CONTRACTS FOR LAND:

THE WRITING REQUIREMENT AND THE EQUITABLE EXCEPTION

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TABLE OF CONTENTS

Introduction ……..…….…...…... 1

Chapter One: The Problem of Part Performance ……...… 3

I. The conceptual problem of part performance ……...…….... 3

II. Part performance's uncertainty …….…….... 4

III. Inconsistencies in application …….....……... 7

IV. Conclusion ….....…… 10

Chapter Two: The Requirement and the Exception …….....…...….. 11

I. Justifying the writing requirement ……...…..... 11

1. Arguments for the writing requirement 11

(a) Evidential argument 12

(b) Channeling argument 12

(c) Consumer protection 13

2. Arguments against the writing requirement 14

3. The Law Commissions' views ……... 16

4. Conclusion 18

II. A general equitable exception ….....……... 18

1. Writing requirement exceptions ……..... 18

2. The general equitable exception 20

3. Conclusion 23

Chapter Three: The Traditional Estoppels 24

I. Estoppels 24

III. England .....…….....……..... 27

1. Proprietary estoppel …….... 28

2. Promissory estoppel, estoppel by convention and estoppel by representation …….... 30

3. Conclusion 31

Chapter Four: Modern Equitable Estoppels 32

I. Conceptually coherent 32

1. Establishing the coherency 33

2. Conclusion 38

II. Produce similar results 38

1. When equitable estoppel applies 38

2. Equitable estoppels remedy 43

(a) What do courts award? 44

(b) What should courts award? 46

3. Discretion 52

III. The certainty of equitable estoppel 52

IV. Conclusion 53

Chapter Five: Formulating The Law 54

I. The writing requirement 54

1. Writing for enforceability or validity 54

2. Who must sign 56

II. The equitable exception 57

1. Contract specific exceptions 57

2. The equitable exception 57

(a) Solution 1 57

(b) Solution 2 59

(c) Solution 3 59

III. The new law 64

Conclusion 65

Bibliography 67

Appendices 81

Appendix A: Relevant Statutory Sections 81

Appendix B: New Zealand and Manitoban Residential House Sales 84

Appendix C: Submissions to the New Zealand Law Commission on the Repeal of the Contracts Enforcement Act Preliminary Paper 85

INTRODUCTION

Since 1677, England has had a writing requirement for land contracts.[1] This was introduced due to the prevalence of fraud, which was exacerbated by the contemporaneous evidence law.[2] Originally, the requirement applied to a wide range of contracts, in New Zealand it now only applies to land contracts and guarantees.[3]

New Zealand has a wide definition of disposition of land; therefore, many contracts must fulfill the requirement.[4] The writing requirement means a contract must be recorded or made in writing.[5] A document must record all of the contract's terms and be signed by the party against whom the contract is to be enforced.[6] While the document must acknowledge that the contract exists, a party may deny liability under the contract in the document.[7]

By 1686 the equitable doctrine of part performance was a recognised exception to the requirement.[8] Chancery courts were concerned that a party to a legitimate oral contract could deny the contract. To prevent the Act from becoming an instrument of fraud, courts held a partly performed contract was enforceable.[9] As an oral contract is

1 An Act for Prevention of Frauds and Perjuries 1676 (Eng); The English Laws Act 1858, s 1.

2 An Act for Prevention of Frauds and Perjuries 1676 (Eng), s 1; A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) 599-600, 604-605; D F Dugdale, "Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956," (1998) 13.3 JCL 268, 269.

3 An Act for Prevention of Frauds and Perjuries 1676 (Eng), s 4; Contracts Enforcement Act 1956, s 2(1), s 2(6); Property Law Act 2007, s 24; D F Dugdale, "Do we need the Contracts Enforcement Act?," [1993] NZLJ 239, 239.

4 Property Law Act 2007, s 4; Commerce Clearing House New Zealand, *New Zealand conveyancing law and practice* (1989-) (updated 7/08/09) para 2-210. However: Property Law Act 2007, s 24(2) – Many leases are exempt; Residential Tenancies Act 1986, s13, s 13C – Residential tenancies must be written but are enforceable if oral.

5 Property Law Act 2007, s 24(1)(a); Commerce Clearing House New Zealand, *New Zealand conveyancing law and practice* (1989-) (updated 7/08/09) para 2-240.

6 Tom Bennion, David Brown, Rod Thomas, Elizabeth Toomey, *New Zealand Land Law* (2005) para 13.3.01; D W McMorland, *Sale of Land* (2nd ed, 2000) para 4.10; Property Law Act 2007, s 24(b).

7 Commerce Clearing House New Zealand, *New Zealand conveyancing law and practice* (1989-) (updated 7/08/09) para 2-236; McMorland, *Sale of Land* (2nd ed, 2000) para 4.11.

8 Note: Part performance is both the name of the doctrine, and the nature of the actions by a party that fulfill the doctrine. *Butcher v Stapely* 1 Vern. 363 in England Reports vol. 23, 524; Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) 614. *See however*: Umberto-Igor A Stramignoni, "At the Dawn of Part Perfomrance: A Hypothesis," (1997) 18.n2 The Journal of Legal History 32.

9 Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1975) 616.

valid but unenforceable by action, parties can partly perform it.[10] Legislation recognises part performance.[11]

This paper argues we should replace part performance with a form of estoppel. This paper will only address situations where parties would have an enforceable contract but for the writing requirement. Chapter one will justify abolishing part performance. Chapter two will justify both the writing requirement and a general equitable exception to that requirement. Chapter three will conclude the traditional estoppels are an inadequate alternative. Chapter four will outline why modern equitable estoppel is a viable alternative. The final chapter will propose that a code that enacts the elements of estoppel is the best way to combine the writing requirement and estoppel. This code will also abolish part performance.

10 Property Law Act 2007, s 24; A party cannot enforce the contract even if the other party admits that the contract exists: McMorland, *Sale of Land* (2nd ed, 2000) para 4.19; *Blagden v Bradbear* (1806) 12 Ves 466 in [1803-13] All ER Rep 372, 373; However a party seeking to avoid the contract must specifically plead the section: *Dawkins v Penrhyn* (1878) 4 App Cas 51 (HL), 58; *Boviard v Brown* [1975] 2 NZLR 694, 700-701.

11 Contracts Enforcement Act 1956, s 3(c); Property Law Act 2007, s 26.

CHAPTER ONE: THE PROBLEM OF PART PERFORMANCE

I. THE CONCEPTUAL PROBLEM OF PART PERFORMANCE

Part performance is internally incoherent. This causes many problems, which justify its replacement. Tipping J has recognised that two concepts underpin part performance:

> [i]t is clear that over the years two concepts have been said to underpin the doctrine of part performance. The first … is that equity will not allow the Statute of Frauds itself to become an instrument of fraud. Thus, if there has been part performance, equity takes the view that the defendant is not charged upon the contract alone but also upon the equities arising from part performance. ... The other concept behind the doctrine of part performance is an important but subsidiary one. It concerns proof. The acts of part performance are treated for probative purposes as a satisfactory substitute for the statutory requirement of writing. It is the concept of substitute proof which led to the need for the acts of part performance, of themselves, without reference to the evidence of the oral contract, to point to the probability of a contract relating to the land and consistent with that alleged.[1]

These concepts, or bases, are inconsistent. [2] The equitable base does not require the actions to provide evidence of the contract.[3] The equity arises if it would be unconscionable for one party to rely on the Act when the other has partly performed the contract. Furthermore, as the parties are enforcing the equities that arise out of the actions, not the contract, they are not enforcing contract by action and there is no bar on parties using oral evidence to prove the contract.[4] Conversely, the evidential base treats part performance as an alternative way to prove the contract. On this analysis, part performance should be as reliable evidence as writing. This requires part

1 *Fleming v Beevers* [1994] 1 NZLR 385, 393-394.

2 *See for instance*: Herbert Wallace, "Part Performance Re-Examined," (1974) 25 N Ir Legal Q 453, 454; Burrows, Finn and Todd, *Law of Contract in New Zealand* (3rd ed, 2007) 259; M G Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 83-84; G H L Fridman, *The Law of Contract in Canada* (5th ed, 2006) 231-232; *See however*: *Steadman v Steadman* [1976] AC 536, 542 per Lord Reid.

3 Wallace, "Part Performance Re-Examined," (1974) 25 N Ir Legal Q 453, 461; *Fleming v Beevers* [1994] 1 NZLR 385, 393-394; *Steadman v Steadman* [1976] AC 536, 561-563 per Lord Simon; Ken Mackie, "Part Performance of Contracts – Recent Australian Developments," (1987-1989) 9 U Tas L Rev 61, 67.

4 Wallace, "Part Performance Re-Examined," (1974) 25 N Ir Legal Q 453, 461; Property Law Act 2007, s 24(1).

performance to provide unequivocal evidence of the contract, which was the test for part performance at one time.[5]

II. PART PERFORMANCE'S UNCERTAINTY

Due to the two bases, part performance has changed many times in its 300 years.[6] Two elements change: the nature, and probative value, of the acts of part performance. As the evidence base waxed and waned in importance, the standard of proof required changed. As the equity base went in and out of vogue, the nature of the acts allowed changed. This paper will now provide a brief overview of these changes.

Before 1974, there were two part performance tests.[7] The first had a high evidential requirement: the acts of part performance had to demonstrate unequivocally the actual contract alleged.[8] The second had a lower evidential requirement: the acts had to demonstrate a contract consistent with that alleged.[9] Both tests required the actions to be actions of part performance: either exercising rights, or fulfilling obligations, under the contract. These actions can be contrasted with acts of reliance, which is wider than part performance.

In 1974, the House of Lords decided *Steadman v Steadman*.[10] The Law Lords disagreed on part performance's test. Lord Reid relaxed the evidential threshold and only required acts of reliance:

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5 Wallace, "Part Performance Re-Examined," (1974) 25 N Ir Legal Q 453, 455, 462; *Steadman v Steadman* [1976] AC 536, 542 per Lord Reid. *Maddison v Alderson* (1883) 8 App Cas 467, 479 per Earl of Selborne LC, 485 per Lord O'Hagan, 491 per Lord Fitzgerald; *Chaproniere v Lambert* [1916-17] All ER Rep 1089, 1092 per Warrington LJ; M P Thompson, "The Role of Evidence in Part Performance," [1979] Conv 402, 408-409. *See however*: *Steadman v Steadman* [1976] AC 536, 542 per Lord Reid.

6 *Steadman v Steadman* [1976] AC 536, 560 per Lord Simon; Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 85; *See also*: R D Mulholland, "The Equitable Doctrines of Estoppel and Part Performance," (1989) 7.n1 OLR 69.

7 Burrows, Finn and Todd, *Law of Contract in New Zealand* (3rd ed, 2007) para 9.5.2.

8 *Maddison v Alderson* (1883) 8 App Cas 467, 479 per Earl of Selborne LC; *Chaproniere v Lambert* [1916-17] All ER Rep 1089, 1092 per Warrington LJ.

9 *Wakeham v Mackenzie* [1968] 2 All ER 783, 787; *Kingswood Estate Co Ltd v Anderson* [1962] 3 All ER 593, 599 per Willmer LJ, 604 per Upjohn LJ.

10 *Steadman v Steadman* [1976] AC 536.

> you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved it if is shown to be more probable than not.[11]

Conversely, Lord Morris required actions of part performance that pointed unequivocally to the existence of a contract such as that alleged.[12]

Steadman demonstrates the fundamental uncertainty of part performance. The Law Lords did not agree whether the acts needed to point to a contract, or a land contract.[13] It was unsettled if the actions had to point unequivocally to the contract.[14] The role of payments was unresolved.[15] It was undecided if the defendant needed to acquiesce in the acts.[16] Finally, it was undetermined if acts in reliance on the contract, or fulfilling its terms were required.[17] The uncertainty in the nature of part performance produced uncertainty in its requirements.

In New Zealand, *Boviard v Brown* opted for Lord Reid's formulation.[18] However, *Boutique Balmoral v Retail Holdings* required actions that fulfilled contractual obligations and demonstrated on the balance of probabilities a contract of the kind alleged.[19] Finally, *Cross v Tie Rack Stores* held the acts should unequivocally refer to an agreement of the kind alleged.[20]

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11 *Steadman v Steadman* [1976] AC 536, 541-542 per Lord Reid.

12 Ibid, 546 per Lord Morris.

13 *Re Gonin* [1979] Ch 16, 31; *Steadman v Steadman* [1976] AC 536: Point to a contract: 541-542 per Lord Reid, 554-555 per Viscount Dilhorne; Did not decide: 562-563 per Lord Simon; Land: 547 per Lord Morris, 568-570 per Lord Salmon.

14 *Steadman v Steadman* [1976] AC 536: Balance of probabilities: 541-542 per Lord Reid, 563-564 per Lord Simon; Unequivocal but not demonstrate terms: 546-547 per Lord Morris, 553 per Viscount Dilhorne, 570 per Lord Salmon.

15 *Steadman v Steadman* [1976] AC 536: Paying money can suffice: 541 per Lord Reid, 555 per Viscount Dilhorne (Payment of arrears was enough (combined with other acts) but if had paid purchase money alone not enough), 565 per Lord Simon, 570-572 per Lord Salmon; Paying money did not suffice: 547-548 per Lord Morris.

16 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (WP 92, London, 1985) para 3.24; *Steadman v Steadman* [1976] AC 536: Preparing the transfer was enough: 540 per Lord Reid; Preparing the transfer in combination with other actions: 555 per Viscount Dilhorne, 564-565 per Lord Simon, 573 per Lord Salmon; Preparing the transfer was not enough: 548 per Lord Morris.

17 *Steadman v Steadman* [1976] AC 536: Reliance on the contract: 541-542 per Lord Reid; Term of the contract: 546 per Lord Morris, 556 per Viscount Dilhorne, 560-561 per Lord Simon, 573 per Lord Salmon.

18 *Boviard v Brown* [1975] 2 NZLR 694, 702; *Mehta v Memon* 20/11/90, Chilwell J, HC Auckland CP 2026/89, 11; *Tapper v Edwin* 20/08/79, Thorp J, SC Auckland H992/79, 7.

19 *Boutique Balmoral Ltd v Retail Holdings Ltd* [1976] 2 NZLR 222, 225-226; *Mason v Public Trustee* 20/10/87, Anderson J, HC Rotorua A91/85, 14; *Ward v Metcalfe* 11/04/90, Fisher J, HC Hamilton, A176/84, 21. Fisher J did not specify whether the acts must be in reliance on the contract, fulfilling obligations or exercising a right; giving and taking possession was sufficient.

20 *Cross v Tie Rack Stores* 27/09/89, Gault J, HC Auckland CP1850/89, 6: Note Gault J questioned if other acts were enough; *Aurora Group Ltd v Computer Associates (New Zealand) Ltd* 6/08/90, Williams M, HC Wellington CP243/90, 14-15.

T A Dellaca v PDL Industries imposed order.[21] Dellaca wanted vacant space in a warehouse that PDL had let to the Westport Borough Council. However, there were only fifteen months remaining on the lease. Dellaca and PDL entered into a purchase agreement and a fifteen-month sublease, which failed the writing requirement.[22] Nonetheless, Dellaca took possession and spent money improving the premises.

Tipping J decided due to the principle that equity will not undermine statutes by enforcing a contract the statute declares unenforceable, courts must narrowly confine part performance.[23] Widening part performance undermines certainty achieved by the statute. Tipping J decided part performance required:

> 1. A sufficient oral agreement such as would have been enforceable but for the Act.
> 2. Part performance of that oral agreement by the doing of something which:
>
> (a) clearly amounts to a step in the performance of a contractual obligation or the exercise of a contractual right under the oral contract; and
>
> (b) when viewed independently of the oral contract was, on the probabilities, done on the footing that a contract relating to the land and [consistent with that alleged].[24]
>
> 3. The circumstances in which that part performance took place make it unconscionable (fraudulent in equity) for the defendant to rely on the Act.[25]

Dellaca's part performance claim failed. The actions pleaded were either done in reliance on the contract (such as surrendering their other lease), or were explicable by Dellaca being a sub-lessee (such as taking possession).[26]

Historically part performance has changed frequently. Codifying the test in legislation could prevent future changes.[27] However these changes are merely a manifestation of an internal incoherence, which codifying the test would not fix.

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21 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88. Accepted by the Court of Appeal in *Mahoe Buildings Ltd v Fair Investments Ltd* [1994] 1 NZLR 281, 287; *Phillips & Ors v Bate* 11/06/03, Christiansen M, HC Christchurch CIV-2003-409-000714, [14]; *Gilmour v Davys* 16/11/01, Paterson J, HC Hamilton AP 31-00, [32]; *Quality & Environment (International) Ltd v Ernst & Young* 4/02/99, Nicholson J, HC New Plymouth AP 16-98, 5; *McIver v Weir & Anor* 28/08/96, Robertson J, HC Auckland HC 36-96, 5. Accepted *Mahoe*, which accepted *Dellaca*.

22 Ibid, 99.

23 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 108.

24 *Fleming v Beevers* [1994] 1 NZLR 385, 392.

25 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 109.

26 Ibid, 109-110.

III. INCONSISTENCIES IN APPLICATION

New Zealand's part performance test incorporates both bases. This conceptual incoherence leads to inconsistencies; when the court apply on the evidential base, the results conflict with the equitable base, and vice versa.

