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# When Is It Fair to Break Promises? Illuminating Promissory Estoppel's Inequity Requirement

by

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# When Is It Fair to Break Promises? Illuminating Promissory Estoppel's Inequity Requirement

*Marcus Moore\**

## Introduction

Promissory estoppel is an important adjunct to contract law, allowing non-contractual promises to be legally binding under prescribed conditions. These conditions include reliance by the promisee, as the doctrine serves to protect reasonable reliance induced by certain types of promises. Typically, the conditions also include a requirement that it would be inequitable for the promisor to go back on the promise. This inequity requirement reflects the nature of promissory estoppel as a creature of the law of equity. Beyond this, however, considerable uncertainty surrounds the inequity element. For example, there are diverging views as to whether it embodies a distinct requirement, or whether it simply encapsulates the question that the doctrine's other conditions together answer. If it does embody a distinct requirement, opinion further differs on whether its role is to inquire into specific considerations, or is to call for an overall (that is, subsuming the other conditions) assessment of the fairness of letting a promise be broken. And if it does mandate a specific enquiry, the set of factors it is meant to investigate, and how they are to be analysed, remains remarkably unknown. As Lord Justice Beatson, Lord Burrows and John Cartwright note, 'there is little... guidance about' what factors 'will make it "not inequitable" for a person to go back on such a promise'.<sup>1</sup>

This article addresses these issues. It aims to clear up confusion around promissory estoppel's inequity requirement, identify its proper role and enable greater consistency in the treatment of this condition of the doctrine. Despite the obscurity surrounding it, I argue that the inequity requirement is essential and that its omission leads to problems. I further endeavour to bring into focus the specific content it covers and the analytical process to follow in considering this enigmatic element of promissory estoppel.

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\* Faculty of Law, University of British Columbia. The author would like to thank Professor J W Carter and the anonymous reviewers of the *CCLR* for their helpful suggestions, as well as Timothy Falco, Sina Seyed Ali, Fraser Caldwell and Trevor Duncan for their valuable research assistance.

1 Jack Beatson, Andrew Burrows and John Cartwright, *Anson's Law of Contract*, 31st ed, Oxford University Press, Oxford, 2020, p 123.

3 The sequence of the paper is as follows. I begin by summarising promissory estoppel's legal function and required elements. I then look more closely at the doctrine's inequity element including the questions surrounding its role and operation. After providing this essential background, I argue that, despite the lingering obscurities surrounding it, the inequity element is an essential condition. This is illustrated by significant difficulties encountered where the inequity condition is omitted, as in Canada, as shown by the recent decision of the Supreme Court of Canada in *Trial Lawyers v Royal & Sun Alliance*.<sup>2</sup> I submit that the inequity requirement calls for a specific enquiry into considerations not answered by the doctrine's other conditions.

I then address the mysteries of what the inequity element specifically covers and what process is to be followed in analysing it. I start from a view that its main role is to canvass reasons why it might *not* be inequitable for a promisor to break its promise, despite having induced another party to change its legal position in reliance on it. I propose that these reasons fall into two categories: (1) equitable considerations countervailing the unfair inducement of a change of position by the promisee in reliance on the promise; and (2) nuance not captured by the on/off character of the doctrine's other conditions, yet relevant to the fairness of letting the promise be broken. On the type of analysis to be conducted in applying promissory estoppel's inequity condition, I submit that it calls for a weighing of equities. More particularly, the already-established element of an induced change of position by the promisee will usually represent a constant against which must be weighed factors of the types just suggested, in arriving at a conclusion as to the inequity of the promisor going back on the promise.

## Background: Promissory Estoppel and the Element of Inequity

### Functions Served by Promissory Estoppel

5 The doctrine of promissory estoppel serves to protect a party, if it was induced to rely on a counterpart's promise not to fully enforce a legal right, against the counterpart later unfairly going back on that promise.

6 Legally, the doctrine provides a means by which certain promises may be binding notwithstanding an absence of consideration in return for the promise.<sup>3</sup> The promise still would not have contractual status, but the promisor is 'estopped' from going back on it, and will be liable to the promisee if it does so. Although the promise itself is not a contractual

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2 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47.

3 Hugh Collins, *The Law of Contract*, 4th ed, Cambridge University Press, Cambridge, 2003, ch 5; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130; *Crabb v Arun District Council* [1976] Ch 179; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

obligation, as Angela Swan explains, such cases are 'best seen as part of the law of contracts; they are adjuvant to the law of contracts; they fill in what would otherwise be serious gaps in the ability of the law to protect reasonable expectations'.<sup>4</sup> Further, promissory estoppel most often concerns promises that relate to pre-existing contractual obligations.<sup>5</sup> Hence, the doctrine helps tell us, for example, in what cases a party to a contract will be held to an impression reasonably given that it would exercise in a certain way a discretionary power that it held under the contract or that it would concede some reduction of a fixed contractual obligation it is owed without asking for consideration in return.

With regard to the underlying social activity it helps regulate, promissory estoppel is therefore significant for parallel reasons as the criteria for the enforceability of contractual promises (including, notably, consideration) — namely, providing guidance to citizens as to when the promises they make will attract legal consequences. From an economic standpoint, this is important in affording parties the opportunity to plan their wider business around what they believe to be their legal claims and responsibilities.<sup>6</sup>

Morally speaking, promissory estoppel gives effect to the principle that a person should not treat others unfairly by breaking a promise after inducing others to rely on it in planning their interests. Usually, the promisee would suffer some detriment if the promisor were not estopped from breaking the promise. A stricter version of the principle, espoused by Lord Denning, focuses on the conduct of the promisor, rather than the detriment suffered by the promisee — regarding it as inequitable to allow a person to repudiate a promise solemnly given and intended to have legal effects.<sup>7</sup> A creature of the law of equity, promissory estoppel plays an important role in promoting interpersonal fairness in the situation the doctrine addresses, by holding parties responsible for inequity that would result from breaking promises that were intended to — and did — induce legal reliance by recipients of these promises.

4 Angela Swan, Jakub Adamski and Annie Na, *Canadian Contract Law*, 4th ed, LexisNexis, Toronto, 2018, §1.9; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801; *VK Mason Construction Ltd v Bank of Nova Scotia* [1985] 1 SCR 271.

5 Hugh Beale, ed, *Chitty on Contracts*, 33rd ed, Sweet & Maxwell, Markham, 2019) § 4-087; Bruce MacDougall, *Estoppel* (2nd edn, LexisNexis, Toronto, 2019, §5.120; *BP Exploration (Libya) v Hunt (No 2)* [1979] 1 WLR 783 at 812 (affirmed without reference to the point [1981] 1 WLR 232; [1983] 2 AC 352); *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd's Rep 245 at 250.

6 I use this phrasing in lieu of 'rights and obligations' because, as mentioned, promises protected by estoppel are not contractually valid. Alluding to their source in equity one could qualify them as *equitable* rights and obligations: see eg *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (Brennan J). However, I prefer here to avoid going further into that semantic debate.

7 A T Denning, 'Recent Developments in the Law of Consideration' (1952) 15 MLR 1 at 6-8.

## Elements of the Doctrine

9 I now summarise the constituent elements of promissory estoppel. There is some variation in how these elements are formulated.<sup>8</sup> Taking this into account, and the accompanying explanations and elaborations, I would state the doctrine's requirements as follows:

1. The promise must be clear and unequivocal.<sup>9</sup>

This requirement is similar to conditions that apply to contractual promises. A promise cannot be excessively vague or imprecise. As for the requirement that the promise be unequivocal, this has its greatest significance in regard to promises not expressed, but implied or inferred from the promisor's conduct. In such cases, it serves to protect pre-existing contractual rights, and privilege the reciprocity of the contractual idea of promise-for-consideration, by not accepting too readily contractual rights' limitation (by the subsequent promise that is the subject of the estoppel) unless that intent appears reasonably definite.<sup>10</sup>

2. The promise must relate to a pre-existing legal relation between the promisor and promisee.<sup>11</sup>

As previously mentioned, the pre-existing relation usually consists in a contract.<sup>12</sup> In that case, the promise at issue relates to obligations under that contract. The promise would effectively vary an obligation of the contract, were the promise contractually enforceable. But because the promises protected by promissory estoppel are not made for consideration, the contract itself is not varied. Rather, the promisor is estopped from reasserting contractual rights it promised not to assert.

8 Compare eg Beale above, n 5, §4-087; Beatson, Burrows and Cartwright, above, n 1, pp 122-9; MacDougall above, n 5, §5.92; John McCamus, *The Law of Contracts*, 3rd ed, Irwin Law, 2020, pp 308-14.

9 Beale, above, n 5, §4-091-4-093; Beatson, Burrows and Cartwright, above, n 1, p 122; Mindy Chen-Wishart, *Contract Law*, 6th ed, OUP, Oxford, 2018, pp 147-8; MacDougall, above, n 5, s V.C.2.b.-i. *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 812 (affirmed without reference to this point [1983] 2 AC 352); *Spence v Shell* (1980) 256 EG 55 at 63; *James v Heim Galleries* (1980) 256 EG 819 at 821; *Société Italo-Belge pour le Commerce et l'Industrie v Palm & Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695 at 700; *Goldsworthy v Brickell* [1987] Ch 378 at 410; *Hiscox v Outhwaite* (No 3) [1991] 2 Lloyd's Rep 523 at 524, 535; *Rowan Companies Inc v Lambert Eggink Offshore Transport Consultants* [1999] 2 Lloyd's Rep 443 at 448, *Thameside MBC v Barlow Securities Group Services Ltd* [2001] EWCA Civ 1; [2001] BLR 113 and *Evans v Amicus Healthcare Ltd* [2003] 4 All ER 903 at [303]-[306]; [2003] EWHC 2161 (Fam) (where the requirement was not met).

10 Marcus Moore, 'Developments in Contract Law: The 2021-2022 Term — The Enduring Allure of Freedom of Contract' (2023) 111 *Sup Ct L Rev* (2d) 3 at 39-41.

11 Beale, above, n 5, §4-089; Piers Feltham and others (eds), *Spencer Bower: Reliance-Based Estoppel*, 5th ed, Bloomsbury, Haywards Heath, 2017, §14.22; MacDougall, above, n 5, s V.C.2.a; Stephen Waddams, *The Law of Contracts*, 8th ed, Thomson Reuters, Toronto, 2022 p 134; *Combe v Combe* [1951] 2 KB 215; *Splithoff's Bevrachtungskantoor BV v Bank of China* [2015] 2 Lloyd's Rep 123 at 156; [2015] EWHC 999 (Comm); *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 757.

12 See n 5.

3. The promise must take the form of a concession relative to the pre-existing legal rights, not an expansion of them.<sup>13</sup>

As with waiver, estoppel only works to limit the (full) exercise of a legal right, and does not work to expand a right or create a new right where none existed previously. As John McCamus explains, for the doctrine to apply it is 'essential' that the promise 'constitute a concession rather than an affirmative undertaking to provide additional benefits under the [pre-existing] agreement'.<sup>14</sup> A promise to accept less therefore might be enforceable by estoppel, whereas a promise to pay more will not.<sup>15</sup> Promissory estoppel's restriction to concessions and not expansions relative to pre-existing rights is generally accepted, with Australia and the US as notable exceptions.<sup>16</sup> The distinction upon which this restriction is made is sometimes criticised as artificial.<sup>17</sup> It is justified as reflecting the nature of estoppels, which do not create rights, but only prevent parties from acting inconsistently with reliance-inducing representations that they have made, if inequity would otherwise result.<sup>18</sup> But this explanation has also been questioned; a common view is that the distinction serves to protect contract law (and the doctrine of consideration in particular) from being overtaken by promissory estoppel.<sup>19</sup>

4. It must be objectively intended that the promise may be legally relied upon.<sup>20</sup>

This requirement of promissory estoppel is relatable to the requirement for contractual promises that there be an intent to be legally bound or to create legal relations. The critical point is to exclude promises that are meant to be binding in conscience only, and not in

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13 McCamus above, n 8, pp 308–9; Beale, above, n 5, §§4-099–4–101; Beatson, Burrows and Cartwright, above, n 1, pp 126–9; Chen-Wishart, above, n 9, pp 152–9; Waddams, above, n 11, p 139; *Orion Finance Ltd v JD Williams & Co Ltd* [1997] CLY 986.

