which Waltons had in the days immediately following 11 November. As the Mahers would suffer loss if Waltons failed to execute and deliver the original Deed, an equity is raised against Waltons. That equity is to be satisfied by treating Waltons as though it had done what it induced Mr Maher to expect that it would do, namely, by treating Waltons as though it had executed and delivered the original Deed. It would not be appropriate to order specific performance if only for the reason that the detriment can be avoided by compensation. The equity is fully satisfied by ordering damages in lieu of specific performance. The judgment of Kearney J. is supported by the first basis of estoppel. The second and third bases may be disposed of briefly.

The second basis: exchange had occurred

36. The second basis - that is, that an exchange of contracts had taken place - is a basis of an estoppel in pais. The difficulty with this basis is that Mr Elvy knew that there had been no exchange. Why Mr Elvy did not pursue the matter with Mr Roth is left unexplained by the evidence. Perhaps Mr Elvy did not perceive the significance of Mr Roth's omission to exchange the original Deed. Perhaps he entertained a notion that the original Deed would be executed and stamped before it was exchanged. The latter hypothesis derives some support from Mr Elvy's evidence with reference to Mr Roth's failure to send Mr Elvy the cheque for $2000.20 which he had asked for in his letter of 11 November in order to attend to the stamping. Mr Elvy explained that after writing the letter he realized that the roles of lessor's solicitor and lessee's solicitor were reversed because the lessee's solicitors had drafted the Deed and, under the Deed, the lessor's solicitors were to be paid fees only on the scale usually payable to a lessee's solicitor and he thought that it would therefore be Mr Roth's responsibility to attend to the stamping. However that may be, there is no suggestion in Mr Elvy's evidence that he assumed that a binding agreement had come into existence or that such an agreement could come into existence without exchange of contracts. If Mr Maher had assumed that exchange had taken place, neither Waltons nor Mr Roth played any part in the adoption of that assumption; if such an assumption had been made, it would have been due to Mr Elvy's failure to tell Mr Maher that the expected exchange to which Mr Elvy had referred in his letter of advice of 14 November had not been effected. As Mr Elvy - who was the Mahers' agent for the purpose of effecting a binding agreement - knew that there had been no exchange, any assumption by the Mahers to the contrary could not have been laid at Waltons' door. The better analysis of the evidence is that Mr Maher expected that Waltons would execute and deliver the original Deed, and that view precludes a finding that he assumed that Waltons had done so.

The third basis: an existing agreement

37. In the course of his evidence, Mr Maher said, "I was of the opinion we had a contract". He was not asked what the contract was which he believed they had. Subsequently, when asked about the need to produce a contract signed by Waltons to support an application for bank finance which he made on 2 January 1984, he said:

" I thought it was a formality. I was under the

impression that the leases were being registered

by the Waltons people, and would be returned in

due course."

This evidence in its context might be susceptible of either of two meanings: either that there was a contract in existence being a contract in the terms contained in the counterpart Deed executed by the Mahers, or that there was a binding obligation on Waltons to do what was necessary to complete the "formality" and bring the contract constituted by an exchange of Deeds into existence. I think it is extremely doubtful whether there is evidence to support a finding that Mr Maher adopted the former of those assumptions, or to support a finding that Waltons induced him to make such an assumption. But it does not matter. If the former assumption can be supported, there was an estoppel in pais and the assumed contract is the charter of the parties' rights and obligations. If the latter assumption was made then, for the reasons earlier stated, there is an equity in the Mahers which is to be satisfied by treating Waltons as if it had executed and delivered the original Deed.

38. However, no contract in writing and no written memorandum or note of any contract was signed by Waltons. In the absence of writing, Waltons submit that s.54A of the Conveyancing Act 1919 (N.S.W.) precludes the Mahers from obtaining the relief they sought. Section 54A provides, inter alia -

" (1) No action or proceedings may be brought

upon any contract for the sale or other

disposition of land or any interest in land,

unless the agreement upon which such action or

proceedings is brought, or some memorandum or

note thereof, is in writing, and signed by the

party to be charged or by some other person

thereunto by him lawfully authorised.

(2) This section ... does not affect the law

relating to part performance ...

(3) ..."

Kearney J. held that the Mahers, by demolishing the old building and partly constructing a new building to Waltons' specification and by applying for finance for the purpose, partially performed the contract which the Mahers believed they had and that the Mahers' right to relief was therefore unaffected by s.54A. In order that acts may be relied on as part performance of an unwritten contract, they must be done under the terms and by force of that contract and they must be unequivocally and in their nature referable to some contract of the general nature of that alleged: Regent v. Millett [1976] HCA 40; (1976) 133 CLR 679, at p 683. The acts which were held to amount to part performance were done by the Mahers to develop their own property, and the development was clearly for a commercial purpose. But, in my respectful opinion, those acts are not unequivocally and in their nature referable to an agreement for a lease of the Mahers' land. If the Mahers' right to relief depended on proof of part performance of the contract which they assumed Waltons had made or would make, their claim would fail. However, s.54A does not present any obstacle to the grant of relief on either of the bases on which the Mahers are otherwise entitled to relief.

39. If the true inference to be drawn from the facts is that Waltons induced the Mahers to assume that a binding contract had come into existence, the assumed contract was a written contract: one which was "being registered by the Waltons people". If the subject of the estoppel which binds Waltons is that a binding contract had come into existence, the estoppel extends to the existence not only of the facts which are essential to the existence of a binding contract but also to the existence of a contract which is binding in law. An estoppel in pais may relate, as we have seen, not merely to facts but to the legal complexion of facts - "to the validity and subsistence of relations", to use the phrase of Spencer Bower and Turner, Estoppel by Representation, 3rd ed. (1977), p 240.

40. If the true inference to be drawn from the facts is that Waltons induced the Mahers to assume that it would exchange the original Deed, there is an equity in the Mahers which is

to be satisfied by treating Waltons as if it had executed and delivered the original Deed. That equity does not arise out of the induced assumption alone. If it did, it would be impossible to distinguish the equity from a contractual right arising out of an oral promise. As s.54A makes an oral agreement to make a written agreement for the disposition of an interest in land ineffective (Daulia Ltd. v. Four Millbank Nominees Ltd. [1977] EWCA Civ 5; (1978) Ch 231), an equity which gave the assumption the same force as a promise would be ineffective. But, as we have seen, the equity is to be satisfied by avoiding a detriment suffered in reliance on an induced assumption, not by the direct enforcement of the assumption. Equitable estoppel does not create a contract to which s.54A might apply, even in cases (and this is one of them) in which the equity is satisfied by treating the defendant as though the contract had been made. The Statute of Frauds and similar provisions prescribing formalities affecting proof of contracts have never stood in the way of a decree to enforce a proprietary estoppel (see Crook v. Corporation of Seaford (1870) LR 10 Eq 678) and, in principle, there is no reason why such provisions should apply when any other equity is created by estoppel. The action to enforce an equity created by estoppel is not brought "upon any contract", for the equity arises out of the circumstances. This is not to say that there is an equity which precludes the application of the statute. It is to say that the statute has no application to the equity. If a decree was moulded (as it could be) to compel Waltons to execute and exchange the original Deed, s.54A would apply to and be satisfied by the contract thus brought into existence. But it is unnecessary to make so circuitous a decree. It is sufficient that the decree be made in the form in which Kearney J. made it.

41. The appeal should be dismissed.

DEANE J. This is an appeal from a unanimous decision of the New South Wales Court of Appeal (Glass, Samuels and Priestley JJ.A.) confirming a decision of a single judge (Kearney J.) of the Equity Division of the Supreme Court. In essence, the issue involved in the appeal is whether the courts below were in error in concluding that the appellant ("Waltons") was estopped from denying the existence of a binding agreement for a six year lease of land owned by the respondents ("the Mahers") on which a building designed to meet the commercial needs of Waltons was to be urgently erected by the Mahers before the actual commencement of the lease. The detailed facts are set out in the judgment of Priestley J.A. (with whose judgment Glass and Samuels JJ.A. agreed) which has been reported ((1986) 5 NSWLR 407, at pp 409-416) and in other judgments in this Court. I shall endeavour to avoid unnecessary repetition of them.

2. It can be said at once that, in my view, the appeal must fail. In so far as the facts are concerned, Waltons seeks to overturn concurrent findings of fact which were open on the evidence. In so far as the law is concerned, the decision in favour of the Mahers was justified on the basis of those and other findings of fact. Moreover, even if particular challenged findings of fact were overturned, I consider that the decision of the courts below

would be justified on the plain facts which would remain. In so far as substantive merits are concerned, the Mahers have them all: Waltons deliberately failed to speak or to warn in circumstances where, as Priestley J.A. commented in the Court of Appeal, "simple standards of honesty and fair dealing required (it) to make known to (the Mahers) that the assumption they were acting on was mistaken." It is true that substantive merits ordinarily have little relevance to the application of legal principle by an appellate court. However, when doctrines of estoppel - with their underlying rationale of good conscience and fair dealing - are involved, it is unlikely that the law will penalize a failure to speak which would not stand condemned by ordinary standards of honesty and decency.