Courts apply the evidential base in several ways. The court cannot consider oral evidence of the contract until the actions of part performance prove the contract exists.[28] The court can then ask whether the actions are consistent with the contract. The evidential base requires this, as the actions provide alternative evidence of the oral contract. However, the equitable base requires the claim to begin with the contract to prove it would be unconscionable for the defendant to deny it. This is similar to an estoppel claim, where the plaintiff must first prove a promise or assumption, and then actions due to that promise or assumption.[29]

Part performance will rarely succeed when parties renew a lease without undertaking different obligations.[30] Without a change in obligations, it is difficult to show the parties do not have a statutory lease, which occurs when a lease expires and parties continue the lease without renewing it.[31] However, the plaintiff has still relied on the contract. Therefore, this evidential concern does not fit with the equity base.[32]

The evidential base would allow a plaintiff to use the defendant's actions to satisfy their part performance claim; either party's actions may prove the contract.[33] The equitable base would not allow a plaintiff to do this; they have not raised an equity in

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27 *See for instance*: Law and Equity Act 1996, s 59(3)(c) (British Columbia).

28 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 109; *Steadman v Steadman* [1976] AC 536, 541 per Lord Reid, 546 per Lord Morris, *See however*: 556 per Viscount Dilhorne.

29 See page 27.

30 *Home Buyers Ltd v Mu* 18/12/06, Gendall AJ, HC Wellington CIV-2006-485-2130, [55-59]; A rent increase may be enough: *Brabazon Properties Ltd v Nixon* 18/08/98, Laurenson J, HC Auckland J HC50/98, 8-9; *Lempriere v Ski Scene Ltd* 31/08/92, Gallen J, HC Palmerston North CP210/90, 9-10; *Mahoe Buildings Ltd v Fair Investments Ltd* [1994] 1 NZLR 281, 287-288.

31 *Home Buyers Ltd v Mu* 18/12/06, Gendall AJ, HC Wellington CIV-2006-485-2130, [56-57]. Note, this case was under the Property Law Act 1952, s 105. However the principle is the same.

32 This difficulty was recognised by *Dale v Hamilton* 5 Hare, 381 per Sir James Wigram in *Maddison v Alderson* (1883) 8 App Cas 467, 479 per Earl of Selborne LC.

33 Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, Vancouver, 1977) 71-72.

their favour.[34] Despite Court of Appeal authority preferring the equitable base,[35] a court has allowed plaintiffs to use the defendant's actions to succeed in their part performance claim.[36] Regardless of whether this case is isolated, this demonstrates a further tension.

However, courts are also emphasising the equitable base. Part performance requires unconscionability.[37] For instance, in *Home Buyers v Mu*[38] Gendall J decided it would not be unconscionable for the defendants to rely on the Act.[39] The defendants were commercially unsophisticated, had no legal advice and were desperate to sell their only asset. Part performance would force them to sell the property significantly below value. Conversely, the plaintiff was a sophisticated property trader who knew the defendants were desperate and potentially misled them about the writing requirement. This conflicts with the evidence base. Unconscionability is irrelevant to whether actions provide sufficient alternative evidence of the oral contract. This requirement means sufficiently probative actions may not fulfill part performance.

The twin bases have caused particular problems for part performance through payment of money. Traditionally, actions of payment would not produce a successful part performance claim.[40] It failed the evidence base; without reference to the contract, it was equivocal.[41] However, *Steadman* recognised that in certain

34 *Mahoe Buildings Ltd v Fair Investments Ltd* [1994] 1 NZLR 281, 287; *Quality & Environment (International) Ltd v Ernst & Young* 2/04/99, Nicholson J, HC New Plymouth AP 16-98, 7.

35 *Mahoe Buildings Ltd v Fair Investments Ltd* [1994] 1 NZLR 281, 287.

36 *Sygrove v O'Leary* 12/11/92, Williams M, HC Wellington CP626/92, 11: The plaintiff's claim of part performance succeeded by showing the defendant acting in a manner that indicated he had rights and obligations of more than a monthly tenant did. For instance, he entered into arrangements with sub-sub-tenants and agreed to pay outgoings. This was not disturbed on appeal: *O'Leary v Sygrove* 17/06/93, Richardson J, Casey J, Robertson J, Court of Appeal CA385/92, 4. *Petty v Fletcher Residential Ltd* 18/02/93, Williams M QC, HC Palmerston North M No 7/93, 7-8: The judge referred to two acts of part performance, one of which was the defendant's.

37 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 109. *See for instance*: *Welsh v Gatchell* [2009] 1 NZLR 241, 262: Knowledge sufficed; *Brabazon Properties Ltd v Nixon* 18/08/98, Laurenson J, HC Auckland J HC50/98, 10-13: Weighed factors for both sides; *Salt of the Earth v Finer* 17/07/08, Hole AJ, HC Auckland CIV2008-404-2388 [24-27]: Considered inadequacy of consideration as a potential factor; *Strickland v Wenzlick* 9/10/03, Lang M, HC Auckland CIV-2003-404-3584, [48]: The defendants had benefited from the contract.

38 *Home Buyers Ltd v Mu* 18/12/06, Gendall AJ, HC Wellington CIV-2006-485-2130.

39 Ibid, [61-63]: Albeit in obiter dictum.

40 *Steadman v Steadman* [1976] AC 536, 565 per Lord Simon.

41 *Maddison v Alderson* (1883) 8 App Cas 467, 479 per Earl of Selborne LC; *Steadman v Steadman* [1976] AC 536, 565 per Lord Simon; *Chaproniere v Lambert* [1916-17] All ER Rep 1089, 1090-1091 per Swinfen Eady LJ.

circumstances payment of money could provide sufficient proof, thereby fulfilling the evidence base.[42] As money is repayable, it failed the equity base.[43] However, *Steadman* recognised money is not always repayable, so the equity base could be satisfied.[44] A plaintiff can use payment to succeed in a part performance claim if in the circumstances the payment fulfilled both bases.

In recent years however, the Courts have relaxed too far the conditions surrounding accepting payment of a deposit as part performance.[45] While some cases recognise that both bases are required, others focus on one base, producing a result inconsistent with the other. In *Welsh v Gatchell* Miller J said "payment of the deposit specified in the agreement was an unequivocal act of part performance in circumstances where I have found that payment followed formation of the contract".[46] This does not follow the appropriate process of considering the actions, and then the contract.[47] While there was an unsigned record of the contract, logically that cannot affect part performance. Part performance requires actions, not an inadequate record, to provide proof of the contract.[48] Therefore, this case allowed part performance via payment though it lacked the required evidential value.

In *Watson v Arted*[49] Venning J held the plaintiff's payment of their share of the deposit fulfilled the test for part performance, though the defendants returned it.[50] As the money was repaid, this case does not fulfill the equitable base.[51] Other cases have also only noted the evidence base.[52] New Zealand now has part performance via

42 *Steadman v Steadman* [1976] AC 536, 555 per Lord Dilhorne, 565 per Lord Simon.

43 Ibid, 565 per Lord Simon.

44 Ibid, 541 per Lord Reid, 565 per Lord Simon.

45 Allowed in: *Welsh v Gatchell* [2009] 1 NZLR 241; *Watson v Arted Ltd* 19/07/05, Venning J, HC Auckland CIV-2005-404-1895, [25]; *McGregor-Koch v Barrett* 19/12/08, Fogarty J, HC Invercargill CIV 2007-425-000236, [122] in obiter dictum; *Petty v Fletcher Residential Ltd* 18/02/93, Williams M QC, HC Palmerston North M No 7/93, 8; *Te Namu & Anor v Kapoor & Anor* 12/06/08, Harrison J, HC Napier CIV 2008-441-186, 8; *Perkins & Anor v Purea & Ors* 3/06/08, Asher J, HC Auckland, CIV 2007-404-00375, [81]: Paying money more than market rent and payments on mortgage showed agreement to buy.

46 *Welsh v Gatchell* [2009] 1 NZLR 241, 262.

47 See above, page 7.

48 *Steadman v Steadman* [1976] AC 536, 565-566 per Lord Simon.

49 *Watson v Arted Ltd* 19/07/05, Venning J, HC Auckland CIV-2005-404-1895.

50 Ibid, [25].

51 *Steadman v Steadman* [1976] AC 536, 541 per Lord Reid.

52 *Phillips & Ors v Bate* 11/06/03, Christiansen M, HC Christchurch CIV714/03, [18], [20]. *See however*: *McGregor-Koch v Barrett* 19/12/08, Fogarty J, HC Invercargill CIV 2007-425-000236, [122] in obiter dictum; *Petty v Fletcher Residential Ltd*

payment cases that do not fulfill both bases. Courts focus on one base, thereby allowing actions to fulfill part performance in a manner that is inconsistent with the other base.

IV. Conclusion

Part performance is conceptually incoherent. Historically, it is changeable and uncertain. Its application is at times conceptually unprincipled. Therefore, this paper will seek to replace it. However, before this paper can replace part performance, it must justify both having a writing requirement and having a general equitable exception to that requirement. This is the goal of the next chapter.

18/02/93, Williams M QC, HC Palmerston North M No 7/93, 8; *Te Namu & Anor v Kapoor & Anor* 12/06/08, Harrison J, HC Napier CIV 2008-441-186, 8; *Perkins & Anor v Purea & Ors* 3/06/08, Asher J, HC Auckland, CIV 2007-404-00375, [81]: Paying money more than market rent and payments on mortgage showed agreement to buy.

CHAPTER TWO: THE REQUIREMENT AND THE EXCEPTION

Part performance is a general equitable exception to the writing requirement, albeit an equitable doctrine with an evidential base. Its problems provide impetus to replace it. However, before this paper can assess replacements it must justify maintaining the writing requirement and a general equitable exception. That is this chapter's goal.

I. JUSTIFYING THE WRITING REQUIREMENT

Repealing the writing requirement removes the need for part performance. This is conceptually elegant. Oral land contracts would be the same as other contracts, valid and enforceable. One Canadian province, Manitoba, has done this.[1] While there are persuasive arguments both for and against the writing requirement, it should remain.

1. *Arguments for the writing requirement*

An important factor in the arguments is whether land is special, meaning it alone requires a formality. Sales of shares could involve higher sums than sales or leases of land. However, land is frequently the single largest purchase of someone's life and is generally very valuable.[2] Many people, with a wide variety of legal and commercial experience, enter land contracts.[3] Moreover, while many people may own shares in one company, often several people will have interests in one piece of land. Finally, land contracts are frequently very complex. These last two factors mean certainty of contractual terms and parties' rights is of the utmost importance.[4] Finally, the law recognises land is special in other ways.[5] For instance, the discretionary remedy of

1 An Act to Repeal the Statute of Frauds 1982-83-84, s 1 (Manitoba).

2 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.9; New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 108, para 109; Alberta Institute of Law Research and Reform, *The Statute of Frauds and Related Legislation* (Report 44, Alta, 1985) 10.

3 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (WP 92, London, 1985) para 5.4.

4 Ibid, para 5.3; Alberta Institute of Law Research and Reform, *The Statute of Frauds and Related Legislation* (Report 44, Alta, 1985) 10; New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 109.

5 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (WP 92, London, 1985) para 5.3; Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.12.

specific performance is usually given for land contracts.[6] This paper will assess the following arguments based on the premise that land contracts are special.

(a) Evidential argument

Oral contracts suffer from two types of uncertainty: establishing if, and when, parties have entered into a contract and proving that contract's terms. The court must determine if there is a contract based on oral testimony.[7] A signed and written contract prevents both of these uncertainties.[8] Thus, the first argument for the writing requirement is evidential; writing achieves certainty.[9]

The first response to this argument is weak: that this reasoning applies to all contracts.[10] The complex nature of land contracts means the argument is more pressing here. The second response to this argument is very damaging: the argument demonstrates it is best practice to write, but it does not justify a writing *requirement*.[11] Courts deal with oral testimony frequently, and are capable of determining the existence and terms of oral contracts.[12] This issue is whether parties should be able to orally contract, thereby risking that they will fall foul of the two uncertainties. This argument does not establish why parties should not be able to take this risk.

(b) Channeling argument

The channeling argument places significance on the writing requirement's ability to clearly demarcate the boundary between contracts and non-contracts. Signing a

6 Terry Sissons, "Specific Performance," in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd ed, 2009) 744.

7 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.7.

8 Alberta Institute of Law Research and Reform, *The Statute of Frauds and Related Legislation* (Report 44, Alta, 1985) 10; John H. Langbein, "Substantial Compliance with the Wills Act," (1974-1975) 88.3 Harv L Rev 489, 492-493; Lon L. Fuller, "Consideration and Form," (1941) 41 Colum L Rev 799, 800.

9 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 109; Fuller, "Consideration and Form," (1941) 41 Colum L Rev 799, 800.

10 Dugdale, "Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956," (1998) 13.3 JCL 268, 270.

11 Ibid, 270.

12 H W Wilkinson [1967] 31 Conv (NS) 182, 186; Alberta Institute of Law Research and Reform, *The Statute of Frauds and Related Legislation* (Report 44, Alta, 1985) 9.

written contract clearly signifies to the parties and judges that they have entered the realm of contract.[13] Fuller argues that this is an important function of formalities.[14]

The channeling argument is subject to the same criticism as the evidential argument; channeling it is not a justification for the writing requirement. Courts and parties can recognise whether something is a contract without the writing requirement. The argument is also subject to another significant criticism; the writing requirement does not provide channeling.[15] The writing requirement divides enforceable contracts from unenforceable contracts; it does not demarcate when parties have entered a contract.[16] Furthermore, Fuller recognises that this function loses its strength when courts utilise lenient interpretations.[17] Courts have recognised multiple doctrines that help contracts fulfill the writing requirement.[18] Moreover, part performance means that an oral contract may be subject to specific performance.[19]

(c) Consumer protection

The consumer protection argument is the predominant modern justification for the requirement.[20] The writing requirement provides two types of consumer protection. First, it prevents parties from being unwittingly bound.[21] Signing a contract provides

13 Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, Vancouver, 1977) 52; Fuller, "Consideration and Form," (1941) 41 Colum L Rev 799, 801-803; Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.11; Langbein, "Substantial Compliance with the Wills Act," (1974-1975) 88.3 Harv L Rev 489, 493-494; Fuller, "Consideration and Form," (1941) 41 Colum L Rev 799, 801-803.

14 Fuller, "Consideration and Form," (1941) 41 Colum L Rev 799, 801-803.

15 Dugdale, "Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956," (1998) 13.3 JCL 268, 270-271.

16 Ibid, 270. However, this will change as this paper will conclude that the writing requirement should change to being must be written to be valid.

17 Fuller, "Consideration and Form," (1941) 41 Colum L Rev 799, 801-803.

18 Dugdale, "Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956," (1998) 13.3 JCL 268, 271; Discussed below, see page 18. Note, changes to the exceptions will affect the strength of this argument, however this paper will not enter this debate.

19 While part performance operates on the equities, it provides a remedy of specific performance: Sissons, "Specific Performance," in Andrew Butler (ed), *Equity and Trusts in New Zealand* (2nd ed, 2009) 757.

20 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.9, para 2.10; Alberta Institute of Law Research and Reform, The Statute of Frauds and Related Legislation (Report 44, Alta, 1985) 10; New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 108, para 109; Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, Vancouver, 1977) 50-51; Manitoba Law Reform Commission, Report on the Statute of Frauds (Report 41, Winnipeg, 1994) 27.

21 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.9, para 2.10; Alberta Institute of Law Research and Reform, The Statute of Frauds and Related Legislation (Report

people with an opportunity to seek legal advice and impresses upon them the seriousness of their actions.[22] Second, it provides protection in the form of certainty about a party's rights and obligations.[23] This is necessary, as land contracts are often complex.

There are three responses to this argument, all of which are unpersuasive. First, while people may enter into oral contracts for goods or services that are worth more than some land contracts,[24] this paper has already established that land contracts have a unique need for consumer protection. Second, while this argument is based on the unproven assumption that writing has protected consumers who would have otherwise become unwittingly bound,[25] this response is empty. One cannot prove these assumptions, just as one cannot prove the assumption that consumer protection is unnecessary.[26] There are no statistics for a counterfactual. Third, some argue the legislation does not provide protection because it only requires parties to have a signed record of the contract.[27] However, the writing requirement provides parties with certainty about the contractual terms. Furthermore, though a party may be bound to an oral contract unwittingly, the other party cannot enforce that contract in court. This is protection.

2. *Arguments against the writing requirement*

The strongest argument for the repeal of the writing requirement is that it causes injustices. Genuine oral contracts are unenforceable unless the party can succeed on part performance.[28] Repealing the requirement would prevent these injustices, as it

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44, Alta, 1985) 10; Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, Vancouver, 1977) 50-51. This overlaps with the cautionary argument: Dugdale, "Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956," (1998) 13.3 JCL 268, 272.

22 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.9.

23 New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 108, para 109.

24 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (WP 92, London, 1985) para 5.4; Dugdale, "Do we need the Contracts Enforcement Act?," [1993] NZLJ 239, 240.

25 Dugdale, "Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956," (1998) 13.3 JCL 268, 272; Alberta Institute of Law Research and Reform, The Statute of Frauds and Related Legislation (Report 44, Alta, 1985) 9.

26 Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 94.

27 Dugdale, "Do we need the Contracts Enforcement Act?," [1993] NZLJ 239, 240.

28 Dugdale, "Do we need the Contracts Enforcement Act?," [1993] NZLJ 239, 240; Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (WP 92, London, 1985) para 5.10; Alberta Institute of Law Research and

would change the focus from formality issues to substantive issues.[29] The supporters of this argument claim that all the positive aspects of the writing requirement will remain, but the injustices will disappear. They claim that most parties would still record their contracts in writing and writing would become a factor for whether the parties intended to be bound.[30] This occurred in Manitoba.[31] Potentially, this could provide consumer protection by preventing people from being bound until they clearly intended to be.