14 McCamus, above, n 8, p 309; Michael Barnes, *The Law of Estoppel*, 1st ed, Hart, Oxford, 2020, §6.158.

15 However, complexities can arise in the case of promises relating to the payment of actual debts due to the special rules on debts (ie *Pinnel's Case* (1602) 5 Co Rep 117a; 77 ER 237; *Foakes v Beer* (1884) 9 App Cas 605). See eg Chen-Wishart above, n 9, pp 136–139. For further discussion of the conflict of rules in this area, see eg Luke Pearce, 'Foakes v Beer and Promissory Estoppel: A Step Too Far' (2008) 19 *King's Law Journal* 630.

16 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; American Law Institute, *Restatement (Second) of Contracts* §90.

17 See eg *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; Chen-Wishart above, n 9, p 155.

18 *Combe v Combe* [1951] 2 KB 215 at 220.

19 See eg *Combe v Combe* [1951] 2 KB 215 at 220; Beale, above, n 5, §4–099; MacDougall, above, n 5, §5.321; *Brikom Investments Ltd v Carr* [1979] QB 467 at 486; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761 at 764.

20 Barnes, above, n 14, §6.146; MacDougall, above, n 5, s.V.C.2.b; Waddams, above, n 11, p 137; Edwin Peel, *Treitel's Law of Contract*, 14th ed, Sweet & Maxwell, London, 2015, p 131; *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 758; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.

law. Or for example, promises made in jest, or otherwise not meant to have legal effect.<sup>21</sup> As usual in private law, intention should be determined objectively; as Michael Barnes explains, this is assessed according to what intention would be understood by a reasonable person in the position of the promisee, not subjectively according to what the promisor actually intended.<sup>22</sup> Also, the requisite intention is not that the promisee *necessarily* rely on the promise; it must only be intended that the promisee be permitted to rely on the promise if the promisee so opts.

Another way of framing the combination of requirements (1) and (4) from this list of the elements of promissory estoppel is that it must be reasonable for the promisee to rely on the promise.<sup>23</sup>

5. The promisee must have changed its position in reliance on the promise.<sup>24</sup>

Closing the loop that commenced with the previous element of the doctrine requiring that the promisor intend that the promise be eligible for the promisee to legally rely upon it, the element enumerated here requires that the promisee actually did legally rely upon it. Whether this reliance included an assumption of legal protection is — in typical common law fashion — not assessed by the presence of some pure legal formality.<sup>25</sup> Rather, it is determined by whether, considering the function of contract law and related areas in enabling people to plan their affairs around their enforceable claims and commitments, the promisee ‘changed its position’, that is, altered its plans, based on the promise. But how do we know if the change of position was in reliance on the promise? ‘Causation’, if we use that term for this, must also be established.<sup>26</sup> The inducement of reliance will only be protected

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- 21 Elizabeth Cooke, ed, *The Modern Law of Estoppel*, Oxford University Press, Oxford, 2000, pp 82–83; Collins above, n 3, p 82; *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.
  - 22 Barnes, above, n 14, §6.141; Waddams, above, n 11, p 137; *Smith v Hughes* (1871) LR 6 QB 597; *Customs and Excise Commissioners v Barclays Bank Plc* [2007] 1 AC 181; [2006] UKHL 28 at [5], [73], [86].
  - 23 See eg Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel*, Hart, Oxford, 1999; Swan, Adamski and Na, above, n 4, pp 125 ff.
  - 24 MacDougall above, n 5, s V.C.2.c. Beatson, Burrows and Cartwright, above, n 1, pp 123–4; Beale, above, n 5, §§4-094–4-095; Chen-Wishart, above, n 9, pp 148–150; *Ets Soules & Cie v International Trade Development Co Ltd* [1980] 1 Lloyd’s Rep 129; *Tankrederei Ahrenkeil GmbH v Frahuil SA (The Multibank Holsatia)* [1988] 2 Lloyd’s Rep 486 at 493; *Hughes v Metropolitan Railway* (1877) 2 App Cas 439; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 18; *James v Heim Galleries* (1980) 256 EG 819 at 825; *Société Italo-Belge pour le Commerce et l’Industrie v Palm & Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd’s Rep 695 at 701; *Youell v Bland Welch & Co Ltd (The Superhulls Cover Case) (No 2)* [1990] 2 Lloyd’s Rep 431 at 454; *Fortisbank SA v Trenwick International Ltd* [2005] Lloyd’s Rep IR 464; [2005] EWHC 339 at [13].
  - 25 Lon Fuller, ‘Consideration and Form’ (1941) 41 *Colum L Rev* at 799.
  - 26 See eg Beale, above, n 5, §4-094; Collins, above, n 3, p 80; MacDougall, above, n 5, s V.C.2.d-I; *Brikom Investments Ltd v Carr* [1979] QB 467 at 490.



if reliance in fact occurs, so it is necessary to show that the promisee actually did rely on the promise in changing its position.

Detrimental reliance by the promisee is often presented as the gist of the requirement currently being discussed.<sup>27</sup> But this should not be understood to mean that the promisee must suffer detriment from relying on the promise; on the contrary, often the promise *benefits* the promisee; and in any case, the detriment would be suffered from the promisor *breaking* the promise.<sup>28</sup> It is disputed whether the doctrine requires detrimental reliance even in the sense just clarified.<sup>29</sup> Undoubtedly, it will most often be present, and the unfairness of being induced to act and left to suffer a detriment from so doing is an important aspect of what the doctrine seeks to protect against. However, besides debate on whether detriment is even a requirement,<sup>30</sup> and confusion over the meaning of detrimental reliance in this context,<sup>31</sup> there are also difficulties of how to define detriment, and dispute about what counts as a detriment.<sup>32</sup> For all these reasons, I will adhere to authority which frames the element of the doctrine currently being discussed as requiring a change of position in reliance on the promise.<sup>33</sup>

6. It must be inequitable for the promisor to go back on the promise.<sup>34</sup>

It is this requirement of promissory estoppel that is the focus of this article. As will be discussed in the ensuing section, there are different views on what it entails. Some view it as merely expressing the equitable basis of the doctrine or encapsulating the elements discussed above. On another view, this element is a kind of overarching assessment which subsumes or second-guesses the discrete analysis of the prior elements. On still a different view, this condition represents another specific

27 See eg Beatson, Burrows and Cartwright, above, n 1, p 123; Collins, above, n 3, p 80; *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47 at [15]–[16].

28 See eg MacDougall, above, n 5, §§5.225; Chen-Wishart above, n 9, pp 148–9; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.

29 Beatson, Burrows and Cartwright, above, n 1, pp 123–4. The leading proponent of the view that detriment is unnecessary was Lord Denning: *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 213; Denning, above, n 7; *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 134. Feltham et al, above, n 11, §14.29. For a strongly argued view that detriment is essential, see MacDougall, above, n 5, §§5.223–5-227; s V.C.2-d.

30 See above, n 29 and accompanying text.

31 Text to n 28.

32 See eg *Commonwealth of Australia v Verwayen* (1990) 95 ALR 321 at 334; MacDougall, above, n 5, §§5.255–5.269; Chen-Wishart, above, n 9, pp 148–9; Jeannie Marie Paterson, Andrew Robertson and Arlen Duke, *Principles of Contract Law*, 5th ed, Thomson Reuters, Sydney, 2016, §§9.65–9.85.

33 Text to note 24.

34 *D & C Builders Ltd v Rees* [1966] 2 QB 617 at 625; *Hughes v Metropolitan Railway* (1877) 2 App Cas 439; Beale, above, n 5, §4–096; Beatson, Burrows and Cartwright, above, n 1, pp 122–3; Chen-Wishart, above, n 9, pp 150–1; Collins, above, n 3, p 75; MacDougall above, n 5, s V.C.2.e; *Maharaj v Chand* [1986] AC 898; *The Bunga Saga Lima* [2005] 2 Lloyd's Rep 1; [2005] EWHC 244 (Comm).

requirement, as with those above, which is essential and distinct from the prior requirements. In the latter event, its phrasing suggests it covers factors bearing on whether it would be inequitable in the circumstances for the promisor to break the promise, assuming all of the other conditions of the doctrine are met.

- 10 Concluding thus my summary of the elements of promissory estoppel, I move on to elaborating in more detail the issues surrounding the inequity element that is the subject of this article.

## Uncertainties Regarding the Inequity Element

- 11 As mentioned, this article aims to clarify questions surrounding promissory estoppel's inequity condition. Despite ambiguity (to be detailed in this section) about the role it plays in the doctrine, and inconsistencies in the role it plays in different jurisdictions (discussed in the following section), certain things are clear about the relevance of inequity to promissory estoppel.

- 12 Having its roots in the law of equity, promissory estoppel is a doctrine that strives to prevent unfairness that might otherwise result from the application of common law rules.<sup>35</sup> As with other types of estoppel, this unfairness is seen to lie in one party having induced the reliance of another on a statement made (in this case, a promise), and then acting inconsistently with its statement, to the other party's disadvantage. The unfairness is countered by holding the party which made the statement to its given word.<sup>36</sup> Many contracts scholars see promissory estoppel as an adjunct to the ordinary rules of contract — correcting for unfairness that would otherwise result if parties induce legal reliance by others on promises that will not be enforced because of the absence of consideration for them.<sup>37</sup>

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35 See eg *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 134; Cooke, above, n 21, ch 3; MacDougall above, n 5, s I-D; *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 410–13; *Olson v Synergistic Techs Bus Sys*, 628 NW2d 142 (Minn 2001). Here, the unfairness that would otherwise result springs from the contractual rule requiring consideration in order for a promise to be binding.

36 See eg MacDougall above, n 5, §1.51; Alexander Trukhtanov, *Contractual Estoppel*, 2nd ed, Informa Law, London, 2022, §1.05.

37 See eg Swan, Adamski and Na, above, n 4, §§2.209, 2.214; MacDougall, above, n 5, §1.13; Collins, above, n 3, pp 74, 76; Beatson, Burrows and Cartwright, above, n 1, p 119; Paterson, Robertson and Duke, above, n 32, §9.05; *Crabb v Arun District Council* [1976] Ch 179. This vocation fits with a view, by some, of equity more generally as a second-order aspect or layer of private law, qualifying the harshness of common law rules. See eg Henry E Smith, 'Equity as Second-Order Law: The Problem of Opportunism' Harvard Public Law Working Paper 15-13, 2015; Dennis Klimchuk, 'Aristotle at the Foundations of the Law of Equity' in Dennis Klimchuk, Irit Samet and Henry E Smith, eds, *Philosophical Foundations of the Law of Equity*, Oxford Academic, Oxford, 2020, pp 32–51; Ben Macfarland and Robert Stevens, 'What's Special about Equity? Rights about Rights' in Dennis Klimchuk, Irit Samet and Henry E Smith, eds, *Philosophical Foundations of the Law of Equity*, Oxford Academic, Oxford, 2020, pp 191–213.