3. The main findings of fact which are challenged by Waltons relate to the Mahers' belief in the existence of a binding contract and to the inducement of that belief by Waltons. Both Kearney J. and the Court of Appeal found that, at the time when the Mahers commenced the actual construction on their land of a building designed to meet the requirements of Waltons, the Mahers believed that there was a binding agreement between themselves and Waltons for the subsequent lease of the premises to Waltons. Kearney J. and the Court of Appeal also found that that mistaken belief had been effectively caused by the conduct of Waltons. Those findings are concurrent findings on contested issues of fact made by a court of first instance after the hearing and a court of first appeal after a rehearing. This Court should not, in the absence of special reason such as plain injustice or clear error, disturb them. In a context where the cost of litigation has gone a long way towards effectively denying access to the courts to the ordinary citizen who lacks access to government or corporate funding, it is in the overall interests of the administration of justice and of the preservation of at least some vestige of practical equality before the law that, in the absence of special circumstances, there should be an end to the litigation of an issue of fact at least when the stage is reached that one party has succeeded upon it both on the hearing before the court of first instance and on a rehearing before the court of first appeal.

4. There are no features of the present case which militate in favour of a reopening of the issues of fact on which Waltons seeks to challenge the findings of the courts below. It could scarcely be contended that considerations of justice require that, in the circumstances of the present case, the Mahers should be subjected to a reconsideration by this Court, so far removed from the live atmosphere of the trial and without the benefit of a transcript of counsels' submissions to identify the manner of its conduct, of factual questions upon which they have already succeeded both on the hearing and on an appeal by way of rehearing. Nor can it be said that the concurrent findings of fact made by the courts below were undermined by plain error. It is true that, as will be seen, those findings need to be placed not only in the context of the recorded evidence but also in the context of the ordinary practice of solicitors in New South Wales in relation to leases and agreements for lease of land if the full force of the reasoning which underlies them is properly to be appreciated. There is, however, nothing unusual about that. It has long been the practice of courts

administering equity in New South Wales, as it was in Chancery in England, to assume, in matters relating to dealings with land, the existence of a basic knowledge of the ordinary practice of conveyancers. Indeed, the fact that particular issues of fact must be decided in the context of the day to day local practice of conveyancers provides an added reason why this Court should hesitate before venturing to review findings made by a trial judge with vast practical experience in conveyancing litigation and endorsed by a unanimous Court of Appeal. If the matter were for me alone, I would decline to go beyond the concurrent findings that the Mahers believed there was a binding agreement and that that belief had been effectively caused by the conduct of Waltons. Since other members of the Court see the matter differently, however, I consider it to be desirable that I embark upon a review of those findings. As I have indicated, a starting point of any such review is the ordinary practice of New South Wales solicitors in relation to leases and agreements for lease. There was no discussion in the course of argument in this Court about that ordinary practice. In so far as it is relevant for present purposes, however, it can be described in terms which, I venture to think, could not give rise to legitimate dispute.

5. Regardless of what the practice might be among conveyancers in other places, (cf., e.g., as to England, Hollington Brothers Ltd. v. Rhodes (1951) 2 TLR 691, at p 694) it is not the ordinary practice of solicitors in New South Wales that there should be a physical "exchange" of the original and counterpart of a lease or an agreement for lease. No doubt, there are some solicitors who insist upon such a physical exchange and there are special circumstances in which other solicitors might consider that such a physical exchange is desirable and should be required. Such cases are, however, the exception and not the ordinary rule. In the ordinary case where the lessor's solicitor prepares the documents and assumes responsibility for lodging them for stamping, he does not send or deliver an executed copy of a lease or agreement for lease to the lessee's solicitor as part of the process of making the agreement. If the original document is to be executed by lessor alone and the counterpart by lessee alone (as distinct from where the original or original and counterpart are executed by both), the lessee's solicitor procures execution by his client of the counterpart and forwards the executed document together with a cheque for, among other things, the amount of stamp duty payable on the completed agreement to the lessor's solicitor who, having obtained execution by the lessor of the original, lodges the documents for stamping on the basis that a binding agreement has been completed. If the matter is viewed in terms of "exchange" of documents, it might be said that there is a notional exchange effective between solicitors at the time when the solicitor for the lessor holds both original and counterpart for stamping in that he then holds that executed by his client on behalf of the lessee and that executed by the lessee on behalf of his client. It is only after the documents emerge from the Stamp Duties Office that, in the ordinary case, the lessee's solicitor will receive a document signed by the lessor. That will be weeks, and sometimes months, after a binding agreement has been concluded.

6. In the context of that ordinary practice, there was nothing intrinsically unlikely about the finding that the Mahers believed that, notwithstanding the absence of a physical exchange, there was a binding agreement between Waltons and themselves. It is true that the respective solicitors had intimated that there would be a physical exchange. In a context where a physical exchange is not ordinarily involved in the making of an agreement for lease, however, it is foreseeable that, in circumstances where there is a need for the agreement to be made as a matter of urgency and the solicitors for the parties are in different parts of the State, one party might be led by the actions and delays of the other to assume mistakenly that a binding agreement for lease has been made notwithstanding that an anticipated physical exchange of documents has not occurred.

7. As I followed the argument, there were three related points advanced to support the contention that the finding that the Mahers believed there was a binding agreement should be overturned. First, it was said that there were important divergences between the relevant finding of Kearney J. and that of the Court of Appeal. Secondly, it was suggested that there was no basis in the evidence for a finding that the Mahers held any such belief. Finally, it was submitted that it was clear on the evidence that Mr. Elvy, the Mahers' solicitor, knew that there was no binding agreement and that, that being so, it could not be properly said that the Mahers were unaware of that fact. I shall deal with these points in the order in which I have mentioned them.

8. The submission that there was a significant lack of correspondence between the respective findings of Kearney J. and Priestley J.A. is, in my view, without relevant substance. Each of their Honours expressly found that the Mahers had acted on the basis of a mistaken belief. In terms, Kearney J. identified that mistaken belief as "the belief that a contract by way of exchange had ... been concluded". Obviously, as his Honour found, there had been no actual physical exchange. In the context of the ordinary practice of solicitors in relation to leases, "the belief that a contract by way of exchange had ... been concluded" to which his Honour referred, was, plainly enough, not intended to exclude completion by a notional but nonetheless effective exchange - in words used by Kearney J. earlier in his judgment, "an exchange effective between ... solicitors". The fact that his Honour was not referring to a specific belief that an actual physical exchange (to the exclusion of a notional exchange) had occurred is confirmed by his explanation that the Mahers were entitled to infer, from Waltons' conduct, "the acceptance" by Waltons of the counterpart of the deed which they had executed "so as to hold reasonably the belief that a contract by way of exchange had in fact been concluded". In terms, Priestley J.A. identified the Mahers' mistaken belief as being simply that there was in fact a binding agreement. The only variation between the respective findings is that Priestley J.A. did not expressly adopt Kearney J's conclusion that the belief was that the agreement had been made "by way of exchange". If that indicates a divergence between their Honours in relation to the relevant finding, it is not as to the existence of the Mahers' belief that there was a binding agreement.

It is as to the legal rationalization of that belief. Any divergence between their Honours in that regard is unimportant for present purposes. I turn to explain why that is so.

9. There are several possible legal rationalizations which a lawyer might apply to an assumption of a binding agreement notwithstanding the absence of physical exchange. It suffices to mention two of them. One is that, in view of the fact that the original and counterpart deeds were to be lodged by Waltons' solicitor for stamping, the parties had impliedly dispensed with the need for the deed executed by Waltons to be actually sent by Waltons' solicitor all the way to Nowra by way of exchange only to be then sent back to Waltons' solicitor in Sydney for stamping. In that event, a binding agreement would have resulted and the requirement of an "exchange" of contracts would have been notionally satisfied if, after the receipt "by way of exchange" by Waltons' solicitor of the counterpart which had been executed by the Mahers, the original had been unconditionally executed by Waltons and had then been held by Waltons' solicitor on behalf of the Mahers for stamping. Another possible legal rationalization is that a binding agreement would have resulted if the requirement of an "exchange" had impliedly been dispensed with by the parties and the original deed had been unconditionally executed by Waltons with an intention of thereby being immediately bound by it (see, e.g., D'Silva v. Lister House Development Ltd. (1971) Ch 17 and note the discussion of the effects of conditional and unconditional execution of deeds in Mr. Justice Needham's article, "Deeds - Formalities" in Australian Bar Review, vol.1, (1985) p 3, at pp 10ff). These different legal analyses of how a binding agreement might have come about notwithstanding the absence of a physical exchange have little direct relevance to the thought processes of the Mahers who, no doubt, did not seek to analyse or rationalize their belief that a contract had been made. The existence of, and divergence between, possible lawyers' rationalizations of a layman's belief of a legal fact does not negate the existence of the belief or alter its actual content. Whatever the possible legal rationalization might be, the operative finding for the purposes of the present case was that the Mahers, who were not lawyers, believed that there was a binding agreement between Waltons and themselves. That finding was made by Kearney J. and by Priestley J.A. in unambiguous terms. It matters not, for the purposes of the present case, that Kearney J. may have preferred the first of the above or some other legal rationalization of that assumption while Priestley J.A. may have preferred the second. Where the possible legal rationalizations will be of more direct relevance is when I come, later in this judgment, to examine the significance of the fact that the Mahers' solicitor knew that there had been no physical exchange.