In *Megill-Stephenson v Woo*[32] the Manitoba Court of Appeal faced an alleged oral contract for land. The judge held there was no concluded contract, as the parties did not intend to be bound until the vendor had received legal advice. The judge held:

> [t]he courts should be reluctant to impose binding contracts on parties based on conversation, particularly where the usual practice has been to reduce such contracts into writing. In spite of the repeal of the *Statute of Frauds*, the practice in dealing with the purchase and sale of land is to have the contracts in written form, and that was the *obvious expectation between the parties* in this dispute [emphasis added].[33]

Thus, Manitoba asks whether parties intend to be bound by an oral contract. The absence of writing is a factor in assessing this.

In New Zealand *Carruthers v Whitaker* decided that because "the parties intended to contract in accordance with common practice, which in New Zealand is to obtain the signatures of both vendor and purchaser to both copies of the agreement", they did not intend to be bound until that had occurred.[34] If parties contemplate a written agreement, there is a presumption that parties do not intend to be bound until they have signed this agreement.[35] A plaintiff can displace this presumption.[36] This

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Reform, *The Statute of Frauds and Related Legislation* (Report 44, Alta, 1985) 9; Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 93

29 Wilkinson (1967) 31 Conv (N.S.) 182, 183; Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (WP 92, London, 1985) para 5.10; Alberta Institute of Law Research and Reform, *The Statute of Frauds and Related Legislation* (Report 44, Alta, 1985) 9.

30 Dugdale, "Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956," *Journal of Contract Law* 13.3 (Nov 1998) 268, 272-273.

31 *Carruthers v Whitaker and Another* [1975] 2 NZLR 667; *Megill-Stephenson Co Ltd v Woo et al.* (1989) 59 DLR (4th) 146; New Zealand Law Commission, *Repeal of the Contracts Enforcement Act* (NZLC PP30, Wellington, 1997) para 31-para 32.

32 *Megill-Stephenson Co Ltd v Woo et al.* (1989) 59 DLR (4th) 146.

33 Ibid, 151.

34 *Carruthers v Whitaker and Another* [1975] 2 NZLR 667, 672.

35 *Welsh v Gatchell* [2009] 1 NZLR 241, 250; *Kain v Hutton* [2004] 2 NZLR 318, [23]; *Attorney-General v Whangarei District Council* (2005) 6 NZCPR 561 [17]; *Prasad v Keith Hay Homes Ltd* [1997] 1 NZLR 363, 366-367; *McFadzean v Westpac*

presumption only applies if the parties contemplate a written agreement.[37] Otherwise, the absence of writing is a factor to be used in determining if parties intend to be bound.[38]

However, the writing requirement does not appear to cause many unjust results. A New Zealand Law Commission preliminary paper in 1997 that advocated repeal could only point to three examples.[39] There is also significant problem with the argument that writing will become an intention issue. First, the presumption only operates if parties intend a written agreement; without this intent, the absence of writing is merely a factor for determining intent. There is no presumption that parties do not intend to be bound by an oral contract. Second, the cases recognise the presumption factor partly due to the long-standing writing requirement.[40] Third, the claim that most parties will still write their contracts is an unproven assumption. Without the writing requirement, parties may no longer write contracts. Therefore, the lack of writing could cease to be a factor in determining intent.[41] However, if that happens, consumers will still require protection. Even if it is widely known that oral land contracts are binding, arguably that would not prevent a consumer becoming bound unwittingly to an oral contract with a slick commercial operator.

3. *Law Commissions' views*

Many Law Commissions have considered whether to retain the writing requirement, for instance, England, British Columbia, Alberta, Ontario, Manitoba and New Zealand.[42] Of these, only a New Zealand preliminary paper advocated repeal.[43] In

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Merchant Finance Ltd (1988) ANZ ConvR 116, 117-118; D W McLauchlan "Informal Agreements for the Sale or Lease of Land: When are they Contracts?," [1993] NZRLR 442, 445-446.

36 *Welsh v Gatchell* [2009] 1 NZLR 241, 250; *Verissimo v Walker* [2006] 1 NZLR 760, 770-771; *France v Hight* [1990] 1 NZLR 345, 352-354; *McFadzean v Westpac Merchant Finance Ltd* (1988) ANZ ConvR 116, 117-118.

37 *Prasad v Keith Hay Homes Ltd* [1997] 1 NZLR 363, 366-367; McLauchlan "Informal Agreements for the Sale or Lease of Land: When are they Contracts?," [1993] NZRLR 442, 451-453: Notes cases which seem to think there is a presumption against being bound informally.

38 McLauchlan "Informal Agreements for the Sale or Lease of Land: When are they Contracts?," [1993] NZRLR 442, 446, 460.

39 New Zealand Law Commission, *Repeal of the Contracts Enforcement Act* (NZLC PP30, Wellington, 1997) para 18-para 20.

40 *Carruthers v Whitaker and Another* [1975] 2 NZLR 667, 672; *Megill-Stephenson Co Ltd v Woo et al.* (1989) 59 DLR (4th) 146, 151; Dugdale, "Formal Requirements: the Proposed Repeal of the New Zealand Contracts Enforcement Act 1956," (1998) 13.3 JCL 268, 273; McMorland, *Sale of Land* (2nd ed, 2000) para 4.16.

41 Ministry of Justice, *Preliminary Paper 30: Repeal of the Contracts Enforcement Act 1956*, (Submission, 30/04/98) 2-3.

42 Note: This paper will use the term 'Law Commission', though some are Law Reform Commissions, and Alberta is the Institute of Law Research and Reform. New Zealand Law Commission, *A New Property Law Act* (NZLC R29, Wellington,

this 1997 preliminary paper, the Law Commission proposed following Manitoba, which repealed the requirement. In Manitoba, "[t]he 'onslaught of litigation' predicted by the Manitoba Law Reform Commission has not to date resulted."[44]

We should approach the Manitoban experience with care. Our conveyancing practices might differ, which the Law Commission did not analyse. If they are different, their experience is an inadequate blueprint for New Zealand. Moreover, there are important differences between Manitoba and New Zealand.[45] Between 1999 and 2008, Manitoba had on average 0.0109 residential house sales per capita.[46] Over the same period, New Zealand had on average 0.0223 residential house sales per capita.[47] These statistics do not represent a complete picture of land contracts. Nevertheless, most consumers enter into a residential house sale, and the writing requirement is concerned with consumers. This data shows a larger proportion of New Zealand's consumers are at risk by the repeal of the writing requirement than in Manitoba.[48]

Second, there is little support for repeal. The Law Commission's 1997 preliminary paper received many submissions against the repeal.[49] For instance, the New Zealand Law Society, the Real Estate Institute of New Zealand and the Ministry of Justice expressed opinions against repeal.[50] The Law Commission did not issue a report and

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1994) para 40, para 41; Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 6.1; Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, Vancouver, 1977) 73; Alberta Institute of Law Research and Reform, *The Statute of Frauds and Related Legislation* (Report 44, Alta, 1985) 58; Manitoba Law Reform Commission, *Report on the Statute of Frauds* (Report 41, Winnipeg, 1994) 49; Ontario Law Reform Commission, *Report on Ammendment of the Law of Contract* (Ontario, 1987) 116 – Note, this Report did not advocate the straight repeal of the writing requirement, but recommended a change to a general requirement that the party alleging the contract produce corroborating evidence: 104-105; 109-110.

43 New Zealand Law Commission, *Repeal of the Contracts Enforcement Act* (NZLC PP30, Wellington, 1997) para 40-para 41.

44 Ibid, para 37.

45 This paper will compare residential housing statistics, as consumer protection is the strongest argument for retention of the writing requirement.

46 See Appendix B.

47 See Appendix B,

48 Residential leases need writing, Residential Tenancies Act 1986, ss13-13D; See Appendix B.

49 New Zealand Law Commission, *Repeal of the Contracts Enforcement Act* (NZLC PP30, Wellington, 1997) para 40, para 41; See Appendix C.

50 Real Estate Institute of New Zealand Incorporated, *Comments on Law Commission Preliminary Paper 30, Repeal of the Contracts Enforcement Act 1956* (Submission, 13/03/98); New Zealand Law Society *Submission to the Law Commission Preliminary Paper Repeal of the Contracts Enforcement Act* (Submission, 9/03/98); Ministry of Justice, *Preliminary Paper 30:*

closed the project. Furthermore, there is little support for repeal in other jurisdictions. No submissions on the English Law Commission preliminary paper supported repeal.[51] The writing requirement is a widely recognised and accepted formality.[52]

4. *Conclusion*

Repealing the writing requirement is undesirable. The arguments are finely balanced. However, the writing requirement does not appear to result in significant injustice. Furthermore, the consequences of repeal are uncertain; we cannot rely on Manitoba and the intention argument is flawed. Therefore, the consumer protection provided by the writing requirement outweighs a few unjust results.

II. A GENERAL EQUITABLE EXCEPTION

This paper has justified the writing requirement. Now it must justify the existence of a general equitable exception to that requirement. Aside from any general equitable exception, courts will find ways to transform a non-conforming contract into a conforming contract. The role of these exceptions must be outlined first.

1. *Writing requirement exceptions*

These exceptions operate at the margins of the requirement. New Zealand recognises: the authenticated signature fiction, joinder of documents, waiver, and rectification.[53] Additionally, England recognises collateral contracts and separate agreements.

Repeal of the Contracts Enforcement Act 1956, (Submission, 30/04/98): The Ministry of Justice did not express a final opinion, however expressed views favouring retaining the requirement.

51 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.6.

52 Canada – British Columbia: Law and Equity Act 1996, s 59(3); Alberta, Saskatchewan, Northwest Territories, Newfoundland and Labrador: Statute of Frauds and Perjuries 1677; Ontario: Statute of Frauds 1990, s 4; New Brunswick: Statute of Frauds 1973, s 1; Nova Scotia: Statute of Frauds 1989, s 7; Prince Edward Island: Statute of Frauds and Perjuries 1677, though the Statute of Frauds 1974 reprint does not mention land contracts (Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 62). The 1974 statute has only very minor differences from the current Statute of Frauds 1988. Australia – Northern Territories: Law of Property Act 2000, s 62; Queensland: Property Law Act 1974, s 59; Western Australia: Statute of Frauds and Pejuries 1677, s 4 (Due to: Law Reform (Statute of Frauds) Act 1962, s 2); New South Wales: Conveyancing Act 1919, s 54A; Australian Capital Territories: Civil Law (Property) Act 2006, s 201, s 204; Southern Australia: Law of Property Act 1936, s 26; Victoria: Instruments Act 1958, s 126(1); Tasmania: Conveyancing and Law of Property Act 1884, s 36; Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) Appendix C.

53 These exceptions are difficult: Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (WP 92, London, 1985) para 3.14, para 3.18-para 3-19; New Zealand Law Commission, *The Property Law Act 1952* (NZLC

The authenticated signature fiction adjusts the signing element of the writing requirement in certain situations.[54] It operates in limited situations. In particular, it requires the party who has not signed the contract to intend to be bound. Due to the intention issues discussed above, this is difficult to prove.[55]

Other doctrines adjust the writing element of the writing requirement when not all the terms of the contract are contained within one document; some may be oral or in another document.[56] The contract must either incorporate these terms or remove them.[57] A party may waive an unincorporated term in some cases, and while they will lose the benefit of the term, they can enforce the contract.[58] In some instances, joinder of documents connects two or more documents together to create a conforming contract.[59]

The English and New Zealand Law Commissions thought rectification was a useful exception.[60] This is doubtful. Rectification modifies a contract when parties omit, add or misstate a term but intended to include, omit or correctly state that term.[61] It

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PP16, Wellington, 1991) para 111-para 112; New Zealand Law Commission, *A New Property Law Act* (NZLC R29, Wellington, 1994) para 41.

54 *Sturt v McInnes* [1974] 1 NZLR 729, 733-734; Bennion, Brown, Thomas, Toomey, *New Zealand Land Law* (2005) para, 13.9.02; McMorland, *Sale of Land (2nd ed, 2000)* para 4.16: It can also apply if a previously written and signed contract is varied; *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 99: Limited because liberalises statute.

55 McMorland, *Sale of Land* (2nd ed, 2000) para 4.16. Either the presumption applies as the parties contemplated both parties signing the contract. Alternatively, the parties did not contemplate a formal signed agreement by both parties. In this situation, the lack of signed writing is still a factor pointing against the parties intending to be bound.

56 *For instance see*: *Record v Bell* (1991) 62 P & C R 192, 194.

57 *Record v Bell* (1991) 62 P & C R 192, 198-199; Law of Property (Miscellaneous Provisions) Act, s 2(1) (Eng); Law of Property Act 2007, s 24(1)(a); McMorland, *Sale of Land* (2nd ed, 2000) para 4.10.

58 McMorland, *Sale of Land* (2nd ed, 2000) para 4.14.

59 McMorland, *Sale of Land* (2nd ed, 2000) para 4.05; Burrows, Finn and Todd, *Law of Contract in New Zealand* (3rd ed, 2007) 255-257. When documents are physically connected when they were signed: *Jones Brothers v Joyner* (1900) 82 LT 768, 769*; Timmins v Moreland Street Property Co Ltd* [1958] 1 Ch 110, 122-4; 133 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 97-98. If one document references another: *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 97-98. If a document references an earlier transaction: McMorland, *Sale of Land* (2nd ed, 2000) para 4.05; *Timmins v Moreland Street Property Co Ltd* [1958] 1 Ch 110, 130-131 per Jenkins LJ; 135-136 per Romer LJ; 136-137 per Sellers LJ. *See for instance*: *Saunderson v Purchase* [1958] NZLR 588, 593-594.

60 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 5.6.

61 McMorland, *Sale of Land* (2nd ed, 2000) para 4.13; Charles Harpum, Stuart Bridge, Martin Dixon, *The Law of Real Property by Megarry and Wade* (7th ed, 2008) para 15-032; *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 29-30.

does not apply when parties choose not to record all the terms of their contract and are mistaken about the legal effect of their choice.[62]

In England, a party can claim the oral term or terms are a collateral contract, which is:

> a separate contract which is in some way related to the main contract. It must be a true contract, that is, there must be an agreement supported by consideration and it must be intended to be binding. Often the consideration will be that, without the promise contained in the collateral contract, a party would not enter into the principal contract.[63]

If the collateral contract is not for land, it need not fulfill the writing requirement.[64] Alternatively, if the land elements of the contract are fulfilled and any incomplete terms are capable of being a supplemental agreement and not absorbed by the doctrine of merger, they are enforceable as a separate agreement.[65]

2. *The general equitable exception*

The previous exceptions adjust the writing requirement. They do not apply to oral contracts. Furthermore, they are unconcerned with a party's actions. This is why an equitable exception has always supplemented these technical doctrines.[66]

This paper will now justify a general equitable exception, namely estoppel. It is justified though it will reduce certainty. As the English Law Commission recognised, injustices would result without an exception.

> Wherever the law requires specific formalities to do something, there is obviously a risk that on occasions these formalities will, through mistake or ignorance, be omitted. While it is important not to undermine the general rule that the formalities should be observed, it is equally important that the law should not be so inflexible as to cause unacceptable hardship in cases of non-compliance.[67]

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62 *Oun v Ahmad* [2008] EWHC 545 (Ch), [54]-[55]; The same result would apply in New Zealand as the concern is content of the contract: McMorland, *Sale of Land* (2nd ed, 2000) para 4.13.

63 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 5.7, para 5.8. *See for instance*: *Record v Bell* (1991) 62 P & C R 192, 193 the collateral contract was a warranty from the vendor of land as to the encumbrances on the title. This warranty was the reason the purchaser entered the contract for sale and purchase.

64 *Robert Leonard Developments Ltd v Wright* 23/03/94, Dillon, Leggatt, Henry LJJ, Court of Appeal (Civil Division) Transcript No. 410 of 1994; Jill Alexander, "Section 2 Requirements" [1996] SJ 564, 564; *Hanoman v Southward London Borough Council* [2008] EWCA Civ 624, [56], [58].

65 *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & C R 452, 455. See for instance: *Mirza v Mirza* [2009] EWHC 3 [139], [143]; Harpum, Bridge, Dixon, *The Law of Real Property by Megarry and Wade* (7th ed, 2008) para 15-034; *Grossman v Hooper* [2001] 2 E.G.L.R. 82, 84: Question of fact if fulfill.

66 At least since *Butcher v Stapley and Butcher* (1686) 1 Vern 363 in English Reports vol. 23 524.

67 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 5.1: Estoppel was one of the ways to prevent this.

In the Canadian, English, Australian and New Zealand jurisdictions, there is a consensus that the writing requirement should have a general equitable exception.[68]

Furthermore, absurd results might occur if no equitable exception existed.[69] If parties did not enter into an oral contract, as their agreement lacked consideration or intention to create legal relations, but one party relied on the other party's promise to their detriment, they might fulfill estoppel. It would be absurd if those same actions by a party to a contract could not produce an estoppel. It would become advantageous to argue there was no contract.

Equity will not undermine a statute enacted for public policy reasons. This may mean equity will not validate a contract the statute declares invalid.[70] However, this does not prevent an estoppel operating. First, the reasons for retaining the writing requirement are finely balanced. It is a weak rule, therefore exceptions are more acceptable than if the reasons for the requirement were overwhelming.