As well, the equitable nature of the doctrine implies that it has a discretionary aspect to it.<sup>38</sup> This seems to be well established with respect to the *effect* of the doctrine — for example, what relief will be granted to the promisee, and to what extent the promisor will be estopped.<sup>39</sup> Whether there is also a substantial discretionary aspect to the *application* of the doctrine may depend on what view is taken on the question of what actual work the inequity element does, if any, in the doctrine's operation. 13

What work is done by the inequity element in the operation of the doctrine is a matter of some confusion. As Bruce MacDougall observes, 'the exact nature and role of equity in the doctrine is unclear'.<sup>40</sup> To date, this issue of the ambiguity of the role of the doctrine's inequity element has been insufficiently addressed. 14

Moreover, even when the ambiguity around the inequity element is referenced, the contest is typically framed as being between two duelling views. Sometimes the duel is described as between (a) a view that an *inequity element does play a role* and is not merely superfluous to the other elements of the doctrine, and (b) a view that it really plays no role — that the *inequity element is redundant* — merely encapsulating what the other elements do, or explaining the equitable basis of the doctrine.<sup>41</sup> In other instances, the duel is presented as between (c) a perspective that sees the inequity requirement as an *overall assessment of whether the doctrine should apply*, transcending or subsuming the doctrine's other conditions of application,<sup>42</sup> and (d) a view that the *inequity element refers to a specific requirement* that calls for an enquiry distinct from those covered by the other conditions of application of the doctrine.<sup>43</sup> 15

Whilst these are the most logical and frequent ways in which a supposed dichotomy of views is presented, sometimes the two oppositions are partially merged. For instance, the view that the inequity element does play 16

38 J W Carter, *Cases and Materials on Contract Law in Australia*, 7th ed, Lexis Nexis, Sydney, 2018, pp 7–17; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553 at [61] (reversed without deciding the point [2019] AC 119; [2018] UKSC 24).

39 See eg Barnes, above, n 14, §6.78; MacDougall, above, n 5, §5.270; American Law Institute, above, n 16, §90(1) ('The remedy granted for breach may be limited as justice requires'); *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 134.

40 MacDougall, above, n 5, §5.270.

41 See eg above, n 40; Paterson, Robertson and Duke, above, n 32, §9.95.

42 Feltham et al, above, n 11, §14.35; Paterson, Robertson and Duke, above, n 32, §9.95; Cooke, above, n 21, p 86; MacDougall, above, n 5, §5.276. See also *Taylor Fashions Ltd v Liverpool Victoria Friendly Society* [1982] QB 133; *B & A Bobcat and Excavating Ltd v Sangha* [1999] BCJ No 160 (per Newbury JA); *Charles v Insurance Corp of British Columbia* (1989) 34 BCLR (2d) 331 (per Lambert JA); *M (N) v A (AT)* [2003] 183 BCAC 46; [2003] BCCA 297 (per Huddart J); *Litwin v Pan* (1988) 52 DLR (4th) 459 at 468 and 470; *Revell v O'Brian Financial Corp* (1991) 86 DLR (4th) 155; *Westwood Plateau Partnership v WSP Construction Ltd* (1997) 37 BCLR (3d) 82; cf *Cominco Ltd v Canadian Pacific Ltd* (1988) 24 BCLR (2d) 124.

43 See eg Chen-Wishart, above, n 9, §3.2.1.3; Beatson, Burrows and Cartwright, above, n 1, pp 122–3. MacDougall, above, n 5, §§5.270, 5.272, 5.278; Paterson, Robertson and Duke, above, n 32, §9.95; *D & C Builders Ltd v Rees* [1966] 2 QB 617 (CA).

a role (view a) may be combined with an assumption that this role is to provide an overall assessment (view c), and together this position contrasted with the stance that the inequity element refers to a specific requirement (view d).<sup>44</sup> Or the outlook that the inequity element represents an overall assessment (view c) may be confused with the position that the inequity condition is redundant (b) and this shared view of the inequity criterion as substantially overlapping with the other elements juxtaposed with the view that the inequity element represents a distinct and specific requirement (view d).<sup>45</sup>

17 Properly understood, the positions that the inequity element calls for an overall assessment (view c) and that it imposes a specific requirement (view d) are both subviews of a conviction that the inequity element does play a role (view a) in determining whether the doctrine applies. Accordingly, to avoid addressing the dispersion of views via an unwieldy two-step debate, it is better to see the contest regarding the role of the inequity element as having three possible competing answers: that it has no role as it is redundant (view b); that, if anything, it is the doctrine's other elements that are redundant, as the inequity element provides for an overall assessment that transcends or subsumes them (view c); and that the inequity element contemplates a specific requirement whose enquiry is distinct from those covered by the doctrine's other requirements (view d).

18 Next I show that the inequity element is a widely recognised condition of promissory estoppel in the common law world, but reveal a divergence in the role the element typically plays in different jurisdictions.

## Wide Recognition of Inequity Element But Divergence in Role

19 In most jurisdictions, the prevailing view is that the inequity element plays an active role in determining the doctrine's applicability, and is not merely an underlying principle which the doctrine gives effect to.

20 In England, for instance, it is clear that inequity is not just a concern animating promissory estoppel; it is a specifically required element of the doctrine.<sup>46</sup> As *Chitty* explains, 'even if the [other] requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not

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44 See eg Paterson, Robertson and Duke, above, n 32, §9.95 ('If [it] is seen as a separate requirement, then it clearly involves a broad inquiry and a judgment that takes into account all of the circumstances'); see also MacDougall, above, n 5, §5.276 v 5.278.

45 See eg MacDougall, above, n 5, §§5.283–5.285.

46 Beale, above, n 5, §4–096; Beatson, Burrows and Cartwright, above, n 1, p 122; *Hughes v Metropolitan Railway* (1877) 2 App Cas 439; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695; *Maharaj v Chand* [1986] AC 898; *The Bunga Saga Lima* [2005] 2 Lloyd's Rep 1; [2005] EWHC 244 (Comm).

“inequitable” for the first party to go back on his promise.<sup>47</sup> The required change of position,<sup>48</sup> which would be unprotected if the promisor were allowed to resile from the promise,<sup>49</sup> is the starting point of the inequity requirement’s enquiry into broader circumstances that could reinforce or counteract the significance of this. Hence, as Mindy Chen-Wishart emphasises, ‘inequity is an *independent* requirement ... and considers other factors’.<sup>50</sup> To date, however, it has remained unclear what set of factors this enquiry encompasses, and how they are to be analysed. As Hugh Beale et al summarise, ‘This requirement cannot be defined with anything approaching precision’.<sup>51</sup>

Singapore follows English law in having as a specific requirement that ‘the promisee must show that it is inequitable for the promisor to resile from his promise’.<sup>52</sup> Irish law also contains as a distinct requirement ‘some element of unfairness and unconscionability’.<sup>53</sup> Similar confusion surrounds the details of this aspect of promissory estoppel in those jurisdictions.

In the United States, promissory estoppel is encapsulated by §90(1) of the *Restatement (2d) of Contracts*, which states: ‘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 ...’<sup>54</sup> The inequity (‘injustice’) element is thus, as in England, a specific requirement that must be established in order for estoppel to apply.<sup>55</sup> However, in the US also, a precise picture of the inequity/injustice element’s role is seen to be wanting.<sup>56</sup> As Farnsworth summarises, ‘This vague qualification has been discussed in relatively few cases’.<sup>57</sup>

Inequity is also pertinent under Australian law. But the situation is more complicated. To begin with, there are suggestions that promissory estoppel has been combined there with other types of estoppel; the better view may be that promissory estoppel is distinct; but the question remains ‘as yet

47 Beale, above, n 5, § 4–087; *Société Italo-Belge pour le Commerce et l’Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd’s Rep 695; *BP Exploration (Libya) v Hunt (No 2)* [1979] 1 WLR 783 at 812; *Nippon Yusen Kaisha v Pacifica Navegacion SA (The Ion)* [1980] 2 Lloyd’s Rep 245 at 250.

48 Element 5 from above section on ‘Elements of the Doctrine’.

49 Beale, above, n 5, §4–096; Chen-Wishart, above, n 9, §3.2.1.3; *Maharaj v Chand* [1986] AC 898; *The Bunga Saga Lima* [2005] 2 Lloyd’s Rep 1; [2005] EWHC 244 (Comm).

50 Chen-Wishart, above, n 9, §3.2.1.3 (emphasis in original).

51 Beale, above, n 5, §4–096.

52 *Oriental Investments (SH) Pte Ltd v Catalla Investments Pte Ltd* [2013] 1 SLR 1182; [2012] SGHC 245 [83].

53 *The Barge Inn Ltd v Quinn Hospitality Ireland Operations 3 Ltd* [2013] IEHC 387. Robert Clark, *Contract Law in Ireland*, 8th ed, Round Hall, Dublin, 2016, §2–68.

54 American Law Institute, above, n 16.

55 E Allan Farnsworth, *Contracts*, 4th ed, Aspen Publishing, Aspen, 2004, §2.19.

56 Above, n 55, p 96.

57 Above, n 55.

unresolved'.<sup>58</sup> Second, there is some debate as to whether the inequity aspect (referred to as 'unconscionability' in Australian law)<sup>59</sup> is strictly a principle which underlies promissory estoppel, or is an ingredient of the doctrine.<sup>60</sup> *Anaconda Nickel* speaks strongly for the former view, but is not a decision of the High Court of Australia, and seems not to be the prevailing view.<sup>61</sup> As to what sort of enquiry the inequity element calls for, the Australian position contrasts with the jurisdictions above. Cases like *Waltons Stores (Interstate) Ltd v Maher* and *Commonwealth of Australia v Verwayen* show that it does not investigate an independent and specific set of factors (per view d in the preceding section), but comprises an overall assessment of whether it would be inequitable/unconscionable for the promisor to go back on the promise (per view c in the preceding section).<sup>62</sup> As Paterson et al write of this element in Australia, 'it clearly involves a broad enquiry and a judgment that takes into account all of the circumstances of the case'.<sup>63</sup> This may reflect a placing of emphasis on the fact, as John Carter notes, that the doctrine is seen as offering 'discretionary equitable relief'.<sup>64</sup>

24 New Zealand law seems, broadly speaking, to follow the approach of Australian law.<sup>65</sup>

25 Thus, whilst an inequity condition is widely recognised across all these jurisdictions, its role diverges among them as described.

26 An exception is Canada, which does not conform to any of the positions above. There, not only does inequity not play an active role in applying the doctrine, it is not even mentioned as one of the doctrine's required elements.<sup>66</sup> A series of Canadian authorities over the past half-century do

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58 *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1; [2016] HCA 26 at [37]; see also *Giumelli v Giumelli* (1999) 196 CLR 101; [1999] HCA 10 at [7]. On suggestions that the estoppels have been unified, see eg *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 411 (per Mason CJ), 428–9 (Brennan J), 440 (Deane J); *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 at 506; [1993] HCA 194. On it being the better view that promissory estoppel is a distinct doctrine, see eg J W Carter, *Contract Law in Australia*, 8th ed, JW Carter Publishing, Sydney, 2023, para 7-05. See also *DHJPM Pty Ltd v Blackthorn Resources Ltd* (formerly called *Aim Resources Ltd*) (2011) 83 NSWLR 728; [2011] NSWCA 348; *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105.

59 Paterson, Robertson and Duke, above, n 32, §9.95 ('It is commonly said that equitable estoppel is essentially concerned with the prevention of unconscionable conduct'); and regarding the unconscionability element, §9.40 ('it must be unconscionable in the circumstances for the representor to depart from the assumption').