10. The suggestion that there was no basis in the evidence for a finding that the Mahers believed that a binding contract existed is, in my view, mistaken. Mr. Maher acted, in his dealings with Waltons, on behalf of both himself and Mrs. Maher. When, in cross-examination, it was suggested to him that "generally" there is no binding agreement until there has been an exchange, he answered: "I was of the opinion we had a contract". That answer was not directly challenged, nor was it subsequently modified. In the course of

cross-examination, Mr. Maher explained his belief that there was a contract or binding agreement more fully. In answering a question about whether he was aware that it was important that Waltons should have "signed" the agreement, he said:

> "I thought it was a formality. I was under the
>
> impression that the leases were being registered by
>
> the Waltons people, and would be returned in due
>
> course" (emphasis added).

Presumably, the reference to registration should be read as a reference to being lodged for stamping. Either way, however, the agreement for lease would be neither being stamped nor being registered until it was binding. This answer, if accepted, is only consistent with a belief that a binding agreement had been made. It is true that there are passages in the cross-examination of Mr. Maher in which he assented to some vague propositions to the effect that he had "assumed that execution by the lessor (sic) and exchange of agreement, would take place", that he "knew that it was important that execution by the lessor (sic) and exchange of agreement should take place" and that he would not have started the work if he had been told by Mr. Elvy "that exchange of the agreement might not take place". From this distance, one can only speculate what Mr. Maher made of these questions. It can, I suppose, be assumed that he realized that the reference to "the lessor" should be understood as referring not to the lessor at all but to Waltons, the proposed lessee. Even if that be assumed, there is no basis upon which this Court could extract from his answers to such questions his present or past adherence to the mistaken legal proposition that there could not be a binding agreement for lease in the absence of a physical "exchange". The significance of such cross-examination of a lay witness requiring the witness to reconstruct his past beliefs about legal matters to which he had probably never directly adverted and to formulate what his reaction would have been to a hypothetical legal situation is very much a matter for a trial judge. The overall effect of Mr. Maher's evidence remained that he believed that a contract or binding agreement had been made and Kearney J. was entitled to, and did, accept his evidence to that effect. Moreover, the existence of that belief was, as both Kearney J. and Priestley J.A. pointed out, unmistakably demonstrated by the Mahers' actions in proceeding with the construction of the building designed for use by Waltons.

11. The third point - that the Mahers' solicitor knew that there was no binding agreement -

seems to me to be likewise without substance. It has been seen that the fact that the process of an actual physical exchange of executed deeds had not been completed did not preclude the possibility that a binding agreement had otherwise come into existence. Mr. Elvy's evidence, which was also accepted by the learned trial judge, highlights the relevance of the ordinary practice of solicitors. He was referred in cross-examination and re-examination to the fact that he had not received the stamp duty which he had requested to be sent to him with the deed executed by Waltons. The transcript of the re-examination continues:

> "Q. Did that alarm you at all? A. No, because I
>
> realised shortly thereafter in fact the lease
>
> provided not only for payment of the stamp duty by
>
> the lessee but it effectively reversed the
>
> situation of solicitors acting for lessors and
>
> lessees. The documents are usually prepared by the
>
> lessors' solicitors, (and) submitted to the
>
> lessee's solicitors. In this situation the roles
>
> were in fact reversed and the lease in fact
>
> specified that the lessors' solicitors would be
>
> paid the scale of fee for lessee's solicitors. So
>
> effectively whereas acting for a lessor I would
>
> normally stamp the documents, in this particular
>
> case they were to be stamped by the lessee's

solicitors."

That answer indicates that, sometime after he had forwarded the document executed by the Mahers "by way of exchange", Mr. Elvy assumed that, subject to adjustments to reflect the fact that the agreement for lease had been prepared and was to be stamped by the lessee's and not the lessor's solicitors, the ordinary practice between solicitors in relation to leases and agreements for lease was being observed. As has been seen, that ordinary practice does not involve physical exchange. Under it, if the positions of lessor and lessee be "reversed", the agreement would become binding when the original deed had been unconditionally executed by Waltons and was held by Waltons' solicitor for stamping without the formality of its being sent backwards and forwards between Sydney and Nowra. The import of Mr. Elvy's answer is that he assumed that that was what was occurring. Indeed, the above answer is only meaningful in a context where he believed that there was a binding agreement. Otherwise, there would have been no occasion for the explanation of the absence of alarm about the non-receipt of stamp duty. Until a binding agreement had been made, there would be nothing to stamp and no occasion for possible "alarm" over delay in or absence of payment on account of stamp duty.

12. It should be mentioned that, in the course of argument in this Court, senior counsel for the Mahers was asked a question about whether the "solicitor for the respondent believed, or did not believe, that an agreement had been made". That question was intended to refer to the solicitor for the respondents (i.e. the Mahers). The answer given to it was that the solicitor "believed there was no concluded agreement by reason of the absence of exchange". In so far as Mr. Elvy is concerned, there is nothing at all in the evidence which would warrant the statement that he believed, at relevant times, that there was no binding agreement. To the contrary, his evidence indicates, as the above extract shows, that shortly after the time when he forwarded the agreement for lease which his clients had executed, he assumed that there was a binding agreement which was to be stamped by Waltons' solicitor. It seems to me to be plain that senior counsel misunderstood the reference to "the solicitor for the respondent" as a reference to the solicitor for Waltons who, unlike Mr. Elvy, had believed and advised his client that there was no concluded agreement by reason of the absence of exchange.

13. The finding that Waltons effectively caused the Mahers to adopt the mistaken belief is also firmly founded in the evidence. It is unnecessary to do more than refer to the critical facts. Waltons had insisted that the Mahers agree to construct the building in a very limited time span (by 5 February 1984) so that it would be ready when Waltons needed it. On 7 November 1983, Mr. Elvy advised Waltons' solicitor (Mr. Roth) that Mr. Maher had told him that the Mahers could "only proceed if agreement is reached so he can order all his supplies and organize the necessary labour within the next couple of days". Later on that day, Mr.

Roth forwarded the final form of the deed of agreement for lease to Mr. Elvy. It was accompanied by a letter in which Mr. Roth explained that he had not obtained Waltons' specific instructions to all of the amendments which were incorporated in the document and added: "... we believe that approval will be forthcoming. We shall let you know tomorrow if any amendments are not agreed to". At the same time, Mr. Roth wrote to Waltons, enclosing a copy of his letter to Mr. Elvy and the amended deed of agreement for lease and requesting that Waltons, if satisfied with the terms of the amended document, "arrange for the Deed of Agreement for Lease to be executed under seal of the company, and returned to us for exchange with the Lessors' solicitors". The letter went on to advise Waltons that the Mahers' solicitor had indicated "that they require exchange of Agreements to take place by document exchange tomorrow night, if possible, to enable their client to proceed with certainty with demolition and construction work".

14. It is apparent from the above that the solicitors for the parties had set the stage for the urgent making of a binding agreement. When Mr. Elvy did not hear on 8 November that any amendments were "not agreed to", he was entitled to assume that Waltons' approval of the amended form of deed had been "forthcoming". He procured the execution of the deed by his clients and carried out his part of an urgent finalization of the agreement by forwarding the executed documents to Mr. Roth "by way of exchange". Upon receipt of the executed document by Mr. Roth, it was apparent to Waltons that the Mahers regarded the formal process of urgently making a binding agreement as having commenced. Indeed, the reverse of the ordinary procedure for finalizing a lease or agreement for lease had been brought about to Waltons' advantage: the proposed lessee held the counterpart deed of agreement for lease executed by the lessor with the legal, if not the moral, choice of entering into or withdrawing from the proposed agreement. Obviously, in that context, basic standards of fair dealing required that Waltons act promptly to return the document executed by the Mahers if it decided indefinitely to delay committing itself to the terms of the agreement for lease. Instead, it adopted a deliberate policy of going slow to keep its options open but yet retained the executed copy of the lease which had been sent to it only as a step in the process of urgently finalizing a binding agreement. In that context, it is not surprising that the deliberate silence of Waltons caused Mr. Elvy and the Mahers to assume that a binding agreement had been made and that the executed lease, instead of being returned to Nowra, had been retained by Waltons' solicitor so that it could be lodged for stamping.