Second, the public policy point is strongest when the statute is enacted for protection reasons. Prima facie, this applies to the writing requirement, which exists to protect consumers. However, a consumer may be either the buyer or the seller in a transaction. Furthermore, the writing requirement does not protect a particular party. It is conceivable that the writing requirement will harm a consumer. This can be contrasted with credit contracts legislation, which protect a particular party to the transaction, the borrower.[71]

Third, in *Yaxely v Gotts* Clarke LJ outlined the appropriate test to decide whether a court should recognise an equitable exception. This involves determining what mischief the statute aims at, and whether the exception is consistent with that.[72] This test is more appropriate than Robert Walker LJ's test in the same case, which looked

68 Ibid, para 6.4; Law and Equity Act 1996, s 59(3) (British Columbia); Uniform Land Transactions Act 1975, s 2-201(b) (US); Australia has part performance: J W Carter, Elisabeth Peden, G J Tolhurst, *Contract Law in Australia* (5th ed, 2007) para 9-09, para 9-24; Canada also has part performance: Fridman, *The Law of Contract in Canada* (5th ed, 2006) 226-227, 229-231.

69 This idea was raised in *Yaxley v Gotts* (2000) 32 HLR 547, 558.

70 *Yaxley v Gotts* (2000) 32 HLR 547, 555 per Robert Walker LJ.

71 Ibid, 555 per Robert Walker LJ.

72 Ibid, 561 per Clarke LJ.

for instances where Parliament had decided the writing requirement was unnecessary, namely for constructive trusts, and allowed an estoppel in those situations. Robert Walker LJ's test requires a law that Parliament has made, it does not indicate how that law should be made. Clarke LJ's test can indicate how the law should be made.

The writing requirement has two aims, the traditional aim to prevent fraud, and the modern aim to protect consumers. It is "an established principle that the statute cannot be used as an instrument of fraud",[73] which is why the general equitable exception of part performance exists.[74] Estoppel likewise prevents fraud.

Estoppel also provides consumer protection. Estoppel does not directly provide the protection of certain contractual terms. However, this paper is only proposing the exception for circumstances where there would have been an enforceable contract but for the writing requirement. Therefore, the exception will only apply to agreements with certainty.[75] Thus, estoppel does not undermine this statutory protection.

Estoppel provides protection by preventing parties from becoming unwittingly bound. A consumer who has unknowingly entered an oral contract will only be forced to uphold the contract if they acquiesced in the other party's actions.[76] Thus, they can object to these actions if they believe their agreement is not binding. Furthermore, a consumer who enters an oral contract, believing it is enforceable, and suffers detriment in reliance on that belief may be able to enforce the contract.[77] The unconscionability requirement may also protect consumers.[78] The estoppel exception is consistent with the aim of the rule. Thus, estoppel does not undermine the writing requirement and therefore does not fall foul of the public policy principle.

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73 *Perkins & Anor v Purea (and a third party)* 3/06/08, Asher J, HC Auckland CIV 2007-404-00375, [80].

74 Ibid, [80]; *Welsh v Gatchell* [2009] 1 NZLR 241, 261-262; Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 84.

75 Burrows, Finn and Todd. *Law of Contract in New Zealand* (3rd ed, 2007) 77.

76 See page 39 and following.

77 See page 39 and following.

78 *Home Buyers Ltd v Mu* 18/12/06, Gendall AJ, HC Wellington CIV-2006-485-2130, [62]: No reason why it would be unconscionable under part performance and not estoppel in the area, namely when have an enforceable contract but for the writing requirement.

3. *Conclusion*

This paper has now justified the consensus view, that we should have the writing requirement and a general equitable exception. Now this paper must ask whether estoppel, in its traditional or modern form, can replace part performance as the general equitable exception. Criteria are required to do this. The first criterion is that estoppel must be conceptually coherent. To replace one conceptually troubled doctrine with another is not an improvement.

The second criterion is that estoppel should cover similar cases to part performance; in particular, it must be available to both sides of the transaction. Either side may commit fraud, either side may need protection; therefore, either side should in principle have the benefit of the exception. Furthermore, it must provide a similar remedy to part performance, namely specific performance. Parties may genuinely make an oral contract, and in some instances, we want to uphold that contract.[79]

Thirdly, any replacement must be reasonably certain. There are two elements to this, whether the test is stable over time and if a party can predict the outcome of their case. With these criteria in mind, this paper will now assess the traditional estoppels.

79 *See however*: The UK report saw part performance as too blunt, and supported the idea that estoppel might not uphold the agreement in every circumstance: Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 1.9. This paper is seeking alternative ways to uphold the agreement, it does not address situations in which the parties do not want to uphold the agreement but want damages. *See for instance*: *Welsh v Gatchell* [2009] 1 NZLR 241, 262; *Ward v Metcalfe* 11/04/90, Fisher J, HC Hamilton, A176/84, 22-25; R D Mulholland, "Part performance and common law damages," [1991] NZLJ 211; Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 87-89; James Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 635-636; *See however*: Gerwyn Ll H Griffiths, "Part Performance – Still Trying to Replace the Irreplaceable?," (2002) 66 Conv 216.

CHAPTER THREE: THE TRADITIONAL ESTOPPELS

This paper will now assess the traditional estoppels using the criteria chapter two outlined. While Australia and New Zealand apply modern estoppel, England applies the traditional estoppels. This chapter will argue the traditional estoppels cannot replace part performance.[1] To do this, the paper must outline the estoppels.

I. ESTOPPELS

While the requirements of the traditional estoppels are fairly settled, they have an uncertain taxonomy.[2] This is because courts developed a taxonomy from decided cases, instead of establishing a taxonomy and then applying it to cases. For instance, promissory estoppel is called equitable, *High Trees* and quasi estoppel.[3] Estoppel by representation is named both equitable estoppel and common law estoppel.[4] Proprietary estoppel is divided into estoppel by encouragement and estoppel by acquiescence, but known by all three names.[5] Until proprietary estoppel was formed, courts considered estoppel *in pais* as a catch-all for common law estoppels.[6] The requirements of the estoppels were tightly circumscribed, and later relaxed.[7]

This paper will use the following taxonomy.[8] There are three overarching categories of estoppel: estoppel by judgment, estoppel by writing, and estoppel by conduct (or

1 While some English cases have expressed a view that all these estoppels are part of one theory they still operate as individual estoppels *see for instance*: *Taylors Fashions Ltd v Liverpool Trustees Co* [1982] 1 QB 133, 151-152; Margaret Halliwell, "Estoppel: unconscionability as a cause of action," (1994) 14.n1 LS 15, 30-31.

2 Michael Spence, *Protecting Reliance* (1999) 19.

3 Mindy Chen-Wishart, *Contract Law* (2nd ed, 2008) para 4.3; Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 606.

4 Edwin Peel, *The Law of Contract* (12th ed, 2007) para 10-090 fn 474; Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 606.

5 Hon Justice KR Handley, "The three High Court decisions on estoppel 1988-1990" (2006) 80 ALJ 724, 724-725; *Taylors Fashions Ltd v Liverpool Trustees Co* [1982] 1 QB 133, 151; *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650, 666 per Oliver LJ, 668 per Stephenson LJ.

6 Kevin Lindgren, "Estoppel in Contract" (1989) 12 UNSWLJ 153, 154.

7 *Willmott v Barber* (1880) 15 Ch D 96, 105-106. These were relaxed by *Taylors Fashions Ltd v Liverpool Trustees Co* [1982] 1 QB 133, 147 in England and *Wham-O Mfg Co v Lincoln Industries Ltd* [1984] 1 NZLR 641, 671-672 in New Zealand. *See also*: Mulholland, "The Equitable Doctrines of Estoppel and Part Performance," (1989) 7.n1 OLR 69.

8 For alternative taxonomies *see*: Piers Feltham, Daniel Hochberg, Tom Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004); Elizabeth Cooke, *The Modern Law of Estoppel* (2000); A Leopold, "Estoppel: A Practical Appraisal of Recent

estoppel *in pais*).[9] Only estoppel by conduct, the focus of this paper, operates in both common law and equity.[10] This estoppel encompasses estoppel by convention, estoppel by representation, proprietary estoppel and promissory estoppel.[11] Estoppel by representation and estoppel by convention operate in both common law and equity.[12] Proprietary and promissory estoppels are purely equitable.[13]

For estoppel by convention, parties must accept an assumption of fact or law that they intend to determine their legal relationship.[14] Party B must rely on that assumption to their detriment, so it would be unconscionable for Party A to deny the assumption.[15] Estoppel by representation requires Party A to make a clear and unambiguous representation of existing fact to Party B, who was intended to, and did, act on this representation to their detriment.[16] These estoppels are not an independent cause of action.[17] They prevent Party A from denying the assumption or representation.[18]

Promissory estoppel requires Party A to make a promise about the future to Party B, intending it to affect their pre-existing legal relations. Party B relies on this promise, so it would be inequitable for Party A to not fulfill the promise.[19] Party B must only alter their position, not necessarily suffer detriment.[20] Promissory estoppel operates

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Developments," (1991) 7 Australian Bar Review 47, 71-73; Lindgren, "Estoppel in Contract," [1989] 12 UNSWLJ 153, 154-155.

9 Lunney "Towards a Unified Estoppel" [1992] Conv 239, 242.

10 Charles Rickett, "Equity," in Hon Justice McGrath (eds), *Laws of New Zealand* (1993-) (updated 30/06/09) para 199.

11 Ibid, para 199.

12 *Jorden v Money* [1843-60] All ER Rep 350, 354-355 per Lord Cranworth LC; *National Westminster Finance NZ Ltd v The National Bank of NZ Ltd* 30/03/93, Tipping J, Court of Appeal CA 159/92, 28-29.

13 Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 605 fn 31.

14 If one party makes a mistake and the other acquiesces, or if the parties expressly agree to the assumption: Peel, *The Law of Contract* (12th ed, 2007) para 3-094, para 3-096; *National Westminster Finance NZ Ltd v The National Bank of NZ Ltd* 30/03/93, Tipping J, Court of Appeal CA 159/92, 30.

15 *National Westminster Finance NZ Ltd v The National Bank of NZ Ltd* 30/03/93, Tipping J, Court of Appeal CA 159/92, 29-30.

16 Peel, *The Law of Contract* (12th ed, 2007) para 9-153; *Jorden v Money* [1843-60] All ER Rep 350, 354, 356 per Lord Cranworth LC, 358 per Lord Brougham.

17 Peel, *The Law of Contract* (12th ed, 2007) para 3-098, para 9-153. However, see page 35.

18 Ibid; *Jorden v Money* [1843-60] All ER Rep 350, 355 per Lord Cranworth LC.

19 John McGhee, *Snell's Equity* (31st ed, 2005) para 10-08; *Hughes v Metropolitan Railway Company* (1877) 2 App Cas 439, 448 per Lord Cairns LC; *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130, 136.

20 Peel, *The Law of Contract* (12th ed, 2007) para 3-084; However, see page 34.

as a shield, not a sword.[21] The estoppel may prevent Party A from denying the legal effect of the promise.[22]

Proprietary estoppel applies when:

> [B], under an expectation created or encouraged by [A] that [B] shall have a certain interest in land thereafter, on the faith of such expectation and with the knowledge of [A] and without objection from him, acts to his detriment in connection with such land.[23]

Proprietary estoppel is a cause of action that does not require a pre-existing legal relationship.[24] The estoppel is traditionally limited to acquiring rights in land.[25]

Australia and New Zealand courts formed modern equitable estoppel by removing the traditional estoppels' limitations. The courts extended proprietary estoppel beyond interests in property.[26] They also abandoned the requirement of a pre-existing legal relationship for promissory estoppel; it is now sufficient if the "promise affected a legal relationship that will arise in the future".[27] Promissory estoppel was applied as a cause of action.[28] Finally, courts recognised the equitable nature of estoppels by representation and convention.[29]

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21 *Combe v Combe* [1951] 2 KB 215, 220 per Denning LJ, 224 per Birkett LJ; However, it can be part of a cause of action see page 36.

22 Peel, *The Law of Contract* (12th ed, 2007) para 3-090: Potentially for a limited time.

23 *Taylors Fashions Ltd v Liverpool Trustees Co* [1982] 1 QB 133, 144 per Oliver J. Proprietary estoppel stems from *Ramsden v Dyson* [1866] LR 1 HL 129, 140-141 per Lord Cranworth LC, 168 per Lord Wensleydale, 170 per Lord Kingsdown. Lord Cranworth LC and Lord Wensleydale outlined unilateral mistake proprietary estoppel and Lord Kingsdown estoppel by encouragement. See *Plimmer Mayor, etc, of Wellington* (1884) 9 App Cas 699 (PC), 710-711; *Taylors Fashions Ltd v Liverpool Trustees Co* [1982] 1 QB 133, 144 for interpretation issues. Traditionally there were five strict criteria *see Willmott v Barber* (1880) 15 Ch D 96, 105-106. These were relaxed by *Taylors Fashions*, 147 in England and *Wham-O Mfg Co v Lincoln Industries Ltd* [1984] 1 NZLR 641, 671-672 in New Zealand.

24 Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 607; *Crabb v Arun District Council* [1976] Ch 179, 187 per Lord Denning MR.

25 However, see page 28.

26 Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 609.

27 *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA), 361. Note, this is more contentious in Australia, *see* Leopold, "Estoppel: A Practical Appraisal of Recent Developments," (1991) 7 Australian Bar Review 47, 64-65; Spence, *Protecting Reliance* (1999) 31-32.

28 Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 488.

29 Estoppel by convention: *National Westminster Finance NZ Ltd v The National Bank of NZ Ltd* 30/03/93, Tipping J, Court of Appeal CA 159/92, 28-29. Estoppel by representation: It is contentious whether this is encompassed by equitable estoppel in both Australia and New Zealand. This paper will assume it is, *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80, 86 says it is. Furthermore, it is illogical for be estoppel by representation to be distinct, as cannot play a separate role, *see*: *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 412-413 per Mason CJ; Spence, *Protecting Reliance* (1999) 29. Finally, if it is not within equitable estoppel, it does not affect the cases in the areas of my paper's concern.

It is settled that for Party B to benefit from modern equitable estoppel:[30]

i. Party A must create or encourage Party B's expectation;
ii. Party B must rely on that expectation;
iii. That reliance must be reasonable;[31]
iv. Party B must suffer detriment;
v. It must be unconscionable for Party A to deny the expectation.[32]

The estoppel is a cause of action that applies to representations or promises about facts or law, without requiring a pre-existing legal relationship.[33] The estoppel is changing: a distinction is forming between estoppels created by representation, silence and convention.[34] Distinctions are perhaps inevitable, as the doctrine is so all encompassing. There are also disputes about the appropriate remedy.[35] The future of the estoppel is uncertain.

II. ENGLAND

Armed with this taxonomy, this paper can assess the traditional estoppels. Because of changing their writing requirement, England abolished part performance in 1989.[36] The Law Commission anticipated that estoppel would replace it:

> [a]re there other solutions than that which might have been provided by part performance? We believe that there are, and that the courts would use doctrines of estoppel to achieve very similar results where appropriate to those of part performance.[37]

30 Some authorities portray differently, *see for instance*: Burrows, Finn and Todd, *Law of Contract in New Zealand* (3rd ed, 2007) 132-133. Leopold, "Estoppel: A Practical Appraisal of Recent Developments," (1991) 7 Australian Bar Review 47, 60-61. However, the content remains the same.

31 This is an element, which for the purposes of this paper and the author submits, generally, is best assessed separately.

32 *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192, 197. *Gillies v Keogh* [1989] 2 NZLR 327, 331 per Cooke P, 345 per Richardson J, *Boys v Calderwood and others* 14/06/05, Ronald Young J, HC Auckland CIV 2004-404-290, [70], [84], [150]. Not always seen as a separate requirement, but often considered separately: *Nectar Ltd v SPHC Operations (NZ) Ltd* 7/05/03, Harrison J, HC Auckland CL20/02, [141], [145-146]; *Elkington v Ruruku and others* 21/12/07, Wild J, HC Nelson CIV 2006-442-00501, [48-49], [55].

33 *Volbar Restaurants Ltd v St Lukes Square Ltd and another* 25/02/92, Barker J, HC Auckland CP 1051/90, 12-13; Spence, *Protecting Reliance* (1999) 31-32; Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 608-609; Andrew Robertson, "The Statute of Frauds, Equitable Estoppel and the Need for 'Something More'" (2003) 19 JCL 173, 184-186.

34 Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 613.

35 See page 43.

36 Law of Property (Miscellaneous Provisions) Act, s 2.

37 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 5.4.

However, this paper will argue that the traditional estoppels cannot adequately replace part performance. They fail the second criterion; they will not cover similar cases to part performance.

1. *Proprietary estoppel*

The Law Commission and courts accepted that proprietary estoppel aids parties with an oral contract.[38] As this estoppel has a proprietary nature, it is only available to plaintiffs seeking an interest in land, not to plaintiffs seeking to divest themselves of an interest in land.[39] Therefore, it is one-sided and fails the second criterion.

While proprietary estoppel extends beyond proprietary rights in land, it cannot help a party trying to divest themselves of an interest in land.[40] First, courts have applied proprietary estoppel to forms of personal property.[41] Second, courts have applied the estoppel when a party gave and received an interest in property as part of a composite transaction.[42] Third, courts have applied the estoppel to a residual estate, which included savings.[43]

These extensions are a long way from recognising a proprietary estoppel for a vendor or landlord. The first extension is simply extending the doctrine to identifiable personal property. One case denied to extend the principle further.[44] In the second extension, the claim was for an interest in real property, which as part of a composite

38 Ibid, para 5.5: They used a proprietary estoppel quote: Edmund Henry Turner Snell, *Snell's Principles of Equity* (29th ed, 1982) 563; *Yaxley v Gotts* (2000) 32 HLR 547, 559-60 per Robert Walker LJ, 561 per Clarke LJ, 570 per Beldam L.J.