60 Above, n 59, §9.95.

61 *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd* [2004] VSCA 167; 50 ACSR 679.

62 See n 58.

63 Paterson, Robertson and Duke, above, n 32, §9.95.

64 Carter, above, n 38, §7-17 (emphasis added).

65 Jeremy Finn and others, *Burrows, Finn and Todd on the Law of Contract in New Zealand*, 6th ed, LexisNexis NZ Limited, Wellington, 2018, pp 141–2; *Gillies v Keogh* [1989]2 NZLR 327 at 331; *Elkington v Ruruku* (2007) 9 NZCPR 97; [2006] NZHC 1552 at [46].

66 Marcus Moore, 'The Puzzling Omission of Promissory Estoppel's Inequity Condition in Canada' [2023] *Allard Law Working Paper* 24-1.



not include this inequity requirement among the conditions of promissory estoppel in Canada.<sup>67</sup> This creates problems where, for instance, it is the inequity requirement that an estoppel claim should founder on. This is shown by the remarkable difficulties encountered by the Canadian supreme court in the recent case *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada*, as I summarise in the next part of the article, and which serves to underline that the inequity requirement — despite the mysteries surrounding it — is an essential element of promissory estoppel.<sup>68</sup>

## The Need for an Inequity Requirement as a Distinct Condition of Promissory Estoppel

### General Argument

In my view, promissory estoppel does have a need for an inequity requirement. Without it, the doctrine lacks what is an essential element. 27  
If this is so, the version of promissory estoppel described and applied in the authorities in Canada, where the inequity condition is not included in the doctrine's requirements, will be critically flawed. In the next section, I will show — through the notable problems encountered by the Canadian Supreme Court in its recent decision in *Trial Lawyers* — that this is indeed so.<sup>69</sup> Without the inequity requirement, it is glaringly apparent that something essential is missing, which the other elements of the doctrine — even stretched and strained beyond their proper limits — cannot make up for.<sup>70</sup>

It remains to be answered what *role* the inequity requirement properly 28  
plays in promissory estoppel. Three common positions on this point were summarised earlier: that this element recaps the doctrine's other requirements or what underlies them, without playing any functional role (that is, it is redundant);<sup>71</sup> that this element integrates or transcends the other elements as an overall global assessment of whether the doctrine should apply in a given case;<sup>72</sup> or that this element represents a specific requirement that calls for an enquiry distinct from those covered by the doctrine's other requirements.<sup>73</sup>

67 *Canadian Superior Oil v Hambly* [1970] SCR 932; *Maracle v Travellers Indemnity Co of Canada* (1991) 2 SCR 50; *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47.

68 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47.

69 See the section 'Recent Illustration of Necessity of Inequity Requirement: *Trial Lawyers v RSA*' below.

70 Discussed in the section 'Recent Illustration of Necessity of Inequity Requirement: *Trial Lawyers v RSA*' below.

71 View b from above section on 'Uncertainties Regarding the Inequity Element'.

72 View c from above section on 'Uncertainties Regarding the Inequity Element'.

73 View d from above section on 'Uncertainties Regarding the Inequity Element'.

29 As I have said that the inequity element plays a necessary role in promissory estoppel, in my view the first of those three possibilities must be ruled out. The difficulties that the Supreme Court of Canada experienced in striving to justify its rejection of the estoppel claim in *Trial Lawyers* (to be discussed in the next section) again serve as a very useful illustration of why the inequity requirement is not redundant.

30 As for the second of the above possibilities of the appropriate role of the inequity requirement in promissory estoppel, I would reject that position also. The following statement, authored by MacDougall and judicially approved, discussing proprietary estoppel, could equally be said of the equivalent view of promissory estoppel at issue here, namely of inequity serving as the basis for an open-ended assessment of whether promissory estoppel applies in a given case:<sup>74</sup>

a structured formulation [of elements] for establishing the need for proprietary estoppel serves the purpose of providing a useful and reasonably clear-cut method for predicting the estoppel. The replacement of such a structure by a single factor of 'unfairness' or 'unconscionability' leads ... [to] too open-ended and amorphous a doctrine that only encourages litigation, particularly given the already very flexible and open-ended nature of the effect of the estoppel.

31 The proper role of promissory estoppel's inequity requirement, I submit, is the third possibility above: that it constitutes a specific condition of application of the doctrine, calling for an enquiry that is distinct from the inquiries covered by each of the other conditions of application. Without this condition, there is a risk of estoppel being used to work injustice — as would have been the case in *D & C Builders*, for example — were it not for recognition of this requirement.<sup>75</sup> Also, without this condition there is a risk of other requirements of the doctrine being deformed in order for them to provide the necessary basis — as in *Trial Lawyers* — for avoiding the doctrine's application where otherwise it would work an injustice.<sup>76</sup>

32 I will elaborate later what factors, in my estimation, the inequity requirement encompasses. For now, I would just summarise what I see as its role in promissory estoppel by reference to the formulation of this requirement as imposing the condition that it must be inequitable for the promisor to go back on the promise.<sup>77</sup> This typical description of the requirement begs the question: why might it *not* be inequitable for a promisor to go back on a promise, after having already induced another party to change its legal position in reliance on that promise?

33 The primary answer, it seems to me, has to be the possibility of there being countervailing equitable considerations that outweigh the inequity of the promisor reneging on its promise after inducing the promisee to legally

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74 MacDougall, above, n 5, \$6.55; quoted in *Cowper-Smith v Morgan* [2017] 2 SCR 4; [2017] SCC 61 para 19.

75 *D & C Builders Ltd v Rees* [1966] 2 QB 617 (CA).

76 To be discussed in the section 'Recent Illustration of Necessity of Inequity Requirement: *Trial Lawyers v RSA*' below.

77 See section above on 'Elements of the Doctrine' condition (6).



rely upon it. This was the case, for example, with the pressure and deception that affected the promise in *D & C Builders*. But differing circumstances would give rise to other sorts of countervailing equitable considerations, as I will explore later.

A secondary part of the answer, I suggest, is that the on/off character of the other conditions of application of promissory estoppel would not fit, without the additional inequity element, the open-ended and flexible nature of equitable doctrines. The inequity element is needed as a means of taking account of nuance that may be lost in the series of on-or-off answers to the prior conditions. 'So for example,' MacDougall notes, 'if the detriment is minimal, there is no need for the estoppel.'<sup>78</sup> Estoppel might similarly be unwarranted in a case where the promisee's reliance was limited,<sup>79</sup> or where the promise was swiftly retracted so that it seems that the promisor's intent that the promise could be relied upon was not a very settled intention.<sup>80</sup> The inequity requirement's capacity to incorporate nuance into deciding the applicability of the doctrine will be discussed later.

But first, as promised, I examine the problems encountered by the Canadian Supreme Court in the recent *Trial Lawyers* case, in order to illustrate why an inequity requirement is essential to promissory estoppel, and is not merely redundant of the doctrine's other conditions.

### Recent Illustration of Necessity of Inequity Requirement: *Trial Lawyers v RSA*

*Trial Lawyers* dealt with whether an insurer should be estopped from denying coverage after previously promising to cover a claim regarding injuries from a motorcycle accident. The insurer's legal rights allowed it to take an off-coverage position if there was alcohol consumption by the insured.<sup>81</sup> Unaware that alcohol was consumed, the insurer promised to cover the claim. After three years (including a year of litigation), the insurer learned in discovery that the insured (who died in the accident) and the claimant (a fellow motorcyclist involved in proceedings stemming from the accident) together consumed alcohol prior to the accident.<sup>82</sup> The claimant had not mentioned this in interviews with the adjuster and police.<sup>83</sup> On learning this, the insurer reasserted its legal right to deny coverage based on the alcohol violation.<sup>84</sup> The claimant sought a declaration that the insurer

78 MacDougall, above, n 5, \$5.289.

79 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553 (reversed on other grounds [2019] AC 119; [2018] UKSC 24); Cooke, above, n 21, p 87.

80 *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.

81 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47 at [1].

82 (2021) 163 OR (3d) 398; [2021] SCC 47 at [8]. The claimant was both injured in the accident and partly responsible for it: at [1], [11].

83 (2021) 163 OR (3d) 398; [2021] SCC 47 at [6].

84 (2021) 163 OR (3d) 398; [2021] SCC 47 at [9].

was estopped from reneging on its promise to provide coverage.<sup>85</sup> The court concluded that the insurer was not estopped. The problem was how to get to that conclusion without an inequity requirement among the conditions of promissory estoppel in Canada?

37 The only option was to find a deficit in satisfying some other element of the doctrine, accepted in Canada. Straining to do so, the court distorted the other elements of the doctrine in problematic ways.

38 One of these was the requirement of intention that the promise can be legally relied upon.<sup>86</sup> The majority opinion, concurred in by all but one justice, interpreted the intention element as subjective, and requiring the promisor's knowledge of facts affecting its promise.<sup>87</sup> On that basis it said 'It is this simple: RSA lacked knowledge of the facts demonstrating [the] breach. This alone is dispositive'.<sup>88</sup> This conflicts with the wide consensus that the intention element of promissory estoppel is objective, not subjective.<sup>89</sup> Further, it opens a can of worms for the doctrine, because as Karakatsanis J noted in her separate opinion, 'subjective intent is unknowable to anyone other than the promisor'.<sup>90</sup> Having to prove subjective intent would in many cases be impossible, and hence would marginalise promissory estoppel, and leave parties who were reasonably induced to rely on promised concessions unprotected. Moreover, as the discussion of knowledge of underlying facts was not limited to cases of mistake, if a promisor ignored *one* fact (X), it could argue that its promise was on the assumption  $\neg X$ , and therefore the intention element is not met. Proof would be needed of the promisor's knowledge of every fact which may have affected the giving of the promise. This burden would further eviscerate the capacity of promissory estoppel to protect reasonable reliance induced by promises.

39 The court also strained to find a problem with meeting the doctrine's requirement of a [pre-existing] legal relationship.<sup>91</sup> The majority were 'far from persuaded' that the requisite pre-existing legal relationship existed.<sup>92</sup> They pointed to how the insurer ceased defending the claim before the third-party claimant obtained judgment against the insured (which gave the third party a direct claim against the insurer).<sup>93</sup> But the pre-existing legal relationship was not the turning of a derivative claim into a direct

85 (2021) 163 OR (3d) 398; [2021] SCC 47 at [12].

86 See above section 'Elements of the Doctrine', element (4); (2021) 163 OR (3d) 398; [2021] SCC 47 at [18]–[39].

87 (2021) 163 OR (3d) 398; [2021] SCC 47 at [21], [23] (emphasis removed). On the point that knowledge is not required, see Barnes, above, n 14, §§6.147–6.148.

88 (2021) 163 OR (3d) 398; [2021] SCC 47 at [23].

89 See n 20 and accompanying text. See also Barnes, above, n 14; McCamus, above, n 8, p 313; MacDougall, above, n 5, §5.195; J Manwaring, 'Promissory Estoppel in the Supreme Court of Canada' (1987) 10 *Dalhousie LJ* 43 at 64.

90 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47 at [56].

91 See above section 'Elements of the Doctrine', element (2).

92 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47 at [43].

93 (2021) 163 OR (3d) 398; [2021] SCC 47 at [42].

claim, and the insurer ceasing to defend the claim is just the insurer resiling from its promise. The pre-existing relationship is the insurance contract, which covers liability to third parties.<sup>94</sup> Thus, the court conflated estoppel's concepts of pre-existing relationship and promise. And it encouraged insurers to avoid third-party liability by abandoning defence of third-party claims. This creates perverse incentives — especially in motor vehicle insurance, where the largest coverage often is third-party liability.