15. The further essential findings of fact of Kearney J. and the Court of Appeal seem to me, in the light of what has been said above, to be beyond real dispute. Waltons became uncertain about whether it wished to proceed with the lease. It became aware of the fact that the Mahers were proceeding with the demolition of the existing building and the erection of the building designed for its occupation. It must have realized that the Mahers had been misled by its silence and inaction and that they believed that a binding agreement for lease had been made. Even then, it said nothing. It took no step to advise the Mahers that the

deed of agreement for lease had never been executed by it with the consequence that no binding agreement had been made. Instead, it maintained its deliberate silence and thereby kept open for itself the option of moving into the building which was being constructed to its specification until, in its own good time, it decided that it did not wish to proceed with the lease. Then, and only then, it advised the Mahers that it would not be proceeding and sought to leave them to bear the resulting loss. That was on 19 January 1984, some 16 days before the nominated date for completion of the building. In the meantime, the Mahers' belief that they had a binding agreement had led them to demolish a building which they otherwise would not have demolished, to borrow money from their bank on the basis that they had a binding agreement for lease with Waltons and to commence construction of a building which they would otherwise not have built.

16. These facts suffice to found an estoppel precluding Waltons from denying the existence of a binding agreement for lease. Indeed, these facts call into play the operation of perhaps the clearest emanation of estoppel by conduct, namely, the principle which precludes departure from a representation or an induced assumption (a "representation ... by silence": Laws Holdings Pty. Ltd. v. Short (1972) 46 ALJR 563, at p 571) of existing fact in circumstances where the party estopped has knowingly and silently stood by and watched the other party act to his detriment. The requirements of such an estoppel have been explained in a number of cases in this Court, in particular by Dixon J. in his judgments in Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507, at pp 547-548 and Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641, at pp 674-677. It is unnecessary, for present purposes, to do more than identify in summary form those aspects of Waltons' conduct which gave rise to such an estoppel.

17. When Waltons' solicitor received the counterpart of the deed executed "by way of exchange" as part of the process of urgently making a binding agreement, the stage had been reached where care was required by Waltons, if it should suffer a change of intention, to avoid misleading the Mahers. At that stage, ordinary prudence, indeed (to repeat Priestley J.A's words) "simple standards of honesty and fair dealing", required Waltons, if it changed its mind and did not intend to complete the urgent making of the agreement, to return the executed counterpart to the Mahers' solicitor or, at the least, to take some step to indicate to the Mahers that the urgent making of the agreement had been aborted. Waltons' action in retaining the executed counterpart which had only been received as part of the process of urgent exchange and its deliberate adoption of a "go slow" policy of silence and inaction to conceal the fact that it was no longer certain that it wished to proceed was likely to mislead the Mahers about the true state of affairs and to cause them to act on the basis of some mistaken assumption. In fact, Waltons' retention of the executed counterpart and its deliberate silence and inaction caused the Mahers mistakenly to assume that a binding agreement existed and to act on that assumption to their detriment in the sense that they placed themselves "in a position of material disadvantage if departure from the assumption

be permitted" (see Thompson v. Palmer, at p 547). In these circumstances and subject only to one possible qualification, the case is one where, in the words used by Dixon J. in Thompson v. Palmer (at p 547) and repeated in Grundt (at p 676), Waltons is required to abide by the assumption of a binding agreement which was made by the Mahers because its "imprudence, where care was required of (it), was a proximate cause of the other party's adopting and acting upon the faith of the assumption". The possible qualification is that it may be arguable that the fact that the Mahers had a solicitor advising them absolved Waltons from the requirement of care or removed it from being the proximate cause of the Mahers' adopting and acting upon the assumption. It is a qualification which appears to me to be without substance in the circumstances of this case where the solicitor himself was led by Waltons' conduct to make the assumption which was made by his clients. It is, however, unnecessary to pursue that question since it seems to me to be plain that, notwithstanding the involvement of the Mahers' solicitor, no such qualification could extend to excuse Waltons' conduct when, having become aware of the fact that the Mahers were acting to their detriment on the mistaken assumption that a binding contract existed, it continued its studied policy of silence and inaction. At that stage, the basis of the estoppel was widened in that the case became one in which, again to apply the words of Dixon J. (ibid.), Waltons, knowing the mistake which the Mahers laboured under, "refrained from correcting (them) when it was (its) duty to do so". Its silence was "deliberate and intended to produce the effect which it in fact produced - namely, the leaving of the respondents in ignorance of the true facts so that no action might be taken by them" to withdraw from the negotiated arrangement (see per Lord Tomlin, Greenwood v. Martin's Bank (1933) AC 51, at p 58).

18. It has often been said that estoppel can be used only as a shield and not as a sword. In so far as estoppel by conduct is concerned, that statement is generally true only in the very limited sense that such an estoppel operates negatively to preclude the denial of, or a departure from, the assumed or promised state of affairs and does not of itself constitute an independent cause of action. The authoritative expositions of the doctrine of estoppel by conduct (or, in more obscure language, in pais) to be found in judgments in this Court have been consistently framed in general terms and lend no support for a constriction of the doctrine in a way which would preclude a plaintiff from relying upon the assumed or represented mistaken state of affairs (which a defendant is estopped from denying) as the factual foundation of a cause of action arising under ordinary principles of the law (see, e.g., the general statements of principle in Craine v. Colonial Mutual Fire Insurance Co. Ltd. [1920] HCA 64; (1920) 28 CLR 305, at pp 327-328; Thompson v. Palmer, at pp 547-548; Newbon v. City Mutual Life Assurance Society Ltd. [1935] HCA 33; (1935) 52 CLR 723, at pp 734-735; West v. Commercial Bank of Australia Ltd. [1935] HCA 14; (1935) 55 CLR 315, at p 322; Grundt, at pp 657, 674-677; Legione v. Hateley [1983] HCA 11; (1983) 152 CLR 406, at pp 430-432). There is no basis in principle for such a constriction of the doctrine. In so far as decisions or statements in judgments in cases in other courts would support a contrary view,

they should not be accepted in this country. It follows that a plaintiff in the position of the Mahers in the present case is entitled to plead and rely upon the facts giving rise to an operative estoppel by conduct which precludes the defendant from denying the existence of a binding contract for the purpose of affirmatively establishing the foundation for the case to be dealt with on the basis of the assumed fact that there was such a contract. That being so, such an estoppel provides the factual foundation of an ordinary action for enforcement of that "contract" notwithstanding that those facts demonstrate that no binding contract was actually made.

19. It was submitted on behalf of Waltons that any agreement between the Mahers and Waltons resulting from the estoppel was unenforceable by reason of the provisions of s.54A of the Conveyancing Act 1919 (N.S.W.). In the courts below, this submission was disposed of on the ground that, even if s.54A were otherwise applicable, there had been part performance by the Mahers of any such agreement. I agree with that conclusion. I would, however, dispose of the submission on the more fundamental ground that s.54A has nothing to say to the circumstances of the present case.

20. There could be circumstances in which s.54A might operate to render unenforceable an agreement which was the product of facts of which some were accepted or assumed as the result of the operation of an estoppel. If, for example, an agreement for the sale of land was made by a person purporting to act as agent for the owner but without actual authority, the provisions of s.54A could operate to render the agreement unenforceable at the suit of the purchaser notwithstanding that it was otherwise binding upon the owner by reason of an estoppel precluding him from asserting the lack of authority of the agent to make the agreement on his behalf. In such a case, the estoppel precluding a denial of the agent's authority has run its course at the point of acceptance or assumption of that authority. Such an estoppel has nothing to say in relation to the question whether the agreement made by the agent in the exercise of that authority was or was not enforceable. In contrast, the estoppel in the present case precludes denial of a binding agreement in circumstances where there was in fact none. In such a case, there is no scope for the operation of s.54A to render the assumed agreement unenforceable. That conclusion can arguably be justified on the broad basis that, as a matter of construction, s.54A applies only to real contracts and agreements and does not apply to an assumed agreement to require that it be evidenced by trappings appropriate to an actual one. It is, however, unnecessary to go quite so far for the purposes of the present case. It suffices for present purposes to say that, in the circumstances of the present case, the estoppel precluding the denial of a binding agreement extends to preclude the assertion of unenforceability of the assumed agreement in that the word "binding" is used in the sense of valid and enforceable. That being so, the estoppel outflanks the provisions of s.54A in that there is no room for their intrusion into the assumed facts to controvert the assumed existence of a binding agreement which Waltons is estopped from denying.

21. What has been said above is sufficient to dispose of the appeal. There are, however, two further matters which I would mention. The first is that I would have been of the view that the appeal should be dismissed even if the evidence had established no more than that Waltons (i) had, by its conduct, led the Mahers to assume mistakenly that the exchange of contracts was a mere formality which would be satisfied by Waltons as a matter of course and (ii) had subsequently, knowing that that assumption had become false, remained silent when it became aware of the fact that the Mahers were acting to their detriment on the basis of it by commencing to erect upon their land the building designed for Waltons' use. I turn to explain why that is so.