39 Christine Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 103; Cooke, *The Modern Law of Estoppel* (2000) 146.

40 Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 103-104; Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para XII.6.1; McGhee, *Snell's Equity* (31st ed, 2005) para 10-16; Mark Pawlowski, *The Doctrine of Proprietary Estoppel* (1996) 17. *See however:* Roger Halson "The offensive limits of promissory estoppel," (1999) 2 Lloyds Maritime and Commercial Law Quarterly 256, 275-276

41 *Strover v Strover* [2005] EWHC 860 (Ch), [35]; *Western Fish Products Ltd. v Penwith District Council and Another* (1979) 38 P & C R 7, 27.

42 *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1981) 41 P & C R 179, 197-199.

43 *In re Basham, Decd* [1986] 1 WLR 1498, 1510: While *Re Basham* is a far from ideal case (see Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 104-105; Jill Martin, "Estoppel and the Ubiquitous Constructive Trust," [1987] Conv 211; David Hayton, "By-passing Testamentary Formalities," [1987] CLJ 215), it was accepted by the Court of Appeal in *Gillett v Holt* [2001] Ch 210, 226-228.

44 *Western Fish Products Ltd. v Penwith District Council and Another* (1979) 38 P & C R 7, 27.

transaction required the plaintiffs to also divest themselves of property.[45] Woolf J noted that he would have refused proprietary estoppel if the claim were to simply compel the purchaser to buy the property and emphasised the unique situation.[46]

The third extension is a specific extension for situations where Party A promises to Party B that they will get 'everything' on Party A's death and the estate consists of real property, personal property and sometimes money.[47] In these cases, courts have relaxed the requirement that the claim be over identifiable property.[48] For instance, in *Thorner v Major*[49] the House of Lords recognised a proprietary estoppel claim over property that had changed considerably over time. Mr. David Thorner made a claim against Mr. Peter Thorner's estate. David had worked on Peter's farm without pay for almost thirty years, relying on the promise that he would inherit the farm on Peter's death.[50] The farm changed considerably between Peter's first promise to David and Peter's death.[51] However, there was an identifiable interest in land because David would inherit that particular farm, as it stood at Peter's death. Both parties knew the content of the farm would fluctuate.[52]

However, generally a party must establish a certain interest in land. In *Cobbe v Yeoman's Row Management*[53], the House of Lords affirmed this. Mr. Cobbe made an oral agreement with Yeoman's Row that Mr. Cobbe would apply for planning permission to develop a block of flats owned by Yeoman's Row. Mr. Cobbe would then buy the block of flats for an agreed sum, develop the property and pay Yeoman's Row a certain proportion of the proceeds.[54] Future negotiations were expected to settle many elements of the agreement.[55]

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45 *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1981) 41 P & C R 179, 191-192.

46 Ibid 191, 199.

47 Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para XII.6.4; *In re Basham, Decd* [1986] 1 WLR 1498, 1510.

48 See for instance: *In re Basham, Decd* [1986] 1 WLR 1498; *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 100, CA; *Thorner v Major* [2008] UKHL 18, [2009] 1 WLR 776.

49 *Thorner v Major* [2008] UKHL 18, [2009] 1 WLR 776.

50 Ibid, [1].

51 Ibid, [91].

52 Ibid, [62].

53 *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 W L R 1752.

54 Ibid, [5-6].

55 Ibid, [7].

As the agreement was incomplete, Mr. Cobbe's lacked a certain interest in land and his claim failed.[56] Any interest was "contingent not simply on the grant of planning permission but contingent also on the course of the further contractual negotiations and the conclusion of a formal written contract".[57] The terms and nature of the proprietary interest were unsettled.[58]

A tenant or purchaser has a claim over identifiable property. As this paper is solely concerned with situations where there would have been an enforceable contract but for the writing requirement, these situations are different to *Cobbe*, where the parties had not reached agreement. However, a landlord or vendor does not have a claim over identifiable property. They could not even fulfill the relaxed requirement for estate claims. A landlord or vendor's claim is "not a claim over to a particular asset or assets of the purchaser either identifiable immediately or at a future date [the estate claim requirement]; it is simply a claim in debt".[59]

2. *Promissory estoppel, estoppel by convention and estoppel by representation*

These estoppels also fail the second criterion: they have little effect in this paper's area. Promissory estoppel requires the parties to be in a pre-existing legal relationship.[60] In England, an oral agreement does not provide this, as it is invalid.[61] Thus, the estoppel is not available unless the parties have a legal relationship on another basis.[62]

Estoppel by representation is limited to representations of facts.[63] A representation from one party that they will convey to, or accept from, the other party an interest in land is a promise. A representation from one party that their oral agreement is binding is a representation of law.[64] A factual representation that there is a signed

56 Ibid, [18-19], [45].

57 Ibid, [21].

58 Ibid, [27], [91].

59 Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 105.

60 *Braithwaite v Winwood* [1960] 1 W L R 1257, 1262.

61 Law of Property (Miscellaneous Provisions) Act 1989, s 2(1) (Eng).

62 Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 117.

63 McGhee (ed), *Snell's Equity* (31st ed, 2005) para 10-01.

64 Ibid, para 10-01; Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 118.

written contract will not help if the party relying on the representation has not signed the written contract themselves, both parties must sign the contract and if the party is aware they have not signed the contract, they cannot honestly hold a belief that they have.[65] If Party A represents to Party B that Party A has signed the contract, that could fulfill the doctrine.[66] This estoppel is unlikely to contravene the public policy principle; this estoppel would prevent fraud and would not undermine consumer protection.[67]

Estoppel by convention is unhelpful. It is limited to assumptions of fact or legal meaning, such as the interpretation of a contractual term.[68] It does not include assumptions about an agreement's legal effect, such as assumptions that an oral agreement is binding.[69] Moreover, this estoppel is likely to contravene the public policy principle.[70] It would directly undermine the statute to hold that parties can ignore the it if they choose.

3. *Conclusion*

Chapter two set out three criteria for part performance's replacement. The traditional estoppels fail the second criterion; they do not cover similar cases to part performance.[71] The only helpful estoppel, proprietary estoppel, is only open to half of all potential litigants.[72] The Law Commission did not explain why they were happy with an unjustified one-sided exception. Therefore, this paper will now assess the potential of modern equitable estoppel.

65 Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 117; Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para V.2.8.

66 Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 118.

67 This estoppel does not suffer the same public policy issues as estoppel by convention: see below fn 70.

68 Note: This is quite contentious, but it is irrelevant for this paper see fn 70. McGhee, *Snell's Equity* (31st ed, 2005) para 10-06 (fn 45); *British Glass Manufacturers Confederation v The University of Sheffield* [2003] EWHC Civ 3108, [22]; Peel, *The Law of Contract* (12th ed, 2007) para 3-096, para 3-099.

69 Peel, *The Law of Contract* (12th ed, 2007) para 3-099; *Keen v Holland* [1984] 1 WLR 251, 261-262. Discussing s 2, the English Court of Appeal expressed an obiter dictum opinion that this estoppel will not aid a contract that fails the formality requirement: *Yaxley v Gotts* (2000) 32 HLR 547, 561 per Clarke LJ. *See however*: Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 119.

70 *Yaxley v Gotts* (2000) 32 HLR 547, 561 per Clarke LJ; citing *Godden v Merthyr Tydfil Housing Association* (January 15, 1997 noted [1997] N.P.C. 1 and (1997) 74 P & C R Dl); Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 121. The Law Commission did not refer to this type of estoppel either, contrary to: Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 123.

71 Davis, "Estoppel: An Adequate Substitute for Part Performance?," (1993) 13 Oxford J Legal Stud 99, 116.

72 Ibid, 127; *See also:* Griffiths, "Part Performance – Still Trying to Replace the Irreplaceable?," (2002) 66 Conv 216, 226-227.

CHAPTER FOUR: MODERN EQUITABLE ESTOPPEL

For modern equitable estoppel to adequately replace part performance, it must be conceptually coherent, produce similar results and achieve certainty. This chapter will assess modern equitable estoppel and conclude that it can adequately replace part performance.

I. CONCEPTUALLY COHERENT

The combined doctrine of equitable estoppel is conceptually sound as the individual doctrines it has absorbed have a conceptual unity, unconscionability, and their differences are of scale, not kind.[1] New Zealand and Australian courts have recognised that the estoppels share a common base of unconscionability.[2] The High Court of Australia described it as:

> the principle that equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it' ... Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.[3]

A completely abstract notion of unconscionability is unsatisfactory.[4] However, this is not a problem for modern equitable estoppel; courts will only intervene when one party causes the other to adopt an assumption, which they have relied on to their

1 "Clearly the unification of common law and equitable estoppel … could only proceed on the basis that the essential purpose of the two doctrines was the same" Andrew Robertson, "Towards a Unifying Purpose for Estoppel," [1996] 22.1 Monash University Law Review 1, 8.

2 *Gillies v Keogh* [1989] 2 NZLR 327, 331 per Cooke P, 345 per Richardson J; *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 404 per Mason CJ and Wilson J, 419, 426 per Brennan J; 458 per Gaudron; *Boys v Calderwood and others* 14/06/05, Ronald Young J, HC Auckland CIV 2004 404 290, [70]; *Andrews v Colonial Mutual Life Asurance Society Ltd* [1982] 2 NZLR 556, 570; *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 35-36 – Where the Judge prefers the term 'inequitable'; *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 409 per Mason CJ, 444 per Deane J; Charles N H Bagot, "Equitable Estoppel and Contractual Obligations in the Light of Waltons v Maher," (1988) 62 ALJ 926, 928; Paul Finn, "Unconscionable Conduct," (1994) 8 JCL 37, 38; Lunney "Towards a Unified Estoppel" [1992] Conv 239, 250.

3 *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 404 per Mason CJ and Wilson J.

4 Jessica Palmer, "Constructive Trusts," in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, 2009) 355: Where the author criticised a remedial constructive trust case for this reason; Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para I.6.5, para XIV.3.13: Note the author is discussing promissory estoppel but the same principle applies.

detriment. Though final element of estoppel, unconscionability, is discretionary, it is a principled discretion. Courts weigh a variety competing factors to reach their result.[5] For instance, the most prevalent factor is how the assumption or belief was formed.[6] It is less likely to be unconscionable to deny a belief induced by silence than a belief induced by active encouragement.[7]

In this area, the nature of the parties and their relationship is the most important factor for unconscionability.[8] Courts are less willing to recognise an equitable estoppel between commercial parties. Commercial parties should rely on contracts, not vague promises.[9] Moreover, when parties are of equal commercial strength, courts are wary to say that it would be unconscionable for the other party to deny the promise.[10] Parties are expected to act with self-interest. This allows estoppel to recognise a distinction between consumers and commercial parties. Therefore, this estoppel can provide consumer protection; the nature of the parties is a valid concern.[11]

1. *Establishing the coherency*

The traditional estoppels are manifestations of this unconscionability principle. This paper will now establish that the differences between the estoppels are of scale not kind. Therefore, when equitable estoppel formed a combined doctrine it was not amalgamating radically different doctrines.

Some have argued estoppel by representation is fundamentally different to promissory estoppel due to the difference between representations of fact and representations of

5 Spence, *Protecting Reliance* (1999) 56-57, 59-66; Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 618-621.

6 Spence, *Protecting Reliance* (1999) 60.

7 All the estoppels can be formed by expressly or implicitly: *National Westminster Finance NZ Ltd v The National Bank of NZ Ltd* 30/03/93, Tipping J, CA CA 159/92, 28; Estoppel by convention: *National Westminster Finance NZ Ltd v The National Bank of NZ Ltd* 30/03/93, Tipping J, CA CA 159/92, 28. Proprietary estoppel: Had an express distinction between encouragement and acquiescence. Promissory estoppel: Lunney "Towards a Unified Estoppel" [1992] Conv 239, 243. Representation: Feltham, Hochberg, Leech, Spencer Bower Estoppel by Representation (4th ed, 2004) para III.4.1.

8 Spence, *Protecting Reliance* (1999) 63-64.

9 *Travel Agents Association of New Zealand Inc v NCR (NZ) Ltd* (1991) ANZ ConvR 553, 555; *Australian Securities Commission v Marlborough Gold Mines Ltd* [1992-1993] 177 CLR 485, 506; Andrew Robertson, "The 'reasonableness' requirement in estoppel," (1994) 1 Canberra L Rev 231, 234.

10 *Austotel Pty Ltd and another v Franklins Selfserve Pty Ltd* [1989] 16 NSWLR 582, 585-586 per Kirby P, 620-621 per Rogers JA.

11 Ibid, 585 per Kirby P: Made it clear relationship is important.

intention.[12] The estoppel by representation remedy is that the first party cannot deny the representation.[13] This remedy is only useful for a representation of fact, not intention. Estopping Party A from denying that at X they had Y intention does not mean they cannot change their mind.[14] However, the fact/intention and fact/law distinctions are strained.[15] For instance, statements about future intent can encompass statements of present fact.[16] Furthermore, most representations of law can be re-framed as representations of fact; that regardless of the law, the parties will treat act in a certain way.[17] Therefore, it is difficult to maintain a fundamental distinction between the two. Furthermore, the remedy for estoppel by representation need not prevent the first party from denying the representation.[18] Equitable estoppel could recognise this continuum and award remedies accordingly.[19]

A common objection to combining the doctrines is that unlike equitable estoppel promissory estoppel does not require the party claiming estoppel to suffer detriment.[20] However, this objection relies on a distinction: broad and narrow detriment.[21] Broad detriment is detriment that would occur if the promise were denied due to the party's reliance. It is not simply the party's disappointed expectation.[22] For instance, if a bank structured its loan policies based on an assumption of when it could increase the

12 Handley, "The three High Court decisions on estoppel 1988-1990," (2006) 80 ALJ 724, 734-735; *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 459 per Gaudron J.

13 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 411 per Mason CJ.

14 Handley, "The three High Court decisions on estoppel 1988-1990," (2006) 80 ALJ 724, 734.

15 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 413 per Mason CJ; *Taylors Fashions Ltd v Liverpool Trustees Co* [1982]1 QB 133, 150-151: Referring to the distinction between fact and law. Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para II.6.1- para II.6.3.

16 Handley, "The three High Court decisions on estoppel 1988-1990" (2006) 80 ALJ 724, 735-736.

17 *Taylors Fashions Ltd v Liverpool Trustees Co* [1982]1 QB 133, 151.

18 Elizabeth Cooke, "Estoppel and the protection of expectations," (1997) 17.n2 Legal Studies 258, 274-275: Where recognised it was a possibility to award a different remedy, albeit unlikely. Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para V.6.4, para V.6.5.

19 *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 449-450 per Deane J. Therefore, fears that binding people to statements of intention is harsher than to their representations of existing fact as they would carry a risk if that the circumstances would change for future, are unwarranted. *See*: Handley, "The three High Court decisions on estoppel 1988-1990" (2006) 80 ALJ 724, 736.

20 Cooke, *The Modern Law of Estoppel* (2000) 62-63; Margaret Halliwell, "Estoppel: unconscionability as a cause of action," (1994) 14.n1 LS 15, 23.

21 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 415 per Mason CJ; *Cromcorp Quay Street Ltd v The Auckland Harbour Board* 4/09/89, Greig J, HC Auckland CP No. 1811/88, 11-12; Cooke, *The Modern Law of Estoppel* (2000) 96.

22 It is otherwise known as 'change of position' or 'alteration of position'. *See* Spence, *Protecting Reliance* (1999) 44. Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 616.

interest rates it would not suffer detriment unless and until the promise were denied.[23] Narrow detriment is detriment incurred during reliance; for instance, if a party demolished buildings so another party would take a lease of the premises.[24] Broad detriment generally encompasses narrow detriment.[25]

Promissory estoppel does not require narrow detriment.[26] However, it does require a change in position, and for it to be inequitable for the other party to deny their promise.[27] This requires detriment in the broad sense; if there is no detriment, it is not inequitable for the other party to deny their promise.[28] However, Cooke argues that the burden of proof is lower for promissory estoppel.[29] Often broad detriment consists of forgone opportunities; the party had opportunities available to them that they did not take up. Cooke argues courts do not require promissory estoppel claimants to show they would have taken up the opportunity, only that there were other opportunities.[30] Nevertheless, promissory estoppel does require detriment; courts have simply relaxed the required proof. Equitable estoppel does not relax the burden of proof. It will not cover all promissory estoppel cases.

Unlike proprietary equitable estoppel, the other estoppels cannot found an independent cause of action. [31] However, this does not prevent a unified estoppel. There is a spectrum of causes of action.[32] First, an estoppel can be a defence to another's cause of action. Second, an estoppel can defeat another's defence to your cause of action. Third, an estoppel can establish one part of another cause of action.

23 *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 36-37.

24 For instance: *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387.

25 Leopold, "Estoppel: A Practical Appraisal of Recent Developments," (1991) 7 Australian Bar Review 47, 59.

26 Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para XIV.2.41; McGhee, *Snell's Equity* (31st ed, 2005) para 10-11; Peel, *The Law of Contract* (12th ed, 2007) para 3-090.

27 McGhee, *Snell's Equity* (31st ed, 2005) para 10-08, para 10-11.

28 *Cromcorp Quay Street Ltd v The Auckland Harbour Board* 4/09/89, Greig J, HC Auckland CP No. 1811/88, 13-16; *Elkington v Ruruku and others* 21/12/07, Wild J, HC Nelson CIV 2006-442-00501, [48-49]; Lunney "Towards a Unified Estoppel" [1992] Conv 239, 242-243; Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para XIV.2.41-para XIV.245.

29 Cooke, *The Modern Law of Estoppel* (2000) 100-101.

30 Ibid, 101-102.

31 Ibid, 63; *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 411 per Mason CJ; *Combe v Combe* [1951] 2 KB 215, 219 per Denning LJ.