The court further questioned whether promissory estoppel's change of position requirement was met.<sup>95</sup> This was said to require detrimental reliance, which was construed in the narrow sense, summarised by *Chitty* as that 'the promisee must have done something that he was not previously bound to do and as a result have suffered loss: for example, by incurring some expenditure in reliance on the promise'.<sup>96</sup> But as *Chitty* goes on to explain, promissory estoppel does not require detriment in this narrow sense.<sup>97</sup> As discussed earlier, normally in promissory estoppel the promisee *benefits* from relying on the promise, but having changed its position in reliance on it, would suffer detriment if the promise is then *retracted*.<sup>98</sup> Thus, the court sowed confusion regarding the change of position element, which may cause problems in future cases.

Meanwhile Karakatsanis J strained to locate a problem in the condition that a promise be unequivocal.<sup>99</sup> Her argument was that the promise was not unequivocal as it did not specifically concede the ability to deny coverage if there was alcohol consumption.<sup>100</sup> This means that a *general* promise (here, to cover a claim) will not suffice as unequivocal; the promise must *specifically* concede every ground (in this case, the insurance policy's exclusions) that the promisor had to not have to make the promise. In my view, this represents an ill-advised expansion of what the unequivocal condition properly calls for.

If the inequity requirement of promissory estoppel were not omitted in Canada, none of these distortions of the doctrine's other elements would have been needed to say that estoppel does not apply on the facts of *Trial Lawyers*. It would have been an easy case to dispose of on the basis that the inequity requirement was not met. The reasoning would simply be that the insurer's promise to cover the claim was induced by the promisee's

94 *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd* (1999) 3 SCR 108.

95 See above section 'Elements of the Doctrine', element (5).

96 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47 at [51]. Beale, above, n 5, §4–095 (citations omitted).

97 Beale, above, n 5, §4–095; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695; *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189 at 213; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553, (overruled on other grounds).

98 Note 28 and accompanying text.

99 See above section 'Elements of the Doctrine', element (1).

100 *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47 at [77].

concealment of the alcohol violation, which obviously would affect the insurer's position, and which the claimant was bound to disclose if equity would protect its reliance on the promise. In short, it was not inequitable for the promisor to go back on the promise in *Trial Lawyers*, as it was induced by concealment of critical information by the promisee.

43 The court was alive to this issue of concealment of key information. The majority was bothered by the promisee's failure 'to disclose material facts, particularly in contexts such as insurance' where exist 'reciprocal duties of utmost good faith'.<sup>101</sup> It saw 'no justice' in the promisee's estoppel claim.<sup>102</sup> But with no inequity requirement in Canada, the majority's argument was that the promisee's concealment made it unfair to say that the insurer should have known of the alcohol violation, which meant that the insurer lacked the underlying knowledge to satisfy estoppel's intention element according to the majority's dubious interpretation of the intention element as requiring knowledge.<sup>103</sup> Meanwhile, Karakatsanis J argued that the concealment deprived the insurer of reasonable notice it needed if it were to concede its ability to assert an alcohol violation, and so its promise to cover the claim was not unequivocal according to her strained interpretation of the unequivocal promise requirement, as explained above. Thus, although all of the justices recognised the unfairness of the promisee's concealment, they had to fold this into circuitous, morally disoriented, doctrinally problematic accounts of why estoppel did not apply.

44 Were the inequity requirement not omitted from promissory estoppel in Canada, it would clearly have provided for a much more straightforward, morally resonant and doctrinally sound judgment. This serves as a recent illustration of why the inequity requirement is an essential element of promissory estoppel.

45 I now turn to answering the longstanding question of what the inequity requirement specifically covers, and what analytical process should be followed in applying it.

## What the Inequity Requirement Specifically Covers and How It Is to Be Analysed

46 Earlier (in the 'General Argument' section), I presented an initial answer to what role is properly played by promissory estoppel's requirement that it be inequitable for the promisor to go back on the promise. That initial answer provides a basis from which it is possible to work out what sorts of scenarios this element of the doctrine should be seen as occupied with. I pursue that objective in this part of the paper.

47 The first portion of my initial answer was that the inequity requirement serves to take account of countervailing equitable considerations that might outweigh the unfairness of the promisor breaking its promise after

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101 (2021) 163 OR (3d) 398; [2021] SCC 47 at [36]–[37] (references omitted).

102 (2021) 163 OR (3d) 398; [2021] SCC 47 (references omitted).

103 Text to nn 87–90.

having induced the promisee to change its legal position in reliance on that promise. The unfair pressure in *D & C Builders* and the unfair concealment in *Trial Lawyers* are two examples of such countervailing equitable considerations. In the section on 'Countervailing Equitable Considerations' below I will examine a full range of equitable considerations that could potentially weigh against holding the promisor to the promise given.

The other portion of the initial answer was that the inequity requirement looks at details that are masked by the on-or-off character of the other conditions of the doctrine and, when taken account of, may weigh against estopping the promisor from asserting its pre-existing legal rights. Previously, I referenced MacDougall's example of where the detriment is minimal; but in the section on 'Nuance in the Doctrine's Other Criteria' below I will consider examples of other potential situations in which details overlooked by the on/off character of the other conditions of the doctrine make for a more nuanced picture than a checklisting of those conditions would suggest. Given the nature of promissory estoppel as an equitable doctrine, it is only proper that this nuance be fully weighed. The doctrine's inequity requirement provides the openness and measure needed to do this.

Together, these discussions should provide a fairly full picture of what scenarios promissory estoppel's inequity requirement should properly be understood to address. This will help fill in a picture hinted at in some prominent cases, but overall still largely obscured, as confirmed by the appraisal of Burrows, Beatson and Cartwright that we still have little guidance on what factors will make it 'not inequitable' to break a promise that otherwise satisfies the (other) conditions for promissory estoppel.<sup>104</sup>

## Countervailing Equitable Considerations

This section examines how promissory estoppel's inequity requirement enables the doctrine to consider equitable considerations that may weigh against the unfairness of allowing a promise to be broken that induced the promisee to rely on it and change its position.

In contemplating the range of possible such considerations, I find it useful — to an extent — to draw analogy to some of the general sorts of reasons that a party may not be held to a *contractual* promise. There are, of course, limits to this analogy. Nonetheless, in my view it provides a useful starting point.

### Vitiating of intent

A first category of considerations that should weigh against it being equitable to hold the promisor to the promise is if the promise was afflicted to a substantial extent by the sorts of factors that are sometimes described in the contractual context as vitiating intent. This corresponds to McCamus's proposition that the promise must have been made 'voluntarily'.<sup>105</sup> The intimidation that helped procure the promise in *D & C Builders* has, for

<sup>104</sup> Above, n 1.

<sup>105</sup> McCamus, above, n 8, p 312 ff.

example, been assimilated to duress in a contractual setting. Carter, for instance, describes it in duress-like terms as a case of ‘undue pressure... applied to the creditor in exploitation of the creditor’s desperate financial position’.<sup>106</sup> And Burrows, Beatson and Cartwright suggest that the development of promissory estoppel’s inequity element may be informed by duress.<sup>107</sup> More broadly, McCamus notes that ‘contracts entered into under duress, undue influence, or in circumstances of unconscionability are unenforceable’; and he submits that there is ‘no compelling basis for fashioning a different threshold test for determining the voluntariness of undertakings in the ... context’ of promissory estoppel.<sup>108</sup> I agree. If a concession regarding a contractual right was promised, but the promise resulted from undue influence or exploitation of the sorts of special disability recognised by the doctrine of unconscionability,<sup>109</sup> these are surely grounds not to hold the promisor to the promise.

53 Further, in the earlier discussion of the *Trial Lawyers* case, I argued that the court struggled in reasoning why the promisor should not be estopped because the proper basis for this conclusion — were estoppel’s inequity requirement recognised in Canada — is that the promise was procured in part by the promisee’s unfair concealment of information from the promisor.<sup>110</sup> That principle should also be capable of generalisation, drawing on the informational vices of consent in the contractual sphere. For example, Burrows, Beatson and Cartwright suggest that ‘Misrepresentation by the promisee will also presumably rule out the application of promissory estoppel’.<sup>111</sup> A promise materially affected by any of what in contract law would be considered mistake, misrepresentation or the breach of a legal duty to disclose information should be grounds for concluding that it may not be inequitable in such case for the promisor to resile from the

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106 Carter, above, n 38, pp 7–17. Beale, above, n 5, expressly refers to it as a case of economic duress: see § 4-096 at n 536; *D & C Builders Ltd v Rees* [1966] 2 QB 617 (CA); *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd’s Rep 128; [2004] EWHC 2676 (Comm).

107 Beatson, Burrows and Cartwright, above, n 1, p 123; *D & C Builders Ltd v Rees* [1966] 2 QB 617; *Huyton SA v Peter Cremer GmbH & Co* [1998] EWHC 1208 (Comm).

108 McCamus, above, n 8, §8.C.3.

109 *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 at 491; Stephen Smith, *Contract Theory*, OUP, Oxford, 2004, pp 343–4; Peel, above, n 20, p 524; Marcus Moore, ‘Why Does Lord Denning’s Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability’ (2018) 134 *LQR* 257 at 273–6; Rick Bigwood, ‘Antipodean Reflections on the Canadian Unconscionability Doctrine’ (2005) 84 *Can B Rev* 171 at 182–7.

110 See above section ‘Recent Illustration of Necessity of Inequity Requirement: *Trial Lawyers v RSA*’.

111 Beatson, Burrows and Cartwright, above, n 1, p 123; see also Cooke, above, n 21, pp 112, 113.



promise.<sup>112</sup> Indeed, because promissory estoppel is an equitable doctrine, these grounds should be capable of extending to where, although there may not strictly speaking be a legal duty to disclose, it could be said that there is an equitable duty to disclose certain information if the promisee hopes to later rely on a promise to which that information was materially relevant, as with the alcohol policy violation in *Trial Lawyers*.<sup>113</sup> MacDougall agrees that it is an issue if there is 'a failure by the promisee to disclose material facts to the promisor' and even that 'such a failure to disclose might be "negligent as [well as] deceitful"'.<sup>114</sup>

If a party who was not under an incapacity at the time of the pre-existing contract subsequently becomes incapable at the time of promising a concession in regard to it, which becomes the subject of an estoppel claim, this would also be an appropriate basis for finding it not inequitable to allow the promisor to resile.

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## Frustration

In contracts, another reason a party may not be held to a promise is if the promise has been frustrated. Frustration occurs where a supervening event radically alters what the parties contemplated, rendering it unjust to hold a party to what it had promised.<sup>115</sup> The contract, not just the promise, is frustrated because contracts involve reciprocal obligations. With respect to promises in estoppel claims, some writers see it as justified for promisors to go back on their promises in what appear to be similar sorts of situations. Chen-Wishart, for instance, lists 'events subsequent to the making of the promise' as a factor which may be taken into account under estoppel's inequity requirement.<sup>116</sup> She presents the following hypothetical as an example:<sup>117</sup>

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if A excuses B from part of her obligations for a particular reason (eg because of labour shortages or price rises of raw materials), it may not be inequitable for A to renege if a subsequent change of circumstances eliminates the reason for the promise ...

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<sup>112</sup> Barnes, above, n 14, §6.195; *D & C Builders Ltd v Rees* [1966] 2 QB 617 (CA) may be an example of misrepresentation. The inequity in that case is often described as including not only intimidation as discussed earlier, but also deception in the claimant falsely stating they were unable to pay the bill (at 622). Denning MR added: 'This case is of some consequence: for it is a daily occurrence that a merchant or tradesman, who is owed a sum of money, is asked to take less. The debtor says he is in difficulties. He offers a lesser sum in settlement, cash down. He says he cannot pay more...' (at 623) (emphasis added). I read Lord Denning as using the word *says* here to refer to cases where it is not a fact, but an unsubstantiated claim by the debtor, that he cannot pay more due to being in difficulties.