22. Pre-judicature system cases in New South Wales demonstrated that one of the areas in which the separation of law and equity could arguably be seen as having substantive effect was the operation of the doctrine of estoppel in relation to promises or expectations as to future conduct (see, e.g., N.S.W. Rutile Mining Co. Pty. Ltd. v. Eagle Metal and Industrial Products Pty. Ltd. (1960) SR (NSW) 495, at pp 502, 510 and 517). The corollary is that that is an area in which it is necessary for care to be taken to avoid the risk that a consciousness of past separateness of common law and equitable doctrines may lead to a tendency to discount the full substantive effects of their fusion. Knowledge of the origins and development of the common law and equity and an awareness of the ordinary and continuing distinctness of controlling equitable principles are prerequisites of a full understanding of the content of a fused system of modern law. To ignore the substantive effects of the interaction of doctrines of law and equity within that fused system in which unity, rather than conflict, of principle is now to be assumed is, however, unduly to preserve the importance of past separation and continuing distinctness as a barrier against the orderly development of a simplified and unified legal system which fusion was intended to advance.

23. Even before the fusion of law and equity, there was general consistency, both in content and rationale, between common law and equitable principle in relation to estoppel by conduct. Thus, one finds Lord Cranworth L.C. in Jorden v. Money (1854) 5 HLC 185; (10 ER 868) describing estoppel by representation in terms which emphasize the fact that it spanned the gulf which then existed between law and equity and operated indifferently in both systems:

> "... a principle well known in the law, founded
>
> upon good faith and equity, a principle equally of
>
> law and of equity, if a person makes any false

representation to another, and that other acts upon

that false representation, the person who has made

it shall not afterwards be allowed to set up that

what he said was false, and to assert the real

truth in place of the falsehood which has so misled

the other" (at p 210; p 880 of ER; emphasis

added);

"a principle of universal application" (ibid.); and

"The whole doctrine was very much considered at

law, for it is a doctrine not confined to cases in

equity, but one that prevails at law also; and

there are, in fact, more cases upon the subject at

law than in equity" (at pp 212-213; p 881 of

ER).

In this Court, the unity at common law and in equity of the doctrine of estoppel by conduct has been consistently assumed. Perhaps the best illustration of that is the fact that the statement of the content and rationale of the doctrine to be found in the judgment of Dixon J. in Thompson v. Palmer, a suit in the equitable jurisdiction of the Supreme Court of New South Wales before fusion in that State, was applied without qualification or adjustment in Grundt (at pp 656-657) to explain the basis of a defence of estoppel by conduct to a claim for trespass in the Western Australian Warden's Court. It is unnecessary for present purposes to seek to identify the reasons for the general consistency between law and equity in so far as estoppel by conduct is concerned. It suffices to say that in the ordinary case of

an estoppel by conduct precluding denial of an assumed or represented fact, particularly in the context of mistaken notions that estoppel by conduct was but a rule of evidence, there was neither point nor practicability in seeking to maintain independent equitable and common law doctrines under a fused system. The position was arguably different however in the vexed field of estoppel in relation to a representation or assumption of future action or inaction. In that field, estoppel by conduct seemed to have been routed at law by the doctrine of consideration whereas it could still be seen as waging sporadic battle in equity, under the nomenclature of "an equity", on a number of isolated but related fronts (see, in particular, Hughes v. Metropolitan Railway Co. (1877) 2 AppCas 439 but cf. e.g., Barns v. Queensland National Bank Ltd. [1906] HCA 26; (1906) 3 CLR 925, at p 938: "there must be something in the nature of what is called a consideration"). It was to these persisting heads of equity that the modern doctrine of promissory estoppel, which was at least partially accepted in this Court in Legione v. Hateley, has been commonly sourced. This has led to a common perception that the doctrine of "promissory estoppel" should be seen as exclusively equitable and to the resulting tendency to see a dichotomy between common law and equitable principle in a field where it did not exist even before the Judicature Acts system was first introduced in England. In my view, that perception and tendency are mistaken.

24. Upon analysis, there is no acceptable reason why the doctrine of promissory estoppel should be seen, in a fused system, as exclusively equitable or as raising some new or heightened conflict between law and equity. As a matter of authority, the previously accepted prima facie exclusion of assumptions or representations as regards future action or inaction from the operation of doctrines of estoppel by conduct applied equally in equity and at law. Indeed, some of the strongest general statements of high authority are to be found in appeals in proceedings in exclusively equitable jurisdictions (see Jorden v. Money; Chadwick v. Manning (1896) AC 231, at p 238). As has been seen, Jorden v. Money is notable as much for Lord Cranworth's emphasis of the unity of the doctrine of estoppel by conduct at law and in equity, as for its exclusion of that doctrine from the area of representation or assumption about future action or inaction.

25. As a matter of underlying rationale, the prima facie exclusion of representations or assumptions about future conduct from the reach of estoppel by conduct could be justified, both at law and in equity, only by deference to the primacy of the doctrine of consideration. The distinction between a representation or assumption of existing fact and one of future action or inaction has always sat uncomfortably with the general notions of good conscience and fair dealing which underlay common law, as well as equitable doctrines of estoppel by conduct (see, e.g., the dissenting speech of Lord St. Leonards in Jorden v. Money, at pp 249-256; pp 895-898 of ER and Marquess of Salisbury v. Gilmore (1942) 2 KB 38, at p 51). Indeed, were it not for the use of the phrase "assumption of fact" on one occasion in Grundt (at p 674), the exposition of principle by Dixon J. in Thompson v. Palmer and in Grundt, with its references to a representation or an assumption of a "state of affairs", could readily be

applied, without expansion or qualification of underlying rationale, to a representation or assumption about future action or inaction. Thus it was that "the rationale of the general principle underlying estoppel in pais" was seen in Legione v. Hateley (at pp 434-435) as a foundation of the acceptance of at least a limited doctrine of promissory estoppel in this country.

26. Nor does the greater scope and flexibility of traditional equitable remedies warrant the perception, within a fused system where such remedies are generally available, of some dichotomy between principles of equity and principles of law in relation to promissory estoppel. Obviously, the general availability of remedies will not assist a plaintiff in circumstances where the operation of an estoppel precluding departure from a represented or assumed state of affairs leaves him with no identifiable entitlement to relief. That does not mean, however, that the doctrine of estoppel by conduct is inappropriate to be applied, both at common law and in equity, in relation to representations or assumptions about future action or inaction. Once it is accepted that the doctrine of estoppel by conduct is one of substantive law, the question of what is encompassed by the preclusion resulting from the operation of an estoppel must be seen as a practical question of fact to be resolved by reference to matters of substance and common sense. In the ordinary case, when regard is had to substance and common sense, an estoppel precluding departure from a representation or assumption about future action or inaction will be as effective to preclude unconscionable conduct as will an estoppel precluding departure from an assumption or representation of existing fact. If, for example, Hughes v. Metropolitan Railway Company is seen as a case of estoppel, the estoppel precluding departure from the induced assumption that the notice to repair would not be relied upon can readily be seen, in accordance with ordinary principle, as having precluded Mr. Hughes from subsequently relying upon it to forfeit the lease of his houses to the Metropolitan Railway Company. That is not to say that courts are free to manipulate the content of the relevant representation or assumption to preclude conduct which would not squarely contravene it. Thus, even if the doctrines of estoppel by conduct are accepted as applying to representations or assumptions about future action or inaction in the same way as they apply to representations or assumptions of existing fact, a representation or assumption which is confined to the existence of a present intention and does not exclude the possibility of future change of mind will ordinarily be inadequate to found an effective estoppel. The reason why that is so is that, even if such a representation or assumption about existing intention were false at the time when it was made, an estoppel denying departure from it would have nothing to say in relation to future conduct since an estoppel precluding departure from the representation or assumption would not preclude any future change of mind. In such a case, the mistaken party would need to rely on causes of action (e.g. fraud or negligence) in which an estoppel precluding assertion of the falsity of the relevant representation or assumption would be a hindrance rather than an aid.

27. One need go no further than the circumstances of the present case to provide a further illustration of the fact that, once regard is paid to substance, the principles of estoppel by conduct can be applied as effectively to a representation or induced assumption of future conduct as they can to one of existing fact. The effect of an operative estoppel precluding Waltons from departing from an assumed state of affairs that an actual exchange of contract was a formality which Waltons would satisfy as a matter of course would be that Waltons was precluded from asserting that the effect of the absence of such an actual exchange was to deprive the Mahers of any entitlement to relief or from resisting, on the ground that there had been no such exchange, any orders for specific performance or damages to which the Mahers would otherwise be entitled. It is not to the point that the Mahers could not, in those circumstances, prove that a binding agreement had actually been made. The effect of the estoppel would, for all practical purposes, be the same as an estoppel precluding departure from a representation or assumption of existing fact. The reason for that is that, the time for the completion of all formalities having well and truly passed, Waltons would, as a matter of substance, be departing from the assumed or represented state of affairs under which the requirement of an actual exchange was a formality which would be satisfied by it as a matter of course if it were now permitted to maintain that that requirement was not satisfied by it as a matter of course or at all or that the consequence of that, far from being an unimportant formality, was that the Mahers were bereft of all contractual rights. In other words, an estoppel precluding a departure from an unqualified representation or assumption that a state of affairs existed, exists or will exist precludes the party estopped from subsequently denying that that state of affairs existed or exists at the relevant time, regardless of whether that time was past, present or future when the representation or assumption was made.