32 Roger Halson, "The offensive limits of promissory estoppel," (1999) 2 Lloyds Maritime and Commercial Law Quarterly 256, 259-261.

Fourth, an estoppel can establish all the parts of another cause of action. Fifth, an estoppel is itself an independent cause of action. All the estoppels are causes of action somewhere on the spectrum.[33]

Estoppel by representation, estoppel by convention and promissory estoppel can be used as a cause of action in the second, third and fourth ways.[34] For instance, a party may bring an action in breach of contract, with the factual basis determined by an estoppel by convention.[35]

Once it is acknowledged that these estoppels are causes of action, it becomes illogical to deny they can be an independent cause of action; estoppel can extinguish a right, or help establish another right, why should it not create a right?[36] It is uncomfortable that a promise and reliance made within a contract could produce an enforceable estoppel, but the same actions made outside a contract would not.[37] There seems to be no reason why the requirement needs an additional cause of action. Furthermore, as Brennan J argued in *Waltons Stores*, unless promissory estoppel is expanded, it would be irreconcilable with proprietary estoppel.[38]

There is no inherent reason why these estoppels cannot be an independent cause of action.[39] *Combe v Combe*[40] limited promissory estoppel purely out of deference to contract law. It feared that estoppel would sweep aside contract law and consideration.[41] However, this is unnecessary. "[E]quitable estoppel has its basis in

33 Cooke, *The Modern Law of Estoppel* (2000) 120-121, 125.

34 Halson, "The offensive limits of promissory estoppel," (1999) 2 Lloyds Maritime and Commercial Law Quarterly 256, 259-261. *See also*: Cooke, *The Modern Law of Estoppel* (2000) 120-125; Handley, "The three High Court decisions on estoppel 1988-1990," (2006) 80 ALJ 724, 732-733: However, he thinks promissory estoppel is only a cause of action in the second way.

35 Cooke, *The Modern Law of Estoppel* (2000) 123.

36 Spence, *Protecting Reliance* (1999) 30. Note the criticism of his case analysis, *see*: Andrew Robertson, "Reliance, Conscience and the new Equitable Estoppel," (2000) 24 Melbourne University Law Review 218, 222-223.

37 Cooke, *The Modern Law of Estoppel* (2000) 124.

38 *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 426 per Brennan J; Leopold, "Estoppel: A Practical Appraisal of Recent Developments," (1991) 7 Australian Bar Review 47, 55.

39 *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130, 134, 136: Denning J simply states that promissory estoppel gives rise to an estoppel, which is binding.

40 [1951] 2 KB 215.

41 Ibid, 219-220 per Denning J. *See also*: Lunney "Towards a Unified Estoppel" [1992] Conv 239, 240-241; Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para XIV.4.1.

unconscionable conduct, rather than the making good of representations".[42] This argument is particularly strong if reliance not expectations is the basis of the doctrine, and therefore the relevant measure for the remedy is reliance, not expectations.[43] However, this paper submits that despite awarding the same remedy as contract, namely expectations, the fundamental concern of estoppel is so different to contract's that an important distinction remains.

Low v Bouverie[44] limited estoppel by representation out of deference to the law of misstatement, which in England at the time required deceit.[45] As a party could not sue upon an innocent or negligent misrepresentation in law, equity would not allow them to sue upon the same misrepresentation. Estoppel would only prevent them from denying the misrepresentation. However, in New Zealand this limit is illogical. An innocent misrepresentation by a contractual party or by someone in trade can still be culpable.[46] There is no longer any need for this limit.

Promissory estoppel originally required a pre-existing contractual relationship. This prevented non-contractual promises of future intention becoming binding. Promissory estoppel had to be limited to prevent estoppel encroaching upon the territory of contract.[47] However, the High Court of Australia found there was no logical distinction between creating a legal relationship and altering an existing legal relationship.[48] In both, the estoppel affects a legal relationship. Furthermore, this requirement is illogical within the unconscionability framework. In the equitable

42 *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 405 per Mason CJ and Wilson J. *See also*: *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 425-427 per Brennan J; *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 453-454 per Dawson J: Note Dawson J is discussing the relationship of common law estoppel and equitable estoppel; Bagot, "Equitable Estoppel and Contractual Obligations in the Light of Waltons v Maher," (1988) 62 ALJ 926, 935; Spence, *Protecting Reliance* (1999) 79. *See more generally:* Bagot, "Equitable Estoppel and Contractual Obligations in the Light of Waltons v Maher," (1988) 62 ALJ 926.

43 Spence, *Protecting Reliance*, (1999) 79; Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para XIV.4.22, XIV.4.23. *See however:* Andrew Robertson, "Reliance, Conscience and the new Equitable Estoppel," (2000) 24 Melbourne University Law Review 218, 230.

44 [1891] 3 Ch 82, CA.

45 *Low v Bouverie* [1891] 3 Ch 82, CA, 100-101 per Lindley LJ, 105 per Bowen LJ, 111-113 per Kay LJ.

46 Contractual Remedies Act, 1979 s 6(1); Fair Trading Act 1986, s 9; *PC Brixton Autos Ltd v Commerce Commission* [1990] NZAR 203, 208-209: Under Fair Trading Act 1986, s 13.

47 Feltham, Hochberg, Leech, *Spencer Bower Estoppel by Representation* (4th ed, 2004) para XIV.2.23, para XIV.2.24.

48 *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 401 per Mason CJ and Wilson J, 419, 425-426 per Brennan.

estoppel cause of action, the unconscionability ties the parties together, no additional relationship is required.[49]

2. *Conclusion*

This paper has established equitable estoppel is conceptually coherent. First, the unconscionability base is not an abstract notion that courts will intervene when they see fit. Second, as the differences between the estoppels are of scale not kind, the estoppel has not incorporated a group of inconsistent doctrines. This paper is not arguing that this estoppel is better than the traditional estoppels or that equitable estoppel will cover the same situations. A new doctrine applies instead of the traditional doctrines, and this new doctrine is more conceptually coherent than part performance. Therefore, modern equitable estoppel fulfills the first criterion.

II. PRODUCE SIMILAR RESULTS

For equitable estoppel to fulfill the second criterion, it must cover similar situations to part performance and provide the remedy of specific performance. Equitable estoppel, in the area of this paper's concern, achieves this.

1. *When equitable estoppel applies*

As equitable estoppel is concerned with unconscionability, not property, the party seeking the estoppel need not claim a property interest.[50] In the area of this paper's concern, the first element of part performance and equitable estoppel are the same.[51] Both require a contract that would be enforceable but for the writing requirement. A potential landlord may have an expectation that the other party will lease their premises. A potential tenant may have an expectation that they will be granted a lease. As equitable estoppel is a cause of action, the parties do not need a secondary expectation that the writing requirement will be waived.[52] Part performance also requires equitable estoppel's fifth element, unconscionability.[53]

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49 Spence, *Protecting Reliance*, (1999) 32.

50 *See for instance*: *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387.

51 Estoppel is far wider than part performanc, *See for instance*: Kevin Gray, Susan Francis Gray, *Elements of Land Law* (5th ed, 2009) para 9.2.4, para 9.2.18, para 9.2.19, para 9.2.23, para 9.2.27; Spence, *Protecting Reliance* (1999) 50-54.

52 Robertson, "The Statute of Frauds, Equitable Estoppel and the Need for 'Something More'" (2003) 19 JCL 173, 180-182, 184-186: The author is discussing guarantees, but the same principle applies.

53 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 109.

Equitable estoppel's second element, reliance, is wider than part performance in two ways. First, a party can rely on a contract without performing any obligations or exercising any rights under that contract.[54] Equitable fraud does not depend on whether a party has performed terms of the contract.[55] For instance, in *Dellaca*, Dellaca's action of leaving its other lease was an act of reliance. Secondly, the acts of reliance do not need to provide any evidence of the contract. Therefore, Dellaca's actions as a sub-lessee could have fulfilled estoppel.[56] The equity produced by detrimental reliance does not logically depend on the evidential weight of the actions.

The third element is that this reliance must be reasonable.[57] This has two elements: both adopting the expectation and relying on the expectation must be reasonable.[58] Whether it is reasonable for a party to adopt an expectation is assessed objectively from the position of the representee.[59] The question is whether the reasonable person would have formed this expectation. In this paper's area, this is likely to be fulfilled. The expectation will be based on an agreement that is sufficiently clear to have been a contract but for the writing requirement.[60]

It must also be reasonable to rely on the reasonably formed expectation. It may be reasonable to form an expectation, but not reasonable to rely on it.[61] In particular, it may be unreasonable for commercial parties to rely on expectations based on vague

54 Both can be fulfilled by inaction: Spence, *Protecting Reliance* (1999) 41-42; *Matthews v Davy* 12/11/99, Nicholson J, HC Auckland AP104-SW99, [31][33].

55 Mackie, "Part Performance of Contracts – Recent Australian Developments," (1987-1989) 9 U Tas L Rev 61, 67.

56 Expended money, took out a sub-lease and undertook considerable renovations.

57 Des Butler, "Equitable Estoppel: Reflections and Directions," (1994) 6.n2 Corporate and Business Law Journal 249, 260-261.

58 Robertson, "The 'reasonableness' requirement in estoppel," (1994) 1 Canberra L Rev 231, 231. Adopting the assumption: *Gillies v Keogh* [1989] 2 NZLR 327, 347 per Richardson J. To rely must be reasonable: *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 445 per Deane J; *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356, 359. Note acts preparatory to the contract will not be reasonable, just as they would not fulfill part performance.

59 *Travel Agents Association of New Zealand Inc v NCR (NZ) Ltd* (1991) ANZ ConvR 553, 555; *Volbar Restaurants Ltd v St Lukes Square Ltd and another* 25/02/92, Barker J, HC Auckland CP 1051/90, 25.

60 Though it is not relevant to this paper, there is debate over whether equitable estoppel requires a belief that the assumption is true, or merely that parties will treat it as if it were true. Notably, estoppel by convention did not require parties to belief in the truth of the assumption, just that the parties would act as if the assumption were true. The expectations here will fulfill either test, as they will be expectations that another party will give or receive an interest in land, the expectation does not directly concern the contract. This paper also submits that the distinction can continue, it will be reasonable to believe something false if your assumption is that the parties will treat it as though it is true. *See* Spence, *Protecting Reliance* (1999) 36-38.

61 Robertson, "The 'reasonableness' requirement in estoppel," (1994) 1 Canberra L Rev 231, 233.

non-contractual promises.[62] Conversely, it may be reasonable for family members to rely on expectations formed from vague non-contractual promises.[63] The nature of the parties, the nature of the representation and their knowledge are important for whether it will be reasonable to rely on the expectation.[64] Therefore, it appears to be important if a party knows that an agreement has no legal effect, because it lacks certain formalities.

The question arises, what effect does this have on land contracts? While the circumstances of land contracts are infinitely wide, it is possible to set out some general propositions. First, in most land contracts, the parties do not know each other before they contract. Therefore, though these people may be commercially unsophisticated consumers, they are not in a family situation where is it reasonable to rely on non-contracts. Second, these parties are trying to contract. This means the representation is unequivocal. However, it also means that parties are trying to set up a legally binding obligation.[65] Third, most people know that writing is required for a land contract to be enforceable.[66]

It is possible to discern three main possible scenarios. In the first scenario, parties have no relationship of trust, are trying to create a legally binding obligation and know that the contract must be written. It seems that, objectively, it is not reasonable for them to rely on the non-enforceable contract. They have no reason to trust the other party and are aware that they have failed to make an enforceable contract. In the second scenario, parties have a relationship of trust, though they may still be trying to create a legally binding obligation and know that to do so they must write their contract. As these parties are within the family situation outlined above, they may reasonably rely on the contract, though they know it is not enforceable. The

62 *Travel Agents Association of New Zealand Inc v NCR (NZ) Ltd* (1991) ANZ ConvR 553, 55-556; Robertson, "The 'reasonableness' requirement in estoppel," (1994) 1 Canberra L Rev 231, 234.

63 Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 625-627.

64 Robertson, "The 'reasonableness' requirement in estoppel," (1994) 1 Canberra L Rev 231, 234.

65 Lionel Bently and Paul Coughlan, "Informal dealings with land after section 2," (1990) 10.n3 LS 325, 338: Though the authors are discussing legitimate expectations the same principle applies; New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 121.

66 *Carruthers v Whitaker and Another* [1975] 2 NZLR 667, 672; Real Estate Institute of New Zealand Incorporated, *Comments on Law Commission Preliminary Paper 30, Repeal of the Contracts Enforcement Act 1956* (Submission 13/03/98) para 8-9; Building Owners & Managers Association of New Zealand Inc, *BOMA Comments on "The Repeal of the Contracts Enforcement Act 1956 – A Discussion Paper"* (Submission, 23/03/98) 1.

third scenario is when parties who have no relationship of trust are trying to create a legally binding obligation but do not know they need writing to do so. As these parties believe they have formed a legally binding contract, it will be reasonable for them to rely on it.

It is possible to construct one rule from these scenarios. First, though it may not be reasonable to rely in the first scenario, if a party does so rely that reliance can become reasonable.[67] It will become reasonable when the other party becomes aware of the first party's reliance, and acquiesces in it. In this instance, it is the reasonable reliance on an expectation induced by silence that the other party will fulfill the contract, though it is not binding.[68] This reliance on the silence of the other party will be reasonable because it is likely that the other party will be under a duty to speak. The other party will have this duty is because they have entered into an agreement intending to create legal relations. This overt intention means that if they decide they will rely on the writing requirement, and deny the contract, they are under a duty to tell this to the first party, who is relying on the failed contract.

Second, though the parties' reliance in the second and third scenarios may be reasonable, it will only continue to be reasonable if the other party does not indicate they are changing their position.[69] A party has a duty to mitigate their losses, and therefore stop relying, when the other party declares they are changing their mind.[70] Therefore, in all the situations, the other party must acquiesce to the first party's reliance. If they do not, then in the first scenario, the reliance cannot become reasonable and in the second and third scenarios, the reliance will cease to be reasonable.

This rule can have a general application. It can apply to cases that fit between the three scenarios, for instance parties who are commercially amicable but do not have

67 Butler, "Equitable Estoppel: Reflections and Directions," (1994) 6.n2 Corporate and Business Law Journal 249, 261.

68 Ibid, 261.

69 *Australian Securities Commission v Marlborough Gold Mines Ltd* [1992-1993] 117 CLR 485, 506: Where the intervening event that meant it was no longer reasonable to rely was a change in the law. *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* 1989] 1 NZLR 356 (CA), 361.

70 *Prudential Building & Investment Society of Canterbury v Hankins* [1997] 1 NZLR 114, 122.

enough trust to fit within the family situation.[71] In these 'in between' cases, either acquiescence makes the reliance reasonable, or it will only remain reasonable while the party acquiesces. Acquiescence also ensures that estoppel provides the consumer protection, discussed above.[72]

While part performance does not explicitly require reasonable reliance, this is a negligible difference. Part performance requires an unequivocal promise.[73] Furthermore, if a party objected to the other party's actions on the basis that there was no enforceable contract, the court is likely to consider that within the unconscionability requirement.[74]

The fourth element of equitable estoppel is that the party claiming the estoppel must suffer detriment. It is unsettled whether equitable estoppel requires broad or narrow detriment, outlined above.[75] However, broad detriment has judicial support.[76] Furthermore, an entire class of recognised detriment is only explicable on a broad detriment analysis. In the 'forgone opportunities' class of detriment, detriment consists of the "opportunities to gain the benefit which will be lost (or avoid the

71 New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 121.

72 See page 22. It is conceivable that consumers might acquiesce, thinking they were free, hoping to benefit somehow. However, requiring acquiescence at least provides them with a chance to voice their view that they are not bound at that stage.

73 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 109.

74 *Steadman v Steadman* [1976] AC 536, 540 per Lord Reid; *Boviard v Brown* [1975] 2 NZLR 694, 702; *Tapper v Edwin* 20/08/79, Thorp J, SC Auckland H992/79, 8. These cases are all pre-*Dellaca* and based on Lord Reid, which we did not pick up. However, the point was focused on the unconscionability element, which we do still have.

75 See page 34. Cases advocating narrow view: *Gold Star Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80, 86: Manner causing loss; *Andrews v Colonial Mutual Life Assurance Society Ltd* [1982] 2 NZLR 556, 568, 570: Assume to his detriment; *Gillies v Keogh* [1989] 2 NZLR 327, 345, 347 per Richardson J: Assume to his detriment; *Pennel v The Yacht 'Premier'* 2/11/04, Salmon J, HC Auckland CIV 2004-404-3654, [30-31]; *Boys v Calderwood* 14/06/05, Ronald Young J, HC Auckland CIV-2004-404-290, [71], [88-95]; *Welch and another v Fraser and another* 9/09/03, Ronald Young J, HC Hamilton CIV 2003-419-491, [22-34]. However, *Juzwa and another v Hill and another* [2007] NZCA 222, [15] relied on *Gold Star* yet was able to find an estoppel with broad detriment [35].