<sup>113</sup> *Trial Lawyers Association of British Columbia v Royal & Sun Alliance Insurance Co of Canada* (2021) 163 OR (3d) 398; [2021] SCC 47 at [37] ('equity... may also entail an obligation to disclose material facts, particularly in contexts such as insurance').

<sup>114</sup> MacDougall, above, n 5, §5.293 (references omitted); see also Cooke, above, n 21, p 112.

<sup>115</sup> Beale, above, n 5, §23-013; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 700 (per Lord Simon).

<sup>116</sup> Chen-Wishart, above, n 9, §3.2.1.3.

<sup>117</sup> Above, n 9.

56 In my view, frustration is a proper consideration for promissory estoppel's inequity requirement to investigate in determining whether it is equitable, notwithstanding the promisee's change of position in reliance on the promise, for the law to allow the promisor to break its promise. For example, one of the circumstances in which frustration applies to contracts is where the supervening event has made the performance of a promise impossible 'not... due to the act or election of the party seeking to rely on' that promisee's frustration.<sup>118</sup> There is no evident reason why promises which were not made for consideration should not also be capable of relief in circumstances where their performance has become impossible through no fault of the promisor.

57 Besides impossibility, another of the standard circumstances in which frustration may apply to a contractual promise is where its purpose has been frustrated, as for instance in the 'coronation cases'.<sup>119</sup> In the promissory estoppel realm, I suggest that the well-known case *Williams v Stern* may be explained as a case of frustration of purpose.<sup>120</sup> Furniture had been pledged as security for a loan. When a certain one of the repayment instalments was due, the borrower asked for extra time as he was occupied with jury duty. The lender promised not to seize the furniture for a week, but only three days later seized the furniture upon learning that the landlord of the debtor was threatening to distrain the furniture for rent arrears. There was no estoppel. Brett LJ said 'under these circumstances I do not blame the [lender] for changing his mind'.<sup>121</sup> In this case, both the promisor and the promisee would have understood the purpose of the promise as merely to accommodate the borrower with regard to the precise timing of the repayment because he was occupied with jury duty, without altering the parties' pre-existing contractual risk allocation with respect to the risk of non-repayment, on one hand, and the risk of the furniture being seized in the event of a default, on the other. But the purpose of accommodating the borrower with regard to the precise timing of repayment whilst he was occupied with jury duty, if this could be done without altering the contractual balancing of risks, was then frustrated by the landlord's subsequent threat to distrain the furniture, which clearly did alter the balance of risks between lender and borrower. This made it not inequitable for the lender to resile from its promise not to seize the furniture for a week.

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118 *Hirji Mulji v Cheong Yue SS Co Ltd* [1926] AC 497 at 510; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 530; *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 274; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 at 729.

119 McCamus, above, n 8, §14.C.2.; For the coronation cases, see eg *Krell v Henry* [1903] 2 KB 740; *Chandler v Webster* [1904] KB 495.

120 *Williams v Stern* (1879) 5 QBD 409. This case is cited as an instance where there was no estoppel due to the inequity requirement: see eg Beale, above, n 5, §4-096; Chen-Wishart, above, n 9, §3.2.1.3.

121 *Williams v Stern* (1879) 5 QBD 409 at 412.



## Public policy

Another reason a party may not be held to a contractual promise is if this would be contrary to public policy.<sup>122</sup> Generally speaking, such a concern should also apply to concessions promised in relation to contractual obligations, even if not made for consideration. The law's withholding of enforcement for promises whose enforcement would be contrary to public policy is inevitably an amorphous category whose boundaries are uncertain. However, an analogy to contract law again provides possible guidance: in the contractual sphere, courts may refuse to enforce a contractual promise to commit a crime, or to pay a potential witness in such a way as to undermine the administration of justice, or to constrain a power of the government to make decisions in the public interest.<sup>123</sup> There is no convincing reason why similar non-contractual promises, if they are the subject of a promissory estoppel claim, should not also be accepted as reasons why the law might not hold a promisor to its promise despite the promisee's change of position in reliance on it. For example, suppose that an unskilled labourer already working for minimum wage was worried about losing their job, and promised to accept a lower wage. The employee should not be estopped from going back on that promise.

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Looking at actual decided cases in which courts pointed to promissory estoppel's inequity requirement, *Southwark LBC v Logan* may be a case of the third scenario mentioned, of constraining government decision-making.<sup>124</sup> The claimant family left the dwelling for which they had a tenancy with the council, and took possession of another dwelling which had not been allocated to them.<sup>125</sup> The council obtained a court order, but sent a letter promising not to enforce it unless they provided the claimant an acceptable alternative dwelling. Notwithstanding its promise, the council brought enforcement proceedings, and the claimant raised promissory estoppel as a defence. It was held that the council were not estopped as the doctrine's inequity requirement was not met. The concern, in this case, was that enforcement of the promise would interfere with the public interest decision-making of the council: 'the council have responsibilities to all those who seek their assistance' which the council must 'balance' against the impact on the claimant.<sup>126</sup> For this reason, the court concluded that it was not inequitable for the council to go back on its promise to the claimant.<sup>127</sup>

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Some authorities view the equities involved as always relevant to the effect of public policy on the enforcement of promises.<sup>128</sup> That was clearly the case in *Southwark v Logan*, where the court took account not only of

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122 McCamus, above, n 8, ch 12.

123 McCamus, above, n 8, ch 12.

124 *Southwark LBC v Logan* (1997) 29 HLR 40.

125 (1997) 29 HLR 40 at 42.

126 (1997) 29 HLR 40 at 47.

127 (1997) 29 HLR 40 at 47.

128 See eg Beatson, Burrows and Cartwright, above, ch 11; *Patel v Mirza* [2017] AC 467; [2016] UKSC 42; *ParkingEye Ltd v Somerfield Stores Ltd* [2013] QB 840; [2012] EWCA Civ 1338.

the public interest responsibilities of the promisor but also, on the other hand, the difficulties the claimant had experienced with racial harassment, as a single parent, and having previously been allocated dwellings that the council acknowledged were too small for the claimant's family.<sup>129</sup> Thus, it does not seem to be that an issue of public policy simply bars the application of promissory estoppel. Rather, as just illustrated, what seems to take place is a weighing of equitable considerations.

61 Next, I argue that this is the general way in which promissory estoppel's inequity requirement factors in equitable considerations which countervail the unfair impact on the promisee of the promisor resiling from a promise that it induced the promisee to change its position in reliance on.

### Weighing the equities

62 The framing of promissory estoppel's inequity requirement as addressing the question of whether it is inequitable for the promisor to go back on the promise suggests that it calls for a weighing of equities. Where an equitable consideration exists of whichever of the kinds outlined in the preceding sections — vices of intent, frustration, issues of public policy, or perhaps other factors — normally this weighing will just consist of deciding whether that countervailing equitable consideration outweighs the unfairness to the promisee of the promisor breaking its promise after inducing the promisee to change its position in reliance on it.<sup>130</sup> Even the seemingly more complicated weighing in *Southwark v Logan* can fit into this frame of the countervailing equitable consideration versus the unfairly induced change of position, in that: the claimant's change of position in reliance on the council's promise not to evict without offering an acceptable alternative *included* foregoing action that it appears the claimant could otherwise have taken based on the dwelling allocated by the council being too small, the claimant being a single parent, and the claimant being racially harassed.<sup>131</sup>

63 This weighing does not turn the inequity requirement into an all-in-one assessment of whether promissory estoppel should apply in a given situation — one of the views of the inequity element rejected above.<sup>132</sup> The inequity element is still a specific requirement, mandating a distinct enquiry into (as far as the aspect of the enquiry discussed so far) whether there exists an equitable consideration countervailing the unfairness that animates the doctrine that is contained in the separate requirement of the promisee's change of position in reliance on the promise. If a promissory estoppel claim gets as far as assessing the inequity requirement, the unfairness of letting a promise be broken after a promisee changed its position in reliance on

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129 *Southwark LBC v Logan* (1997) 29 HLR 40.

130 One example of a case where this was spelled out was *Strata Plan 1261 v 360204 BC Ltd* 1995 CarswellBC 659; [1995] BCJ No 2761: 'The seriousness of the defendant's non-disclosure is to be weighed against the equities arising against the plaintiff'.

131 Indeed, when the council later did pursue eviction, the claimant raised these complaints in defence, in addition to the council's prior promise not to evict without offering an acceptable alternative.

132 See above section 'General Argument'.

it has already been established by the separate condition concerning that, just referenced. There is no need to reassess that at the stage of the inequity requirement, and thus no redundancy. The requisite weighing simply consists of asking whether the countervailing equitable consideration — identified as part of the enquiry called for by the inequity requirement — *outweighs* the usual unfairness to the promisee already established by the change of position element.

If a stricter separation between the inequity and change of position requirements was seen as desirable, the inequity requirement could be framed as asking (in the scenarios discussed so far) this even more specific question of whether there exists a countervailing equitable consideration that *outweighs* the unfairness of breaking a promise after the promisee changed its position in reliance on it. However, in my view, the analysis called for by promissory estoppel's inequity requirement is best disciplined by proceeding in two stages: first identifying whether there exists a countervailing equitable consideration in the case at bar; and, if so, assessing then whether this outweighs the unfairness to the promisee that is inherent in the change of position requirement.<sup>133</sup>

The distinction between this conception of the inequity requirement and the view rejected above, of it being an overall assessment of whether the doctrine applies, is far from a distinction without a difference. Moving beyond the abstract discussion of what the inequity requirement, on this view, encompasses, the difference is perhaps most evident from the fact that playing the role described above, one would expect it to be rare for there to be present in cases the sorts of countervailing equitable considerations discussed, and for them to outweigh the fairness concern animating estoppel that is found in the change of position requirement. Thus, on this view, the inequity requirement would *rarely* determine the outcome of cases, in contrast to it virtually always being determinative where the inequity requirement is conceived of and applied as an all-in-one assessment of the doctrine's applicability.

MacDougall, who opposes an inequity requirement,<sup>134</sup> does recognise a need for promissory estoppel to factor in countervailing equitable considerations, but sees their role as being equitable bars that render the estoppel unavailable or negate its effect.<sup>135</sup> He acknowledges, however, in summarising the cases, that 'to a certain extent what is involved is not a simple cancellation of one equity by another but a balancing of equities.'<sup>136</sup> This is consistent with the view argued here that the inequity requirement is needed, and that it calls for weighing the countervailing equitable consideration — if one is present — against the usual unfairness captured by the doctrine's change of position requirement.

133 This sort of analytical separation and sequencing has 'legal value', per Dieter Grimm.

134 MacDougall, above, n 5, V.C.2.e-(i-ii).

135 MacDougall, above, n 5, V.C.2.e-iii.

136 MacDougall, above, n 5, §5.292.

## Nuance in the Doctrine's Other Criteria

67 Besides enabling countervailing equitable considerations to be weighed, the inequity requirement of promissory estoppel permits the weighing of nuance regarding the other elements of the doctrine, beyond the yes/no question of whether those conditions were satisfied. As an equitable doctrine, it is appropriate that promissory estoppel fully consider this nuance. The openness of the inequity element allows this nuance to be weighed as part of assessing whether it is inequitable for the promisor to resile from the promise. Thus, in this way it is again possible that, although the doctrine's prior conditions are met, taking into account additional details, there will be certain cases where it is not inequitable for the promisor to go back on the promise. Below, I examine some possible such scenarios.