28. At the cost of some repetition, it is convenient to bring together in summary form what has been said above in relation to promissory estoppel. The unity, at law and in equity, of the general doctrine of estoppel by conduct was clearly established prior to the introduction of the Judicature Acts system. The general proposition that the doctrine of estoppel by conduct did not extend to a representation or assumption of future fact was developed, in the context of that accepted unity of doctrine, as applying indifferently both in equity and at law. There is no reason, in authority or in principle, for introducing into a fused system a dichotomy between equity and law in those cases where estoppel by conduct, under the nomenclature of promissory estoppel, is recognized as extending to at least some representations or assumptions about future fact. Nor, in a fused system where equitable and legal remedies are all generally available, is there any pragmatic reason why the application of the doctrine of estoppel by conduct to preclude departure, in some circumstances, from a representation or assumption of a future state of affairs should be seen as an exclusively equitable development. Finally, once it is recognized that the doctrine of estoppel is one of substantive law and equity, there is no reason why that doctrine cannot be applied as effectively in relation to a representation or assumption of a future state of affairs as to one of an existing

state of affairs. In Reed v. Sheehan [1982] FCA 1; (1982) 56 FLR 206, at p 230; [1982] FCA 1; 39 ALR 257, at pp 276-277, I expressed a tentative and qualified view that promissory estoppel could, to the extent that it was accepted, "be treated as an emanation of estoppel in pais in an area where the doctrine of consideration would otherwise have prevailed". Re-examination of the question, in the light of the matters mentioned above, leads me to affirm that view in a non-tentative and unqualified way.

29. On that approach, Legione v. Hateley must be seen as establishing that earlier decisions to the effect that the doctrine of estoppel by conduct could not be applied at all in relation to a representation or assumption of future fact (e.g. Jorden v. Money and Chadwick v. Manning) are no longer good law in this country. The doctrine of estoppel by conduct must now be accepted as applying to preclude departure from a represented or assumed future state of affairs in at least some categories of case. There is much to be said for the view that this Court should, in the interests of clarity and simplicity of the law, immediately take the final jump to the conclusion, which Lord Denning M.R. informs us was reached by Sir Owen Dixon some forty years ago, that the doctrine of estoppel by conduct should be generally extended "to include an assumption of fact or law, present or future" (see Moorgate Ltd. v. Twitchings (1976) QB 225, at p 242). If it were necessary to consider such a general extension of the doctrine, my present inclination would be to accept it. It is not, however, necessary to resolve the matter for the purposes of the present case and it seems to me to be preferable to proceed, at least for the time being, with the development of the law in that area on a more cautious basis. That being so, promissory estoppel should, for the time being, continue to be seen in this country in the manner envisaged in Legione v. Hateley, that is to say, as an extension of the doctrine of estoppel by conduct to representations or assumptions of future fact in at least certain categories of case. In identifying those categories of case, it remains, at this stage, necessary to proceed by the ordinary processes of legal reasoning and to be conscious of the currently entrenched importance of the doctrine of consideration. Proceeding on that more cautious case by case basis, it appears to me that the present case would, if the assumption made by the Mahers had been no more than that exchange was a formality which Waltons would satisfy as a matter of course, fall within a category of case to which the doctrine of estoppel by conduct should be applied notwithstanding that the assumption related to future conduct. In the following paragraph, I explain why that is so.

30. The notions of good conscience and fair dealing which underlie the doctrine of estoppel by conduct, reasoning by way of analogy and the ordered development of principle all support the applicability of the doctrine of estoppel by conduct to the category of case where an owner of land, under the mistaken belief that the other party intended to complete the making of a binding agreement for lease as a matter of course, demolishes a building on the land and commences the erection of one designed to suit the needs of the prospective lessee in circumstances where (i) the prospective lessee has induced the mistaken belief; (ii)

the prospective lessee is aware of the existence of the mistaken belief, of the fact that it is mistaken and of what the owner is doing on the basis of it; (iii) the prospective lessee stands by so that the opportunity of entering into the lease and the advantage of use of the building will be available to him if he decides to go ahead with the lease. Notions of good conscience and fair dealing, enforced by the rationale of legal doctrines precluding unjust enrichment, point towards a conclusion that, in such circumstances, the prospective lessee should be precluded from departing from the mistaken assumption about his future conduct. So do analogy and notions of mutuality since it is plain that estoppel would extend to the case if the positions were reversed and it was the prospective lessee who had acted on the induced assumption and had incurred expense in erecting a building for his use on the land on the basis of a mistaken belief that the owner intended to enter into a binding agreement for its lease as a matter of course. Nor would the extension of the doctrine of estoppel by conduct to that category of case undermine the general position of the doctrine of consideration in the fields in which it presently holds prima facie sway. To the contrary, the extension of the existing applicability of estoppel by conduct in those fields to that category of case would, if anything, strengthen the overall position of the doctrine of consideration by overcoming its unjust operation in special circumstances with which it is inadequate to deal.

31. The other further matter is mentioned by way of precaution. The object and operation of the doctrine of estoppel by conduct is to avoid the injustice which would result from the application or inadequacy of other laws in the circumstances which would be disclosed if departure were permitted from the relevant represented or assumed state of affairs. There is obviously some force in the approach that that doctrine does not operate to preclude departure from an induced mistaken assumption of fact if the application of the law to the true facts would produce the same result that would be produced by the application of the law to the represented or assumed facts. If, for example, a defendant who had induced a plaintiff to make and act on a mistaken assumption of fact would be under an equal or greater liability in negligence to the plaintiff if the demonstrated falsity of the assumption is acknowledged as he would be for breach of contract if he were estopped from asserting that falsity, it is difficult to discern the justification in principle or in common sense for holding that the law requires that the case be decided on the assumed and not the true facts. In so far as principle is concerned, it is difficult to see the conceptual justification of an estoppel in circumstances where the position of the party relying on the estoppel will be no worse if the law is applied to the true facts than it would be if the law is applied to the mistakenly assumed state of affairs. In so far as common sense is concerned, it is difficult to see the justification for requiring the law to operate on the basis of a factual situation which does not exist in circumstances where the result would, from the plaintiff's point of view, be no worse if the law were applied to the actual facts. The same may be said of a case where the relief to which the plaintiff would be entitled on the actual facts can be seen to be more appropriate than the relief to which he would be entitled on the assumed facts. The relevance of all this

for the purposes of the present case is that it appears to me that, on the facts established by the evidence and found by the courts below, there is much to be said for the view that the Mahers had a good cause of action in negligence against Waltons for the damage which they sustained by reason of the failure on the part of Waltons to speak in circumstances where it owed a relevant duty of care to them. Ordinarily, the question whether a plaintiff should be prevented from relying on an estoppel by reason of the fact that he will suffer no detriment if the case is dealt with on the actual facts will be of academic interest only since a defendant will have little interest in asserting that he is not liable to pay damages claimed in reliance on an estoppel for the reason that he is liable to pay them in any event. It may be assumed that the question is merely of academic interest in the present case since it was neither raised by Waltons nor adverted to in argument. In these circumstances, it is unnecessary that I express any firm view in relation to it. I have adverted to the question for the reason that there may be circumstances in which it is of real practical significance. An example of such circumstances is a case where a defendant, who is sued on a contract which did not exist but which he is alleged to be estopped from denying, would be entitled, if the case was determined on the true facts, to bring third party proceedings, in respect of the damages recovered, against a joint tortfeasor. In such a case, there is something to be said for the view that the development of the common law should be as a coherent body of principles which can be applied to ascertained facts to produce a legal definition of rights and liabilities and not as a miscellany of overlapping, competing and sometimes inconsistent sets of laws from which a plaintiff may selectively choose to the detriment of a defendant.

32. The appeal should be dismissed.

GAUDRON J. In September 1983 Waltons Stores (Interstate) Limited ("the appellant") commenced negotiations with Mr and Mrs Maher ("the respondents") for the granting of a lease over property owned by the respondents in the business district of Nowra. It was envisaged that the respondents would erect on the land a building having an area of 14,000 square feet. The respondents were requested to prepare plans and specifications in accordance with requirements made known by the appellant, and to submit them to the appellant as a matter of urgency. During these negotiations it was made clear by the appellant that the building was required to be completed by 15 January 1984.

2. Discussions continued through the month of October with agreement being reached as to the design of the building, the term of the lease, and the amount of rent to be paid, and culminating with an exchange of information as to the identity of the legal representatives who would thereafter be acting in relation to the matter for the appellant and the respondents.