76 *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 404 per Mason CJ and Wilson J, 423 per Brennan J; *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 415-416 per Mason CJ; *National Westminster Finance NZ Ltd v The National Bank of NZ Ltd* 30/03/93, Tipping J, CA CA 159/92, 30; *Elkington v Ruruku and others* 21/12/07, Wild J, HC Nelson CIV 2006-442-00501, [48]; *Nectar Ltd v SPHC Operations (New Zealand) Ltd* 7/5/03, Harrison J, HC Auckland CL20/02, [140]; *Walton Mountain Ltd v Apple New Zealand Ltd and others* 17/12/03, O'Regan J, HC Auckland CIV-2003-404-534, [40], [43]; *Smyth v Wadland* 16/07/07, Frater J, HC Auckland CIV-2005-404-3459, [131] (Upheld on appeal, *Smyth v Wadland* [2008] NZCA 578 [43]); *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 36; Spence, *Protecting Reliance* (1999) 44-45; Lindgren, "Estoppel in Contract" (1989) 12 UNSWLJ 153, 175.

detriment which will be suffered) if the belief or expectation is abandoned".[77] They are broad detriment because the party has not yet suffered loss, but merely changed their position. They will only suffer loss if the promise is denied.[78]

Finally, the broad doctrine of estoppel is conceptually coherent.[79] Narrow detriment places a primacy on when the detriment must occur, which is unnecessary. The "fundamental purpose of all estoppels [is] to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted".[80] When a party denies the expectation, both forms of detriment are real and potentially substantial.[81]

While part performance does not specifically require detriment, the unconscionability requirement encompasses this analysis. Like promissory estoppel, part performance requires actions and it to be unconscionable to deny the contract.[82] Without detriment, it is unlikely to be unconscionable to deny the contract.[83] Courts assessing a part performance claim have recognised this link.[84]

2. *Equitable estoppel's remedy*

So far, equitable estoppel fulfills the second criterion, as it provides a remedy for similar cases to part performance. Equitable estoppel is also an adequate replacement because it provides the same remedy for those cases as part performance. Estoppel requires a party to form an expectation and rely on it. However, in the area of remedies, expectation and reliance are also shorthand for two remedy theories. Estoppel will be an adequate replacement for part performance if the expectation

77 *Smyth v Wadland* 16/07/07, Frater J, HC Auckland CIV-2005-404-3459, [134] citing James Palmer, "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trust in New Zealand* (2003) 498-500.

78 Cooke, *The Modern Law of Estoppel* (2000) 99.

79 Spence, *Protecting Reliance* (1999) 45-46: Note however, the author thinks estoppel is based on reliance.

80 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 410 per Mason CJ; Cooke, *The Modern Law of Estoppel* (2000) 98, 111-112.

81 A party who has benefited to date and will suffer only a minor loss when the promise is denied will not overall suffer detriment: *Boys v Calderwood* 14/06/05, Ronald Young J, HC Auckland CIV-2004-404-290, [77], [88-90], [91] [95]; *See also*: Spence, *Protecting Reliance* (1999) 46.

82 *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 35-36.

83 Lunney "Towards a Unified Estoppel" [1992] Conv 239, 240.

84 *Brabazon Properties Ltd v Nixon* 18/08/98, Laurenson J, HC Auckland J HC50/98, 10-13; *Steadman v Steadman* [1976] AC 536, 565 per Lord Simon; *Welsh v Gatchell* [2009] 1 NZLR 241, [80].

theory prevails over the reliance theory.[85] For instance, Barnaby and Alice form an oral agreement that Barnaby will lease Alice's land for four years. In reliance on this, Barnaby spends money improving Alice's land. The reliance measure would make Alice give Barnaby the money he spent on the improvements. It equates to narrow detriment.[86] The expectation measure would make Alice grant the lease. Courts generally award an expectation remedy, which is justified.

(a) What do courts award?

Studies by commentators in Australia, Canada and England show that their courts primarily award expectation remedies for successful estoppel cases. For instance, out of fifty-two successful Australian estoppel cases, the court awarded an expectation remedy in forty-three.[87] In every Canadian promissory estoppel case surveyed, the court awarded an expectation remedy, though it frequently overlapped with the party's reliance.[88] In a survey of English proprietary estoppel cases, the court awarded an expectation remedy in thirteen of the eighteen successful cases.[89]

85 Griffiths, "Part Performance – Still Trying to Replace the Irreplaceable?," (2002) 66 Conv 216, 234-235.

86 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 415-416 per Mason CJ.

87 Out of fifty-two successful estoppel cases, courts awarded an expectation remedy in forty-three. Andrew Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805, 828-829: The first survey looked at reported cases from the time of *Verwayen* in 1990 to the end of 1995. Courts awarded remedies in twenty-six estoppel cases. Courts awarded full expectation remedies in twenty-four of those cases. The remedy in the other two cases was uncertain. Andrew Robertson, "Reliance and expectation in estoppel remedies" (1998) 18 LS 360, 366 fn 41: Robertson recognised seven further cases in which the Courts awarded remedies for estoppels. Five of these awarded expectation remedies, and the other two reliance remedies. Andrew Robertson, "The Reliance Basis of Proprietary Estoppel Remedies," (2008) 72.n4 Conv 295, 297-300: The second survey looked at cases within the period 30 June 2002 to 20 February 2008 but focused only on cases that would fulfill proprietary estoppel. He found that of the nineteen cases that fulfilled proprietary estoppel, fourteen gave the full expectation measure as the remedy including those which gave a monetary remedy (Appendix B, 299). For one of these cases the expectation measure coincided with the expectations measure. One case awarded less than the full expectation amount due to proportionality. Only four cases awarded a remedy based on the reliance of the claimant.

88 Adam Ship, "The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis," (2008) 46 Alberta L Rev 77, 100: In every promissory estoppel case the remedy was consistent with expectations, although frequently with reliance too.

89 England: Andrew Robertson, "The Reliance Basis of Proprietary Estoppel Remedies," (2008) 72.n4 Conv 295, 297-300: The survey looked at cases within the period 30 June 2002 to 20 February 2008 but focused only on cases that would fulfill proprietary estoppel. In eighteen cases the Courts awarded a remedy for proprietary estoppel. Thirteen of these cases awarded the full expectation remedy *in specie* (Appendix A). In four of these cases the reliance measure coincided with the expectation measure. Three cases awarded less than the full expectation amount due to proportionality. However, one of these cases was *Cobbe v Yeoman's Row Management Ltd* [2006] EWCA Civ 1139, which failed estoppel on appeal, see page 30. Only two cases awarded a remedy that was the reliance measure.

A survey of estoppel cases in New Zealand, in the period 1 January 2000 to 30 June 2009 produced twenty-four successful estoppel cases.[90] The court awarded a remedy for the estoppel in nineteen cases.[91] In seventeen cases, the court awarded the claimant their expectation interest.[92] In two of these cases, this expectation interest

90 My search process was as follows: I did a search in Briefcase for "equitable estoppel" or "promissory estoppel" or "proprietary estoppel"; I did search in Briefcase for "estoppel by representation" or "estoppel by convention". I also checked the cases that cited the following cases: *Goldstar Insurance Co Ltd v D G Young Insurance Ltd* [1998] 3 NZLR 80; *Burbery Mortgage Finance & Savings (in rec) v Hindsbank Holdings Ltd* [1989] 1 NZLR 356; *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192; *National Westminster Finance New Zealand Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548; *Waltons Stores (Interstate) Ltd v Maher* [1987-1988] 164 CLR 387. The cases this search produced were: *Hart v Mitchell* 4/10/06, Gendall AJ, HC Palmerston North CIV-2006-454-353; *Nectar Ltd v SPHC Operations (New Zealand) Ltd* 7/5/03, Harrison J, HC Auckland CL20/02; *Paramount Export Ltd v New Zealand Meat Board* 17/7/01, Heron J, HC Wellington CP202/96; *Christchurch City Council v Link Company Ltd* 13/2/08, Chisholm J, HC Christchurch CIV-2005-409-1742; *PGG Wrightson Ltd v Wai Shing Ltd* 23/2/06, Keane J, HC Auckland CIV-2003-404-6579; *Griffiths v Akatea Developments Ltd* (2008) 9 NZCPR 328 (HC); *Wade v Tauranga Hotels Ltd* 28/5/07, Fogarty J, HC Rotorua CIV-2006-463-392; *Clifton-Mogg v National Bank of New Zealand Ltd* (2001) 10 TCLR 213 (HC) (Said as alternate basis of award); *Capital Equipment Finance Ltd v Dominion Finance Group Ltd* 31/10/01, Salmon J, HC Auckland CP349-SD/00 (CA didn't overturn on this issue, *Capital Equipment Finance Ltd v Dominion Finance Group Ltd* 3/12/02, Blanchard J, Keith J, Anderson J, Court of Appeal CA36/02); *Matariki Ltd v Deadman* 22/3/01, Potter J, HC Tauranga CP8/96; *Bay of Plenty Electricity Ltd v Natural Gas Corporation Energy Ltd* [2002] 1 NZLR 173; *Allen v Hogan Developments Ltd* (2001) 4 NZ ConvC 193,420 (HC); *Minaret Resources Ltd v McLellan* 30/9/03, Chisholm J, HC Dunedin CIV2003-412-47; *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739 (HC); *Juzwa v Hill* 1/6/09, CA 214/05 (upholding *Hill v Juzwa* 20/9/05, Courtney J, HC Auckland CIV-2004-463-840); *Walker v Collins* 25/2/09, French J, HC Christchurch CIV-2007-409-2209; *NZ Labour Hire Ltd v Holden* [2002] DCR 912; *Allan v Warneford* 19/12/05, Simon France J, HC Auckland CIV-2005-404-3255; *Boys v Calderwood* 14/06/05, Ronald Young J, HC Auckland CIV-2004-404-290; *Biddick v Silverstream Holdings Ltd* [2001] DCR 993; *Grove Darlow and Partners v Dyer* 7/11/08, Joyce DCJ, DC Auckland CIV-2008-004-2716; *Attorney-General v Whangarei District Council* (2005) 6 NZCPR 561 (HC); *Button v Aqua Filter Products Ltd* (1994) 30/3/01, Wild J, HC Palmerston North AP49/00.

91 *Griffiths v Akatea Developments Ltd* (2008) 9 NZCPR 328 (HC); *Wade v Tauranga Hotels Ltd* 28/5/07, Fogarty J, HC Rotorua CIV-2006-463-392; *Clifton-Mogg v National Bank of New Zealand Ltd* (2001) 10 TCLR 213 (HC) (Said as alternate basis of award); *Capital Equipment Finance Ltd v Dominion Finance Group Ltd* 31/10/01, Salmon J, HC Auckland CP349-SD/00 (CA didn't overturn on this issue, *Capital Equipment Finance Ltd v Dominion Finance Group Ltd* 3/12/02, Blanchard J, Keith J, Anderson J, Court of Appeal CA36/02); *Matariki Ltd v Deadman* 22/3/01, Potter J, HC Tauranga CP8/96; *Bay of Plenty Electricity Ltd v Natural Gas Corporation Energy Ltd* [2002] 1 NZLR 173; *Allen v Hogan Developments Ltd* (2001) 4 NZ ConvC 193,420 (HC); *Minaret Resources Ltd v McLellan* 30/9/03, Chisholm J, HC Dunedin CIV2003-412-47; *Villages of New Zealand (Pakuranga) Ltd v Ministry of Health* (2006) 8 NZBLC 101,739 (HC); *Juzwa v Hill* 1/6/09, CA 214/05 (upholding *Hill v Juzwa* 20/9/05, Courtney J, HC Auckland CIV-2004-463-840); *Walker v Collins* 25/2/09, French J, HC Christchurch CIV-2007-409-2209; *NZ Labour Hire Ltd v Holden* [2002] DCR 912; *Allan v Warneford* 19/12/05, Simon France J, HC Auckland CIV-2005-404-3255; *Grove Darlow and Partners v Dyer* 7/11/08, Joyce DCJ, DC Auckland CIV-2008-004-2716; *Attorney-General v Whangarei District Council* (2005) 6 NZCPR 561 (HC); *Button v Aqua Filter Products Ltd* (1994) 30/3/01, Wild J, HC Palmerston North AP49/00.

92 *Griffiths v Akatea Developments Ltd* (2008) 9 NZCPR 328 (HC); *Wade v Tauranga Hotels Ltd* 28/5/07, Fogarty J, HC Rotorua CIV-2006-463-392; *Clifton-Mogg v National Bank of New Zealand Ltd* (2001) 10 TCLR 213 (HC) (Said as alternate basis of award); *Capital Equipment Finance Ltd v Dominion Finance Group Ltd* 31/10/01, Salmon J, HC Auckland CP349-SD/00 (CA didn't overturn on this issue, *Capital Equipment Finance Ltd v Dominion Finance Group Ltd* 3/12/02, Blanchard J, Keith J, Anderson J, Court of Appeal CA36/02); *Matariki Ltd v Deadman* 22/3/01, Potter J, HC Tauranga CP8/96; *Bay of Plenty Electricity Ltd v Natural Gas Corporation Energy Ltd* [2002] 1 NZLR 173; *Allen v Hogan Developments Ltd* (2001) 4 NZ ConvC 193,420 (HC); *Minaret Resources Ltd v McLellan* 30/9/03, Chisholm J, HC Dunedin CIV2003-412-47; *Villages of New*

coincided with the claimant's reliance interest.[93] In one case, the Court awarded a remedy less than the expectation measure, based on unconscionability.[94] In the one case that the Court awarded a reliance remedy, expectation damages were impossible.[95] Thus, New Zealand courts are consistently giving claimants their expectations.

(b) What should courts award?

Moreover, courts are justified in awarding expectations. There are three important things to note. First, courts talk in terms of detrimental reliance.[96] Second, most commentators argue for the reliance theory, of which Andrew Robertson is the most prolific proponent.[97] This paper will only address Robertson's reliance arguments. Third, arguments on this issue vary significantly. Some use a taxonomy of obligations to determine the place of estoppel in the law of obligations.[98] Some focus

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Zealand (Pakuranga) Ltd v Ministry of Health (2006) 8 NZBLC 101,739 (HC); *Juzwa v Hill* 1/6/09, CA 214/05 (upholding *Hill v Juzwa* 20/9/05, Courtney J, HC Auckland CIV-2004-463-840); *Walker v Collins* 25/2/09, French J, HC Christchurch CIV-2007-409-2209; *Grove Darlow and Partners v Dyer* 7/11/08, Joyce DCJ, DC Auckland CIV-2008-004-2716; *Attorney-General v Whangarei District Council* (2005) 6 NZCPR 561 (HC); *Button v Aqua Filter Products Ltd* (1994) 30/3/01, Wild J, HC Palmerston North AP49/00.

93 *NZ Labour Hire Ltd v Holden* [2002] DCR 912; *Allan v Warneford* 19/12/05, Simon France J, HC Auckland CIV-2005-404-3255.

94 *Boys v Calderwood* 14/06/05, Ronald Young J, HC Auckland CIV-2004-404-290.

95 *Biddick v Silverstream Holdings Ltd* [2001] DCR 993.

96 Michael G Pratt, "Equitable Estoppel: Defining the Detriment – A Reply to Denis Ong" (2000) 12 Bond LR 48, 48.

97 Expectation theorists: Michael Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel LR 209; Pratt, "Equitable Estoppel: Defining the Detriment – A Reply to Denis Ong" (2000) 12 Bond LR 48; Denis SK Ong, "Equitable Estoppel: Defining the Detriment" (1999) 11 Bond LR 136; Denis SK Ong, "Equitable Estoppel: Defining the Detriment – A Rejoinder" (2000) 12 Bond LR 56; Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UW Austl L Rev 1; Ship, "The Primacy of Expectancy in Estoppel Remeides: An Historical and Empirical Analysis" 46 Alberta L Rev 77; Bronwen Morgan, "Estoppel and gratuitous promises: a new liability" 13 Sydney L Rev (1991) 213; Fiona R Burns, "*Giumelli v Giumelli* Revisited: Equitable Estoppel, The Constructive Trust and Discretionary Remedialism" (2000-2001) 22 Adel L Rev 123; James Edelman, "Remedial Certainty or Remedial Discretion after Giumelli?," (1999) 15 JCL 179; Cooke, "Estoppel and the protection of expectations," (1997) 17 LS 258; Cooke, *The Modern Law of Estoppel* (2000) 150-158. Reliance theorists: Robertson, "The Reliance Basis of Proprietary Estoppel Remedies," (2008) 72.n4 Conv 295; Andrew Robertson, "Towards a Unifying Purpose for Estoppel" (1996) 33.n1 Monash University Law Review 1; Andrew Robertson, "Reliance and expectation in estoppel remedies," (1998) 18 LS 360; Andrew Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805; Andrew Robertson, "Situating Equitable Estoppel Within the Law of Obligations" (1997) 19 Sydney L Rev 32; Andrew Robertson, "Reliance and expectation in estoppel remedies" (1998) 18 LS 360; Lindgren, "Estoppel in Contract" (1989) 12 UNSWLJ 153; Spence, *Protecting Reliance* (1999) 66-71; Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 636-639; Patrick Parkinson, "Equitable Estoppel: Developments after Waltons Stores (Interstate) Ltd v Maher" (1990) 3.n1 JCL 50-69; Darryn Jensen, "In Defence of the Reliance Theory of Equitable Estoppel" (2000-2001) 22 Adel L Rev 157.

98 Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 UW Austl L Rev 1; Barbara Mescher, "Promise Enforcement by Common Law or Equity" (1990) 64 The Australian Law Journal 536; Robertson, "Situating Equitable Estoppel

on judicial pronouncements.[99] Others utilise pragmatic arguments.[100] This paper will focus on the doctrinal arguments.