### Intention not settled

68 One possible such scenario is if the promisor did have at the time the promise was made the intent required to satisfy the doctrine's intention condition,<sup>137</sup> but the broader facts reveal that this was not a very settled intention. An example of this is *MWB v Rock Advertising*, where the promisor MWB was not estopped from going back on a promise to reschedule the debt of the promisee Rock.<sup>138</sup> Lord Justice Kitchin held the inequity requirement to be dispositive in the circumstances.<sup>139</sup> Whilst his analysis of the inequity requirement refers to various issues, in my view it is best explained by it being evident that the promisor's intention was not settled.<sup>140</sup> Kitchin LJ noted how an agent of the promisor company promised to reschedule the debt, but 'very soon realised that she had gone too far'.<sup>141</sup> The agent referred it to her superior, who rejected it.<sup>142</sup> She then treated the terms of the reschedule as unapproved, communicating what amounted to a resiliation to the promisee only two days after the initial promise.<sup>143</sup>

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137 See above section on 'Elements of the Doctrine', element (4).

138 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553. I am referring to the much discussed decision of the Court of Appeal. The latter was overturned by the UKSC (*Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24), but on a different point. Also the UKSC decision is controversial, with some doubting its soundness. For a view differing from that of Lord Sumption, see Andrew Burrows, 'Anti-Oral Variation Clauses: Rock Solid or Rocky?' in Paul S Davies, and Magda Raczynska, eds, *Contents of Commercial Contracts: Terms Affecting Freedoms*. Hart Publishing, Oxford, 2020, pp 35–49.

139 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

140 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

141 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

142 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

143 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

69 These observations by Kitchin LJ reveal the intention to have been unsettled in multiple respects. First, there was an issue of whether the promise was made with proper authority to represent the company's intent. The agent at least *ostensibly* had such authority, which is enough to satisfy promissory estoppel's intention element.<sup>144</sup> However, the agent quickly realised that she did not *actually* have that authority, referred it to a superior who did; the superior rejected it, and the agent promptly relayed this to the promisee.<sup>145</sup> Second, the intention did not endure for a substantial length of time. When made, the promise included an intent that it could be relied upon, as the doctrine's intention element requires. However it was swiftly retracted, close to the outset of the period of possible reliance on it. As well, although as initially made the promise met the unequivocal condition of promissory estoppel, there soon followed equivocation of the intent to make a promise, with the agent treating the promise now as a proposal requiring approval, not a concluded promise.<sup>146</sup> In all these ways, although the intent required by the doctrine's other conditions was present, these took no account of the unsettled nature of that intent, evident on the facts of the case. It was the role of the inequity requirement to factor in that nuance, and decide whether as a result it was not inequitable for the promisor to resile from the promise.

70 Similarly to how the previous section described that countervailing equitable considerations should be weighed, the unsettled nature of the intention element was in *MWB* weighed against the unfairness to the promisee of the promisor breaking its promise after inducing the promisee to change its position in reliance on it: Kitchin LJ acknowledged that despite the short period of reliance, Rock did in that time change its position by making a payment on the revised schedule. However, as payment was due regardless of the promise, the making of it was not found to be very compelling, unlike the promisor's unsettled intention. Thus, it was not inequitable for *MWB* to go back on its promise to Rock.<sup>147</sup>

71 I have argued here that *MWB* shows that the settled nature of the promisor's intention is one type of nuance that courts will factor in through promissory estoppel's inequity requirement. To my mind, this factor explains in part some scholars' observation of a pattern of courts more likely finding the inequity element unsatisfied in cases in which there is a short time-lag between the promise and its resiliation (although such cases may implicate other factors as well, such as the extent of reliance and/or change

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144 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

145 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

146 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

147 *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553.

of position, as I just mentioned, was taken into account in *MWB*, and as I will discuss more fully below).<sup>148</sup>

72 It may be wondered whether it is appropriate to take account of the settledness of the promisor's intent. After all, this is not a factor in the enforceability of contractual promises, where scholars sometimes refer to a 'moment of responsibility' in which an objective meeting of minds is present, as all that is required.<sup>149</sup> I submit that in the context of promissory estoppel, it is appropriate to consider the settledness of the promisor's intention. For contractual promises, the basis of enforceability is consideration — usually a promise in return for a promise. As Lon Fuller explained, the law protects bargains,<sup>150</sup> for the sake of the economic benefits for society that flow from being able to trust that market transactions will be enforced, even if a party wishes to change its mind a moment later. By contrast, the basis for enforcing promises by virtue of estoppel is reasonable reliance.<sup>151</sup> It seems to me that the settledness of a promisor's intention is directly relevant to the reasonableness of reliance: the more settled that intention, the more reasonable it is to rely on it; and vice versa.

### Little change of position

73 Another scenario in which it could happen that the other conditions of promissory estoppel are met, but looking more closely at the details, it is evident that nonetheless it would not be inequitable for the promisor to go back on the promise, is where there has been little change of position by the promisee in reliance on the promise. In my estimation, this is the best way of explaining the conclusion with respect to promissory estoppel in *The Post Chaser*.<sup>152</sup> In that case, sellers of palm oil were late in sending shipment documents to the buyer. The buyer was found to have promised not to reject the shipment. However, two days later it did reject the shipment after its own sub-purchaser did so. Lord Goff concluded that the buyers were not estopped, as promissory estoppel's inequity requirement had not been met.

74 The doctrine's change of position requirement had been satisfied: 'the sellers did conduct their affairs on the basis of the buyers' representation'.<sup>153</sup> However, Robert Goff J (as he then was) went on to say that:<sup>154</sup>

it does not follow that in every case in which the representee has acted ... in reliance on the representation, it will be inequitable for the representor to enforce his strict legal rights for the nature of the action ... may

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148 See eg Chen-Wishart, above, n 9, §3.2.1.3. The extent of the change of position will be discussed more fully in the section below 'Little change of position'.

149 Collins, above, n 3, ch 9.

150 Fuller, above, n 25, at 816.

151 See above section 'Functions Served by Promissory Estoppel'.

152 *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.

153 *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.

154 *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.



be insufficient to give rise to the equity, in which event [the inequity] requirement ... for the application of the doctrine would not have been fulfilled.

In the circumstances, Goff J said that he could not see that the promisee had suffered any 'prejudice'.<sup>155</sup> In my view, this was slightly overstated in that, in reliance on the promise, the promisee did as requested have their agent deliver the shipment documents to the promisor's sub-buyer, as well as lose two days before having to make other arrangements for the sale of the palm oil.<sup>156</sup> But the point is that their position changed little; there was not a significant change in the promisee's position as a result of the promise (including the two days' reliance on it before the resiliation). And on this basis, the court held that the sellers' estoppel claim failed as it did not satisfy the inequity condition, as was necessary.<sup>157</sup> 75

As far as the analysis called for by the inequity requirement, one can harmonise that in *The Post Chaser* with the weighing of equities suggested in the preceding sections by recognising that however small the detriment suffered by the promisee as a result of the promisor going back on the promise, the promisee was induced to rely on a promise that was subsequently broken. This is enough to satisfy the doctrine's condition of a change of position.<sup>158</sup> The smallness of the change of position, then, has to be weighed against the fact that the promise did induce a change of position. I would qualify Lord Goff's statement, accordingly, as about whether the change of position was significant enough to give rise to a *net* inequity, weighing the unfairness of the fact that a change was induced against the fairness of letting the promisor reassert its rights if the promisee only modestly changed its position in reliance on the promise. 76

It may be, as MacDougall says, that 'if the detriment' that would result from breaking the promise 'is minimal, there is no need for the estoppel'.<sup>159</sup> I leave open the possibility, however, that there could be cases where despite the detriment being trivial, a court might still find it inequitable to allow a promise to be broken.<sup>160</sup> This could happen where, for instance, the circumstances are such that the other side of the scale weighs heavily — the 77

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155 *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.

156 *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.

157 *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695.

158 *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695; *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 213.

159 MacDougall, above, n 5, \$5,289. Or 'trivial': see Cooke, above, n 21, p 87; *Watts & Ready v Story* (1984) 134 NLJ 631.

160 Above, n 158.

side emphasised by Lord Denning, focusing on the repudiation of a promise solemnly given and intended to have legal effect.<sup>161</sup>

78 In *The Post Chaser*, there was little time (two days) between the promise and its resiliation during which a significant change of position might occur. The observed pattern (noted earlier) of courts sometimes not finding it inequitable for a promisor to go back on a promise shortly after it was made likely reflects (besides the promisor's intention possibly being unsettled, as discussed above),<sup>162</sup> a lesser likelihood of a large change of position occurring where there is a short time lag between the promise and its retraction. That said, one can easily imagine scenarios (for example, stock trading, string transactions, etc) in which a crucial change of position could occur in very little time. Thus, in my view, the duration of the time lag itself is not relevant. Where there is a short time lag, the questions are: does it raise an issue of the settledness of the promisor's intent or, as discussed here, did it limit the change of position by the promisee?

### **The inequity has been or should be mitigated**

79 A third situation wherein promissory estoppel's other conditions might be established but, taking account of the full circumstances, it might not be inequitable for the promisor to go back on the promise, is where that inequity has been or should be mitigated. This could be for a variety of different reasons.

80 One way the inequity could be mitigated is if the promise is rejected. In discussing promissory estoppel, we do not often speak of acceptance or rejection of promises, as we do with contractual promises. However, consider the following scenario: a prime seat is empty on an otherwise full flight. The flight attendant tells a passenger in an undesirable seat that they can take the prime seat without paying the fee for the premium seat. The passenger declines, saying they prefer to keep their assigned seat. So the flight attendant offers the prime seat to another passenger, who takes it. Unaware of this, the first passenger changes their mind and wishes to take the prime seat, but the flight attendant says it is no longer available. Surely, once the first passenger declined the seat, it was not inequitable for the airline to go back on its promise of it to the first passenger. The promise had been rejected.

81 Now consider a scenario in which the promise is to reduce a pre-existing legal obligation of the promisee, but the promisee then does not perform the reduced obligation. In my view, this should be treated as an implied rejection of the promise, and here again once the promise is rejected, it has effect no longer. The inequity is mitigated once the promisee ceases to itself comply with the terms of the reduced obligation. In this regard, consider the

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161 See n 7. Hugh Collins regards *Pascoe v Turner* [1979] 2 All ER 945 as an example of such a case. According to Collins, 'a moral judgement about the behaviour of the promisor in all the circumstances', combined with a 'meagre' change of position, may be sufficient to satisfy this requirement in some cases: Collins, above, n 3, p 84.

162 Text to nn 140–8.



decision in *Re Selectmove*.<sup>163</sup> In *Selectmove*, a company owed tax arrears; the Revenue allegedly promised to hold off on enforcement measures as part of a rescheduling of the debt, but then sought an order for a winding up of the company after the company did not make payments due under the reschedule. The Revenue was not estopped. Peter Gibson LJ concluded that the doctrine's inequity condition was not satisfied, it not being inequitable for the Revenue to go back on its promise because the company failed to adhere itself to the reduced obligation it was promised.<sup>164</sup> As I see it, by not making the payments due under the reschedule (which were a necessary part of its acceptance), the company impliedly abandoned its acceptance up to that point of the concession promised. From then on, the promise had no effect, which mitigated the inequity of going back on it thereafter.