3. On 21 October, Messrs Dawson Waldron, solicitors for the appellant, wrote to Messrs Morton & Harris, solicitors for the respondents. There was enclosed with the letter a "Deed of Agreement for Lease" with a form of "Lease" annexed thereto. The letter proceeded to

reserve the right to make amendments to the lease, and to note that "a Schedule of Finishes remains to be annexed to the Deed".

4. Conversations took place between the solicitors on 1, 2 and 7 November. Various amendments to the form of the lease were discussed, as was an extension of time for the completion of the building. The building was to be available for fitting out by 15 January, and to be completed by 5 February 1984.

5. In the conversation of 7 November 1983 Mr Elvy of Messrs Morton & Harris stressed that "the agreement must be concluded within the next day or two otherwise it will be impossible for Maher to complete it". He pointed out that "there's a newer brick part of the old factory on the site, which Maher hasn't demolished yet and doesn't want to until it's clear there are no problems". Mr Elvy then asked if instructions had been received in relation to the amendments. To this question Mr Roth of Messrs Dawson Waldron answered that he had received "verbal instructions from Waltons that the amendments are acceptable" but that he would obtain "formal instructions".

6. On the same day, Messrs Dawson Waldron wrote to Messrs Morton & Harris enclosing fresh documents incorporating the amendments discussed. It was noted that specific instructions had not been obtained in relation to the amendments and it was stated that "(w)e shall let you know tomorrow if any amendments are not agreed to." The letter also noted the belief of Messrs Dawson Waldron "that a Schedule of Finishes should be annexed to the Deed prior to exchange".

7. There was no further communication on the subject of the amendments, and on 11 November 1983 Messrs Morton & Harris forwarded by way of exchange to Messrs Dawson Waldron documents executed by the respondents. Enclosed therewith was also a "Schedule of Finishes" signed by the respondents "for approval and annexure to the Deed ... prior to exchange". This letter was received by Mr Roth of Messrs Dawson Waldron on 14 November. On the same day Messrs Morton & Harris wrote to their clients, the respondents, informing them that the "amended Agreement for Lease duly executed by you both has been forwarded to the Lessee's Solicitors for execution by the Lessor (sic) and exchange of Agreement". It was noted that the respondents would commence work as the building was "required to be completed on or by the 5th February 1984". It was also pointed out that if "the Lessors' work is not completed by the 31st March 1984, the Lessee may by notice in writing rescind the Agreement".

8. The respondents commenced demolition work. The fact that demolition was in progress came to the knowledge of officers of the appellant on 10 December. It is implicit in the findings, both at first instance and in the Court of Appeal, that the appellant knew not merely that demolition work was in progress but that the work was being undertaken as part of the work necessary for the erection of the building which had been the subject of the

negotiations between the parties.

9. By 10 December when officers of the appellant became aware that demolition work had commenced, the appellant's enthusiasm for the project had been dampened by reason of a review of its retailing strategy, and it had on 21 November ascertained from its solicitors that, contracts not having been exchanged, it was not bound to proceed with the arrangement. Thereupon the appellant instructed its solicitors to "go slow", and no further communication was had by them with the respondents' solicitors.

10. In early January 1984, the respondents commenced building in accordance with the plans and specifications previously submitted to the appellant. The work was interrupted temporarily pending council approval which was obtained on 5 January. Thereafter work proceeded without interruption. By 10 January officers of the appellant were aware that the building was under construction. On 18 January Mr Roth of Messrs Dawson Waldron was instructed to inform the respondents' solicitor that the appellant was not proceeding with the matter. This was done by letter of 19 January. Mr Maher became aware of the contents of this letter on 23 January. By that stage, the building was about forty per cent complete.

11. The respondents commenced proceedings in the Supreme Court of New South Wales seeking a declaration that there was a valid and enforceable agreement for the taking of the lease and an order for specific performance of that agreement. The respondents were successful in their action, but, by reason of events occurring since the institution of the proceedings, specific performance was held to be no longer appropriate, and in lieu thereof payment of damages was ordered.

12. In his reasons for judgment Kearney J., before whom the matter was heard, rejected an argument that a binding agreement had come into existence without the formality of exchange. However, his Honour found that the respondents "believed that they had an agreement" and, in conjunction with that finding, found that the respondents were "entitled ... to assume that the exchange would be duly completed". His Honour then held that the appellant was estopped from "denying that a concluded agreement by way of exchange did in fact exist between the parties". By that it would seem that his Honour considered the appellant estopped from denying that exchange occurred, that being the question which his Honour said was raised in consequence of his holding that "exchange was a prerequisite to the creation of a concluded contract between the parties".

13. An appeal to the Court of Appeal of the Supreme Court of New South Wales was dismissed, it being held by Priestley J.A., with whom Glass and Samuels JJ.A. agreed, that during December and until 18 January, the respondents "were under the mistaken belief that there was in fact a binding agreement between them in terms of the documents" and that the appellant "had caused them to believe that such assumption was factually correct". From that decision and the order of the Court of Appeal the present appeal is brought.

14. Counsel for the appellant relied strongly on the differences in expression in the findings of Kearney J. and the findings of Priestley J.A., arguing that the differences disclosed such uncertainty in the nature of the matter in respect of which the appellant was held to be estopped that no estoppel could be said to arise. In particular it was argued that estoppel by conduct is an aspect of estoppel by representation and that only a clear representation could found an estoppel.

15. The object of an estoppel, whether a common law estoppel or an equitable estoppel, is as was explained by Dixon J. in relation to estoppel in pais in Thompson v. Palmer [1933] HCA 61; (1933) 49 CLR 507, at p 547:

> "... to prevent an unjust departure by one person
>
> from an assumption adopted by another as the basis
>
> of some act or omission which, unless the
>
> assumption be adhered to, would operate to that
>
> other's detriment".

16. In the present case there are, as pointed out by counsel for the appellant, three contending assumptions:

> (a) that exchange would occur;
>
> (b) that exchange had occurred; and
>
> (c) that there was a binding agreement between the
>
> parties.

17. The expressions "common law estoppel" or "evidentiary estoppel", on the one hand, and "equitable estoppel", on the other hand, serve to distinguish estoppels which operate by reference to an assumption of fact and those which operate by reference to an assumption as to rights.

18. Common law or evidentiary estoppel compels adherence to an assumption of fact by denying the person estopped the right to assert a contrary matter of fact. By so doing, it may operate to fashion a set of facts by reference to which is imposed a liability which otherwise does not exist. This operation is illustrated by Laws Holdings Pty. Ltd. v. Short and Others (1972) 46 ALJR 563. In that case the defendant was held liable in an action for goods sold and delivered and work done because it was estopped from asserting facts inconsistent with the plaintiffs' assumption that they were dealing with the defendant.

19. Equitable estoppel operates so as to compel adherence to an assumption as to rights. Sometimes that adherence can only be compelled by the recognition of an equitable entitlement to a positive right in the person claiming the benefit of estoppel and the enforcement of correlative duties on the part of the person against whom the estoppel is successfully raised. See, for example, Dillwyn v. Llewelyn [1862] EngR 908; (1862) 4 De GF & J 517 (45 ER 1285) and Crabb v. Arun District Council [1975] EWCA Civ 7; (1976) Ch 179. Where equity compels adherence to an assumption in this manner, the resulting estoppel is generally referred to as "proprietary estoppel". On other occasions adherence to an assumption as to rights may be compelled by precluding the person estopped from asserting existing rights. It is in this manner that "promissory estoppel" has generally operated. See, for example, Central London Property Trust Ltd. v. High Trees House Ltd. (1947) KB 130; Ajayi v. R.T. Briscoe (Nigeria) Ltd. (1964) 1 WLR 1326; (1964) 3 All ER 556 and Bank Negara Indonesia v. Philip Hoalim (1973) 2 MLJ 3. Other estoppels may operate in the same way. Thus a beneficiary who acquiesces in a breach of trust may be estopped from asserting his or her rights against the trustee. See Walker v. Symonds [1818] EngR 592; (1818) 3 Swans 1 (36 ER 751); Chillingworth v. Chambers (1896) 1 Ch 685 and Re Pauling's Settlement Trusts. Younghusband v. Coutts & Co. (1961) 3 All ER 713.

20. I turn now to the assumptions which have been identified in the present case. The first assumption, viz. that contracts would be exchanged, did not form the basis of the decision of Kearney J. or of the decision of the Court of Appeal. Nevertheless counsel for the respondents relied on the assumption as one which would support an estoppel entitling the respondents to the judgment given in their favour at first instance.

21. The assumption that contracts would be exchanged is an assumption as to future fact, or

in terms of Jorden v. Money (1854) 5 HLC 185 (10 ER 868) an assumption as to future conduct. It is clear from Jorden v. Money and the many cases in which it has been applied that a representation as to future conduct will not found a common law or evidentiary estoppel. That it will not found a common law or evidentiary estoppel is not merely a matter of authority, but also a matter of logic - at least in so far as the representation gives rise to an assumption as to a future event. Because common law or evidentiary estoppel operates by precluding the assertion of facts inconsistent with an assumed fact, the assumption must necessarily be as to an existing fact and not as to a future event.

22. However, the assumption that contracts would be exchanged is also an assumption as to future rights. An assumption as to a future right may provide the basis for the operation of an equitable estoppel, as is clear from Ramsden v. Dyson (1866) LR 1 HL 129; Salvation Army Trustee Co. Ltd. v. West Yorkshire Metropolitan County Council (1980) 41 P & CR 179 and Bank Negara Indonesia v. Philip Hoalim.

23. Whether an assumption as to a future contractual right will found an equitable estoppel may depend on whether proprietary estoppel and promissory estoppel are discrete categories of equitable estoppel based on definitional differences as to the circumstances in which they operate or are merely illustrative of different assumptions as to rights (for example, an assumption as to a right possessed or to be possessed as distinct from an assumption as to the manner in which a right possessed or to be possessed by another will be exercised) and the different ways in which adherence to those different assumptions will be compelled. In Crabb, Scarman L.J. appears to have favoured the latter view saying (at pp 192-193):

> "If the plaintiff has any right, it is an equity
>
> arising out of the conduct and relationship of the
>
> parties. In such a case I think it is now well
>
> settled law that the court, having analysed and
>
> assessed the conduct and relationship of the
>
> parties, has to answer three questions. First, is
>
> there an equity established? Secondly, what is the

extent of the equity, if one is established? And,

thirdly, what is the relief appropriate to satisfy

the equity?"

24. There is, I think, much to be said for the view expressed by Scarman L.J. However, as I have formed a view favourable to the respondents on the basis of the second assumption, that is not a matter which need here be explored.

25. The assumption that exchange had taken place is an assumption of fact, adherence to which requires that the appellant be precluded from asserting any contrary fact. Although the third identified assumption, viz. that there was a binding agreement, is, in form, an assumption as to an existing right, adherence to which requires that the appellant discharge the corresponding duties, it is merely an expression of the legal consequence flowing from exchange which was assumed to have taken place. Thus it seems to me sufficient and appropriate to proceed by reference to the assumption that exchange had taken place.

26. In Grundt v. Great Boulder Pty. Gold Mines Ltd. [1937] HCA 58; (1937) 59 CLR 641, Dixon J. (at p 675) explained that the justice of an estoppel depends not only on "the fact ... that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position" but also "on the manner in which the assumption has been occasioned or induced". His Honour observed:

"Before anyone can be estopped, he must have played

such a part in the adoption of the assumption that

it would be unfair or unjust if he were left free

to ignore it."

27. In the present case it was found by Kearney J. that the respondents had acted upon the assumption that exchange had taken place. The finding of the Court of Appeal that the respondents believed that there was a binding agreement also involves the finding that the respondents assumed that exchange had taken place. This is so because the process of negotiation, as was found by Kearney J., resulted in a situation in which the parties intended that no binding agreement would come into existence without exchange. It is not in issue that departure from the assumption that exchange had taken place will result in detriment to the respondents. The issue is whether the appellant so contributed to the assumption that exchange had taken place that it would be unjust or unfair if it were left free to ignore it.

28. In Grundt (at pp 675-676) Dixon J. made it clear that the question of fairness or justice was not at large, saying:

> "(The law) defines with more or less completeness
>
> the kinds of participation in the making or
>
> acceptance of the assumption that will suffice to
>
> preclude the party if the other requirements for an
>
> estoppel are satisfied."

His Honour then repeated the recognized grounds of preclusion set out in Thompson v. Palmer (at p 547) including that:

> "... knowing the mistake the other laboured under,
>
> he refrained from correcting him when it was his
>
> duty to do so; or ... his imprudence, where care
>
> was required of him, was a proximate cause of the

other party's adopting and acting upon the faith of

the assumption".

29. The case has thus far been conducted on the basis of failure by the appellant to correct what it knew to be the mistaken belief of the respondents. Kearney J. found that the appellant had "such knowledge of the (respondents') activities on the land as to fix (it) with knowledge of the (respondents') mistaken belief". That mistaken belief was, as previously noted, that "a contract by way of exchange had in fact been concluded". That finding was challenged by counsel for the appellant who argued that the appellant may well have believed that the respondents were proceeding simply in the hope or belief that exchange would occur. There was no evidence of the actual knowledge or belief of the appellant or its officers concerning the state of mind of the respondents. The evidence of the appellant's knowledge as to the activities on the land on and immediately following 10 December is not, in my view, capable of supporting an inference that the appellant knew or believed that the respondents mistakenly believed that exchange had taken place.

30. Where a fact is to be proved by inference from evidence, the only inference which may properly be made is "the most probable deduction from the established facts": Holloway v. McFeeters [1956] HCA 25; (1956) 94 CLR 470, per Dixon C.J. at p 477. Given that the transaction which had been negotiated was to be carried into effect by solicitors and that the appellant knew that exchange had not taken place it seems to me that the most probable deduction from the established facts is, as was submitted by counsel for the appellant, that from and immediately following receipt of knowledge that demolition work was in progress the appellant believed that the respondents had commenced work in the hope or belief that exchange would take place, and not in the belief that exchange had in fact taken place. Thus, in my view, the appellant is not estopped in relation to the respondents' assumption that contracts had been exchanged on the basis that it knew of and failed to correct this mistaken assumption. However, that is not the end of the matter.

31. 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. An expectation by the respondents that exchange would take place was eminently reasonable in the light of all the facts known to them. The

negotiations had been completed to the point that the documents expressed the requirements of all parties; the terms of the documents which had been agreed between the solicitors required speedy completion of the building; the respondents had executed the agreement; the agreement had been forwarded to the appellant's solicitors by way of exchange; the appellant's solicitor had been informed on 7 November that it was necessary for the agreement to be concluded "within the next day or two". Against that background the appellant must have known that an expectation of exchange was reasonable on the facts known to the respondents, but was not reasonable in light of the appellant's changed attitude. At that stage prudence was required. It was not forthcoming.

32. Where imprudence is "a proximate cause of the other party's adopting and acting upon the faith of the assumption" the justice of an estoppel is made out (emphasis added): (Thompson v. Palmer, at p 547; Grundt, at p 676). That test requires no knowledge as to the other's state of mind. Nor does that test require that imprudence should have caused the assumption to be made. It is sufficient that imprudence is "a proximate cause" of the assumption being adopted and acted upon.

33. Whatever may have caused the respondents to make their assumption that exchange had taken place, the evidence clearly supports the inference that the failure of the appellant to inform them that its attitude had changed was a proximate cause of their adopting and acting upon the faith of that assumption. Indeed such a finding is implicit in the finding of Kearney J. that "by the (appellant's) action in doing nothing to complete the exchange the (respondents) were lulled into a sense of false security".

34. It remains to be considered whether knowledge by the respondents' solicitor that exchange had not taken place renders it unjust or unfair that the appellant be estopped from asserting that exchange did not occur. Ordinarily (conventional estoppel aside) knowledge of the falsity of an assumption will be fatal to the success of an estoppel based on that assumption. In such cases knowledge of falsity will either result in failure to establish that action or inaction was based on the faith of the assumption, or the failure to establish that the person sought to be estopped played such part in the adoption of the assumption that departure therefrom is unjust or unfair.

35. The knowledge of an agent, particularly where the agent is a solicitor acting in the relevant transaction, may also be fatal to the success of an estoppel based on an assumption which the agent knows to be false. However, that is not because of the difficulty in establishing that the assumption was the basis of the relevant action or inaction but because the person sought to be estopped may escape a relevant duty to inform by reason of the agent's knowledge. However, that duty cannot be evaded if the conduct relied upon to establish the justice of the estoppel also has the consequence that the person raising the estoppel is shut out from the knowledge of his agent. In the present case enquiry by the respondents of their solicitor may have disabused them of their assumption. However, the

sense of false security engendered by the imprudence of the appellant must have also operated to induce in the respondents a belief that enquiry was unnecessary. The conduct of the appellant thus caused the respondents to be shut out from any contrary knowledge had by their agent.

36. Accordingly, I am of the view that because of the appellant's imprudence in failing to inform the respondents that exchange might not occur, the respondents adopted and acted upon the assumption that exchange had taken place, and it would be unjust or unfair to allow departure from that assumption. The appellant is estopped from asserting any matter contrary to that assumption.

37. By reason that the appellant is estopped from denying that exchange had taken place, the rights and liabilities of the parties are to be determined on the basis that it had in fact taken place. An assumption that exchange had taken place necessarily also involves an assumption that the agreement was duly executed by the appellant, and the question of compliance with s.54A of the Conveyancing Act 1919 (N.S.W.) becomes irrelevant.

38. The appeal should be dismissed.

ORDER

Appeal dismissed with costs.