Moving into a somewhat different set of facts where a court could conclude that the inequity has been mitigated, consider situations where reliance on the promise is seen to be reasonable only up to a point, and that point is past. I find this a helpful way of understanding the US case *Kiley v First Nat'l Bank*.<sup>165</sup> In *Kiley*, depositors claimed that a bank reneged on a promise to keep their accounts under pre-existing terms, when it changed its standard terms for account holders. The court suggested a limit to the reasonableness of the depositors' reliance on the claimed promise, stating 'any claimed reliance that the Kileys may have had on the alleged promise to maintain *forever* the original terms of the account would have been unreasonable'.<sup>166</sup> Noting that the depositors had already enjoyed 'the benefit of the [prior] terms for some five years', the court held that 'justice certainly does not compel application of promissory estoppel'.<sup>167</sup> The inequity of resiling from the promise was mitigated in this case by or before the elapse of five years from the time that the promise was made, and during which time the promise was kept.

The present discussion is relevant, in my view, to the claim sometimes made that the normal effect of promissory estoppel is to suspend rather than extinguish the promisor's strict rights.<sup>168</sup> An adequate explanation for this as the supposedly normal effect of the doctrine has been lacking, I submit, in that there should be no normal effect: *a priori*, the effect depends on the intent that was present in the promise made.<sup>169</sup> If the intent was only to suspend, the effect is to suspend; but if the intent was to extinguish,

163 *Re Selectmove* [1995] 1 WLR 474; Chen-Wishart, above, n 9, p 137 ('the company had not 'accepted' the Revenue's offer').

164 *Re Selectmove* [1995] 1 WLR 474 at 481.

165 *Kiley v First Nat'l Bank* (1994) 102 Md App 317.

166 *Kiley v First Nat'l Bank* (1994) 102 Md App 317 at 337 (emphasis added).

167 *Kiley v First Nat'l Bank* (1994) 102 Md App 317 at 337.

168 See eg Beale, above, n 5, §§4-097-4-098; McCamus, above, n 8, p 315; *Virulite LLC v Virulite Distribution Ltd* [2015] 1 All ER (Comm); [2014] EWHC 366 at 204.

169 I say *a priori* because, as I will discuss below, circumstances other than the intent inherent in the promise may also affect the doctrine's effect.

the effect may be to extinguish.<sup>170</sup> However, looking at the cases from the perspective of the discussion here, it may be that the suspensory effect often observed is not a characteristic of the doctrine, but rather a pattern in how it applies to common circumstances, namely: that courts *often* see promisees' reliance in the circumstances as reasonable only up to a point, after which the inequity of resiling from the promise has been mitigated.<sup>171</sup> Indeed, this could explain the effect that promissory estoppel had in *High Trees* of suspending rather than extinguishing the lessor's rights.<sup>172</sup> It is difficult on the facts in *High Trees* (and in many cases) to make a convincing argument on intent to suspend versus extinguish. But Denning MR's reasoning about the effect — referencing factors such as the subsistence of wartime conditions, the depression of the market, and the timing of notice of a desire to assert the strict rights — fit very well the argument here that the promisee's reliance was reasonable only under the 'conditions' that Lord Denning cast as implicitly intended. When those ended, it was no longer inequitable for the promisor to go back on the promise. The inequity of going back on the promise was mitigated upon lapse of the conditions under which, in this case, the promisee *was* estopped.

84 My use of the word mitigation in this section of course raises the question of whether the promisee is ever expected by law to mitigate the detriment it suffers from the broken promise, as the innocent party to a broken contractual promise is.<sup>173</sup> As I have construed the decisions, this indeed was the case in *Kiley* and *High Trees*: beyond the point that the court thought reliance on the promise was reasonable, it was the promisee's duty to mitigate any further detriment; there was no inequity in going back on the promise any longer. It seems to me that in other circumstances, this could be so with respect to the suffering of any detriment *at all* from the promisee's resiliation. For example, suppose in *The Post Chaser* that there was a significant change of position — for instance, that the sellers were incurring substantial expense for the palm oil being held until it was sold to a new buyer. The basis discussed in the last section for the broken promise not being inequitable would then not apply. But suppose further that in the time following the buyer's breaking of the promise, the market price of palm oil surged. Surely, the seller could not sit on its hands and use promissory estoppel to claim against the buyer. Such reliance is not reasonable. The seller must sell the palm oil to a new buyer for the higher market price available, and thus mitigate the detriment of the cargo storage fees.

85 More generally, whenever despite all of the other conditions of promissory estoppel being fulfilled, it would be unreasonable for a promisee

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170 See eg Beatson, Burrows and Cartwright, above, n 1, pp 135–6; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2017] QB 604; [2016] EWCA Civ 553; *Crabb v Arun District Council* [1976] Ch 179.

171 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761 (Lord Cohen).

172 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 134 at 135.

173 See eg Beatson, Burrows and Cartwright, above, n 1, p 554; Waddams, above, n 11, ¶758; Paterson, Robertson and Duke, above, n 32, para 27.45; Michael G Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss' (1989) 105 *LR* 398.

to rely on a promise, this should be taken into account in deciding whether it would be inequitable for the promisor to resile from it.<sup>174</sup> As the doctrine is meant to protect reasonable reliance, it must have latitude (beyond the other conditions which verify that reliance was induced, was meant to include legal effects, and led to a change of position) to measure the reasonableness of reliance.<sup>175</sup> The inequity requirement is able to do that by addressing whether, in the circumstances, the detriment should be mitigated by the promisee, rather than held against the promisor. In contrast to the on/off character of the doctrine's other conditions, and with more transparency than fictitious ascriptions of suspensory or extinctory intent, the doctrine's inequity element has the flexibility to take account of essential nuance such as differences in the reasonableness of reliance across the passage of time (as in *Kiley*) or amidst changes in relevant circumstances (as in *High Trees*).

Whilst the focus of this article is on promissory estoppel's conditions of application, not its effect, I note the flexibility with regard to its effect that this role of the doctrine's inequity requirement provides. As Barnes notes, this flexibility is an important aspect of promissory estoppel.<sup>176</sup> Flexibility in its effect ensues from the possibility of limits to the reasonableness of the promisee's reliance. In particular, whether the promisor's intent was to suspend or extinguish its prior rights — and bearing in mind the frequent difficulty of ascertaining that — if the reasonableness of the promisee's reliance is limited, the inequity will be mitigated beyond that point of delimitation. Moreover, the source of that flexibility is itself flexible in being responsive to changing circumstances, as opposed to freezing the doctrine's effect as a sole function of the promisor's intent at the moment the promise was made.<sup>177</sup>

As with other equitable considerations discussed in previous sections, a conclusion that the detriment should be mitigated by the promisee must be balanced against the inequity of the promisor resiling from a promise after inducing the promisee to change its position in reliance on it. Cases like *Kiley* and *High Trees* show how the outcome of this weighing may differ at different points or under different conditions. Even in a case like the above hypothetical of *The Post Chaser* under a surge of palm oil prices, the fact that the detriment should be mitigated from the promise's inception could conceivably still be overridden, for instance, if there are facts that speak especially compellingly to Lord Denning's concern about repudiation of a promise solemnly given and intended to have legal effect.<sup>178</sup>

Cases in which the inequity is mitigated by express (as in the hypothetical airline seat case) or implied (as in *Selectmove*) rejection of the promise

174 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 1 WLR 761; Paterson, Robertson and Duke, above, n 32, p 194; *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485; [1993] HCA 194; *Galaxidis v Galaxidis* [2004] NSWCA 111.

175 Collins, above, n 3, pp 81–3; *Division of Labor Law Enforcement v Transpacific Transportation Co*, 137 Cal Rptr 855 (1977).

176 Barnes, above, n 14, §6.99

177 See n 169 and accompanying text.

178 See n 7.

would, however, not involve any weighing: as the rejected promise has no effect, the inequity of resiling from it is mitigated at that point.

## Flexibility

89 As the preceding sections demonstrate, the nuance that the inequity requirement is able to take account of provides promissory estoppel flexibility that it needs as an equitable doctrine which aims to do justice by considering the full circumstances.<sup>179</sup> The series of prior on/off conditions (promise + pre-existing relation + concession + intent to induce legal reliance + change of position) offers guidance and predictability. However, these elements are not comprehensive. Justice cannot be reduced to a formula. It is the inequity condition that enables promissory estoppel to avoid undue rigidity and incorporate the flexibility expected of it as an equitable doctrine. Moreover, as regulatory governance scholarship has noted, a mix of bright line rules and flexible principles often provides for a more suitable legal approach when dealing with issues that involve a complexity of considerations, as estoppel does.<sup>180</sup>

## Conclusion

90 The inequity requirement has long been a mysterious element of promissory estoppel. Some dispute whether inequity plays an active role, or merely expresses the equitable foundation of the doctrine. Among those who accept that it is among the doctrine's conditions of application, there is further debate of whether it represents an overall assessment that subsumes the doctrine's other criteria, or whether it represents a distinct and specific requirement. The latter possibility gives rise to further questions: if it plays a specific role, what factors does it cover that distinguish it from the doctrine's other requirements? And what analytical process is to be used to assess whether in the circumstances it would be inequitable for the promisor to go back on the promise?

91 These are important questions, whose answers would greatly help illuminate the inequity requirement of promissory estoppel which has so long remained largely inscrutable.

92 This article has sought to answer these questions. As I have argued here, the inequity requirement plays an active role in conditioning the application of promissory estoppel, and does not merely express the doctrine's equitable foundation. Further, it was suggested that the inequity requirement should properly be understood to call for a specific inequity, not an overall assessment of whether the doctrine applies, subsuming or reconsidering the other conditions of the doctrine's application. The remaining challenge, then, was to spell out what factors the inequity requirement is meant to

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179 This flexibility is also reflected, for example, in variable remedies.

180 John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Aust J Leg Phil* 47; see also Colin Diver, 'The Optimal Precision of Administrative Rules' (1983) 93 *Yale LJ* 65.

inquire into, and how it is to assess whether in light of those, it would be inequitable for the promisor to go back on the promise.

My argument was that when turning to consider whether the doctrine's inequity requirement is met, it has already been established by the separate change of position requirement that the unfairness which animates promissory estoppel — inherent in that induced change of position in reliance on the promise — is present. At the stage of the inequity condition, the focus is thus largely on reasons why despite this, it might *not* be inequitable for the promisor to break its promise. One reason this could be is due to the presence of countervailing equitable considerations, such as factors that should be considered to vitiate the promisor's intent, to cause the promise to be frustrated, or to raise public policy concerns. To assess whether these make it inequitable to break the promise, such countervailing equitable considerations must be weighed against the unfairness established by the doctrine's change of position requirement. Another reason why, despite the unfairness of the induced change of position, it might not be inequitable to break the promise, is in taking account of nuance concealed by the yes/no character of the doctrine's other conditions. This could occur, for example, due to circumstances showing the promisor's intention was not very settled, or the promisee's change of position was not significant, or that the inequity was or should be mitigated because other circumstances made reliance on the promise unreasonable or reasonable only for a certain time or whilst certain conditions prevailed, etc. Such factors would likewise have to be weighed against the promisor having induced the promisee to change its position, in order to answer whether it would be inequitable in the circumstances to permit resiliation from the promise.

This investigation of the inequity requirement shows, then, considerable and important work that it does in determining whether the doctrine should apply. Far from being redundant, it covers extensive ground in canvassing the possible presence of other equities, and weighing them against inducement of the promisee's change of position. And far from being relevant only in exotic cases, it considers factors of obvious import in circumstances that occur regularly — at least as indicated by comparable considerations to be taken account of in respect of promises in the contractual sphere. In my view, promissory estoppel's inequity requirement plays an essential role in determining when it is fair for a party to break a promise not to enforce its legal rights.