Unconscionability does not point to a particular remedy. The High Court of Australia has emphasised that providing an expectation remedy is simply one way of doing justice between the parties. Providing a reliance remedy is another.[101] Three separate High Court of Australia cases have been unable to agree on whether reliance or expectations is the correct remedy. This demonstrates that unconscionability does not lead to a particular remedy.[102] However, it is sufficient to note it is possible to adhere to the expectation theory on an unconscionability doctrine. England adheres to the same remedy principle as Australia, namely that the remedy should be "the minimum equity to do justice".[103] However, England also adheres to the expectation theory.[104]

Andrew Robertson argues that estoppel is based on reliance.[105] A successful estoppel claim does not require the plaintiff to prove the defendant made a promise. Silence or acquiescence may be sufficient. Robertson says this means that promise enforcement cannot be the basis of estoppel.[106] Conversely, reliance is a very important element in estoppel. The claimant must not only have relied, their reliance must be

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Within the Law of Obligations" (1997) 19 Sydney L Rev 32; Cooke, "Estoppel and the protection of expectations," (1997) 17 LS 258. *See however*: Edelman, "Remedial Certainty or Remedial Discretion after Giumelli?," (1999) 15 JCL 179.

99 Ong, "Equitable Estoppel: Defining the Detriment" (1999) 11 Bond LR 136; Ong, "Equitable Estoppel: Defining the Detriment – A Rejoinder" (2000) 12 Bond LR 56; Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805.

100 Cooke, "Estoppel and the protection of expectations," (1997) 17 LS 258; Robertson, "Reliance and expectation in estoppel remedies" 18 LS (1998) 360-368.

101 *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 419, 423, 427 per Brennan J; *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394; 411-412, 415-416 per Mason CJ.

102 *Waltons Stores (Interstate) Ltd v Maher and another* [1987-1988] 164 CLR 387, 423, 427 per Brennan J; *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 415-416 per Mason CJ, 429-430 per Brennan J, 445-446 per Deane J, 454 per Dawson J, 487 per Gaudron J; G*iumelli v Giumelli* (1999) 196 CLR 101, 123-125.

103 *Crabb v Arun District Council* [1976] Ch 179, 198 per Scarman LJ.

104 Furthermore the High Court of Australia used the English principle, from *Crabb v Arun District* Council [1976] Ch 179, 198 per Scarman LJ. However, England uses expectations and proportionality, *see*: *Jennings v Rice* [2002] EWCA Civ 159, [50], [56]: In cases where the parties have reached an agreement just short of a contract. *See also*: Cooke, "Estoppel and the protection of expectations," (1997) 17.n2 Legal Studies 258, 266.

105 Robertson, "Towards a Unifying Purpose for Estoppel" (1996) 33.n1 Monash University Law Review 1; Robertson, "Situating Equitable Estoppel Within the Law of Obligations" (1997) 19 Sydney L Rev 32. *See also*: Jensen, "In Defence of the Reliance Theory of Equitable Estoppel" (2000-2001) 22 Adel L Rev 157.

106 Jensen, "In Defence of the Reliance Theory of Equitable Estoppel" (2000-2001) 22 Adel L Rev 157, 168; Andrew Robertson, "Situating Equitable Estoppel Within the Law of Obligations" (1997) 19 Sydney L Rev 32, 44-45.

reasonable.[107] Robertson compares this strict requirement of reasonable reliance with the more relaxed requirement of how the expectation is formed, and concludes that reliance is the important element of the doctrine.[108] Because it is the most important element of the doctrine, it is the basis of the doctrine.[109]

However, this argument conflates protecting promises and protecting expectations, by assuming the expectation theory requires estoppel to be a form of promise enforcement. Presumably, Robertson makes this assumption because contract law protects both promises and expectations. However, estoppel may protect expectations but, unlike contract, not protect promises.[110] Alternatively, Pratt has argued that all representations are a sort of promise.[111] Therefore, Robertson's assumption that because estoppel does not protect promises it also does not protect expectations is contested. Robertson needs to argue for his initial assumption.

Even if this paper accepts Robertson's initial assumption that estoppel does not protect promises and therefore cannot protect expectations, there are significant problems with his argument. First, a party's reliance must be reasonable, but their expectation must also be reasonable.[112] Estoppel will not occur if a party has an unreasonably adopted expectation. Neither element is sufficient. Together they make it unconscionable for the representor to resile from the represetee's expectation.[113]

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107 See page 39.

108 Robertson, "Situating Equitable Estoppel Within the Law of Obligations" (1997) 19 Sydney L Rev 32, 56; Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805, 835-836; Robertson, "Towards a Unifying Purpose for Estoppel" (1996) 33.n1 Monash University Law Review 1, 19.

109 Robertson, "Situating Equitable Estoppel Within the Law of Obligations" (1997) 19 Sydney L Rev 32, 56; Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805, 835-836; Andrew Robertson, "Towards a Unifying Purpose for Estoppel" (1996) 33.n1 Monash University Law Review 1, 19.

110 *Giumelli v Giumelli* (1999) 196 CLR 101, 121 per Gleeson CJ, McHugh, Gummow and Callinan JJ citing *Riches v Hogben* [1985] 2 Qd R 292, 300-301 per McPherson J.

111 Pratt, "Defeating Reasonable Reliance," (1999) 18.n2 U Tas L Rev 181, 190-192.

112 See page 39.

113 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 445 per Deane J; *Australian Securities Commission v Marlborough Gold Mines Ltd* [1992-1993] 177 CLR 485, 506; Robertson, "Towards a Unifying Purpose for Estoppel" (1996) 33.n1 Monash University Law Review 1, 17; Butler, "Equitable Estoppel: Reflections and Directions," (1994) 6.n2 Corporate and Business Law Journal 249, 256-257. *See also*: Pratt, "Defeating Reasonable Reliance," (1999) 18.n2 U Tas L Rev 181, 184-185, 189-190, 193: Reasonable reliance alone cannot be the basis as circular. Need a prior binding promise.

Second, it does not seem that the extent of the reliance must be reasonable. This is hard for the reliance theorist to explain. Under the reliance theory, the extent of reliance directly affects what the defendant must compensate.[114] The extent of reliance is only relevant if the reliance is more than the expectation (in which case the remedy is the expectation), or if the expectation is disproportionate to the reliance (in which case the remedy is reduced).[115] Conversely, a party's expectation must be reasonable, and that expectation directly affects the remedy under the expectation theory.[116] Therefore, there is a closer link between the reasonable conduct of forming the expectation and the expectation theory than there is between the reasonable conduct of relying on the expectation and the reliance theory.

Pratt and Ong argue that for a reliance theorist to deny the harm is the failed expectations, the reliance theorist must argue that harm has occurred before the expectations are dashed. This is because, according to the reliance theorists estoppel protects against detriment, which a party has incurred before their expectations are dashed. Pratt and Ong argue the reliance theorists cannot establish harm occurs before the promise is denied.[117] One party making a promise to another does not cause them harm.[118] It is not even harmful when someone relies on that promise. It is only harmful when someone has relied on the promise and his or her expectations are dashed.[119] This is why a party's reliance is not actionable per se.[120] A party has done nothing unconscionable until they deny the promise and dash the other party's expectations. This demonstrates that "the defendant's wrong lies not in inducing reliance, but in defeating the expectation that induced it – that is, failing to keep the relied-upon promise".[121] However, Pratt and Ong disagree on the effect of this argument. Ong argues it means the detriment consists in the failed expectations.[122]

114 Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805, 846.

115 Ibid, 816; See page 52.

116 See page 39.

117 Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel LR 209, 211; Ong, "Equitable Estoppel: Defining the Detriment" (1999) 11 Bond LR 136, 139.

118 Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel LR 209, 211.

119 Ibid, 211-2.

120 Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel LR 209, 212; Ong, "Equitable Estoppel: Defining the Detriment" (1999) 11 Bond LR 136, 139.

121 Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel LR 209, 212.

122 Ong, "Equitable Estoppel: Defining the Detriment" (1999) 11 Bond LR 136, 137-139.

Pratt simply uses the argument to attack the reliance theorists.[123] Pratt accepts that though there is no harm until expectations are dashed, this does not necessarily mean the harm equals the failed expectations.[124]

Pratt and Ong's argument is only damaging if the reliance theorists' remedy equates to narrow detriment.[125] Under narrow detriment, the detriment is incurred during reliance. Therefore, if the reliance theory protects this detriment, they are protecting against detriment that occurs before the expectations are dashed; yet this detriment is not actionable until the expectations are dashed. This is difficult to explain. However, the reliance theory could also logically protect broad detriment.[126] The reliance theory is concerned with preventing detriment, not expectations.[127] Broad detriment is detriment; moreover, it is detriment that flows from reliance. It is simply detriment that flows from reliance and the denial of the promise. Protecting broad detriment does not equal protecting expectations; broad detriment is not dashed expectations.[128]

The reliance theory could put the party who relied back into the position that they would have been in if they had never relied, under either version of detriment. To change the earlier example,[129] instead of spending money improving the premises, Barnaby gives up his old lease and simply takes possession of Alice's property. Thus far, Barnaby has changed his position, but he has not suffered detriment. However, if Alice denies the lease, Barnaby will now suffer detriment. He may not be able to find

123 Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel LR 209, 211-212.

124 Pratt, "Equitable Estoppel: Defining the Detriment – A Reply to Denis Ong" (2000) 12 Bond LR 48, 51.

125 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 415-416 per Mason CJ. Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel LR 209, 212: Refers to narrow detriment; Pratt, "Equitable Estoppel: Defining the Detriment – A Reply to Denis Ong" (2000) 12 Bond LR 48, 50.

126 It is unclear whether Robertson's theory accords with this view. Robertson cites 'Emotional investment in a home' as detriment, though this will only be broad detriment: Robertson, "The Reliance Basis of Proprietary Estoppel Remedies," (2008) 72.n4 Conv 295, 308-312. However, he usually refers narrow detriment examples: Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805, 813-815 and cites the pages in which Mason CJ articulates broad and narrow detriment and says that the remedy will be closer to narrow detriment as Mason CJ supporting the reliance theory Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805, 823 fn 125.

127 By Robertson's own classification: Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805, 808.

128 *See* Robertson, "Satisfying the Minimum Equity: Equitable Estoppel Remedies After *Verwayen*" (1995-1996) 20 Melb U L Rev 805, 808 for where broad detriment might be conflated with failed expectations. .

129 See page 44.

another property to lease for a while. The reliance theory could compensate Barnaby for that loss by providing damages to account for the time where he have no lease, without giving him his expectation, which is an agreement to lease Alice's land.

This version of the reliance theory is compatible with Pratt and Ong's observation that no harm arises until the promise is denied. This detriment has not occurred until the promise is denied, yet it is detriment that flows from the reliance.[130] Therefore, though Pratt and Ong have established that detriment does not occur until the expectation is dashed, the reliance theorist could account for this.

However, Pratt uses the fact that harm has not occurred until the expectations are dashed to establish that estoppel produces a positive entitlement to a remedy under either theory. Estoppel is not simply a right not to be harmed, like tort. This positive entitlement does not necessarily lead to either a reliance or expectation theory of remedies.[131]

In tort, Party A does something to cause Party B harm, and must then return them to the position they were in before they were harmed. In estoppel, Party A leads Party B to develop an expectation. When Party A does not fulfill the expectation, Party B has suffered harm, in the form of disappointment, regardless of whether they have relied.[132] They have not suffered harm until the Party A denies the expectation. If they choose to act, their actions will be secure, either Party A will fulfill the expectation, or they will get a remedy in a reliance or expectation form. Party B can safely rely because they have a positive entitlement to a remedy.[133] Unlike the ever-present duty to take care on the road, this entitlement only arises once Party A has led Party B to develop an expectation. It is analogous to contract, once parties have made binding promises to each other, they can rely safe in the knowledge they will get either an expectation or reliance remedy if the other party breaches. Whether Party B's positive entitlement is one of expectation or reliance is a policy decision therefore. In this area, it must be an expectation remedy.

130 See page 34.

131 Pratt, "Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel" (1999) 21 Adel LR 209, 215-216.

132 Ibid, 216.

133 Ibid, 217.

3. *Discretion*

Courts have discretion in awarding equitable estoppel remedies; for instance, the judge may look at the effect of the remedy on third parties or whether the reliance is proportional to the expectation.[134] In this particular situation, there should be no discretion and an expectation remedy should be awarded. The role of third parties affects the nature of the remedy, not the quantum, and therefore can be set aside.[135]

The most commonly addressed factor, proportionality, does not apply here: proportionality is concerned that one party may rely very little, but have significant expectations; for instance, Barnaby expends $100 constructing a shed in reliance that he will get Alice's $1 million property.[136] For this paper, a more appropriate example is that Alice and Barnaby have formed an oral agreement that Barnaby will lease Alice's land. Barnaby then sells his property, engages an architect and seeks planning permission to make changes to the land. Alice denies the agreement and Barnaby successfully claims estoppel. However, Barnaby must still pay rent under the lease. Barnaby is not getting a lot for a little, he is getting what he agreed to give and get. Furthermore, the parties intended to create a contract with certain obligations, for courts to impose something other than these obligations goes against the parties' intentions. Therefore, equitable estoppel fulfills the second criterion. It covers similar situations to part performance and providing an expectation remedy, namely specific performance, is justified.

III. THE CERTAINTY OF EQUITABLE ESTOPPEL

The final criterion is that equitable estoppel must be sufficiently certain. There are two parts to this criterion; whether the doctrine is stable over time and whether parties can reasonably predict the result of their case. As the discussion in chapter three demonstrated, equitable estoppel fails the first part of the criterion. However, enacting equitable estoppel in legislation would prevent this uncertainty.

134 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 413 per Mason CJ; Leopold, "Estoppel: A Practical Appraisal of Recent Developments," (1991) 7 Australian Bar Review 47, 52-53; Every-Palmer, "Equitable Estoppel" in Andrew Butler (eds), *Equity and Trusts in New Zealand* (2nd ed, 2009) 635-639; *Jennings v Rice* [2002] EWCA Civ 159, [56].

135 For instance: *Giumelli v Giumelli* (1999) 196 CLR 101, 125 per Gleeson CJ, McHugh, Gummow and Callinan JJ. This paper is not addressing the damages element.

136 *The Commonwealth of Australia v Verwayen* [1990] 170 CLR 394, 441-442 per Deane J.

Equitable estoppel is no less difficult for parties to predict than part performance. The first element of both doctrines is the same.[137] The concern is whether the parties intend to be bound by an oral contract.[138] The elements of reliance, reasonable reliance and detriment are also relatively certain.[139] Chapter five will propose enacting the requirements for reasonable reliance to ensure certainty. Detrimental reliance requires weighing of the costs and benefits incurred by the party.[140] The unconscionability element is inherently uncertain.[141] However, this discretion is principled. Furthermore, part performance suffers from the same uncertainty. Thus, the uncertainty of estoppel is no worse than the uncertainty of part performance.

IV. CONCLUSION

Equitable estoppel fulfills all three criteria to replace part performance. It is a conceptually coherent doctrine founded on unconscionability. It produces similar results to part performance. The uncertainty of estoppel's future is preventable. The uncertainty of predicting an estoppel claim is unpreventable, but no worse than part performance. Overall, equitable estoppel is an adequate replacement. The final question is: how should we enact the exception?

137 Within the area of this paper's concern.

138 *Carruthers v Whitaker and Another* [1975] 2 NZLR 667, 672.

139 Again, within the area of this paper's concern.

140 *Boys v Calderwood and others* 14/06/05, Ronald Young J, HC Auckland CIV 2004 404 290, [95].

141 Spence, *Protecting Reliance* (1999) 59-66.

CHAPTER FIVE: FORMULATING THE LAW

In deciding how to incorporate the exception, this paper must revisit the rule. The nature of the rule affects the available exceptions. In doing so, this paper will consider the law of New Zealand, England, British Columbia and the United States of America (hereafter the US).[1] This paper will not assess the writing requirement exceptions or the broader question of what is land.[2]

I. THE WRITING REQUIREMENT

New Zealand, British Columbia and the US currently only require the contract to be evidenced in writing, and signed by only the party against whom the contract is to be enforced.[3] Conversely, England requires the contract to be made in writing and for both parties to sign the contract.[4] The proposed law will follow England's model.

1. *Writing for enforceability or validity?*

The English model effectively removes part performance. Although part performance was an exception to the writing requirement before courts decided parties failure to fulfill the requirement meant a contract was valid but unenforceable,[5] the dominant interpretation is that part performance requires a valid contract to partly perform.[6] If

1 See Appendix A.

2 England effectively abolished the authenticated signature fiction and joinder of documents these doctrines. Though joinder of documents remains (*see* Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 4.6, Appendix D paras 3.12-3.14), it must be express: Law of Property (Miscellaneous Provisions) Act 1989, s 2(2); *Commission for the New Towns v Cooper* (Great Britain) Ltd. [1995] Ch 259; Harpum, Bridge, Dixon, *The Law of Real Property by Megarry and Wade* (7th ed, 2008) para 15-027. The authenticated signature fiction no longer applies: *Firstpost Homes Ltd. v Johnson and Others* [1995] 1 W.L.R. 1567, 1576. Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 68-71; Commerce Clearing House New Zealand, *New Zealand conveyancing law and practice* (1989-) (updated 7/08/09) para 2-210**;** Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (WP 92, London, 1985) para 3.8-para 3.10.

3 Property Law Act s 24(1); Law and Equity Act 1996, s 59(3)(a) (British Columbia); Uniform Land Transactions Act, s 2-201(a) (United States).

4 Law of Property (Miscellaneous Provisions) Act, s 2(1), s 2(3) (Eng).

5 Bently and Coughlan, "Informal dealings with land after section 2," (1990) 10.n3 LS 325, 325 fn 2.

6 Peter Rank, "Part performance: A Requiem," (1990) 134.n3 SJ 72, 72; Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 4.13.

an oral contract is invalid, there is no contract to part perform.[7] This interpretation is aided by the removal of the explicit part performance exception.[8]

The English version provides stronger consumer protection. In New Zealand, currently parties can still enter an oral contract without realising they have done so.[9] That oral contract could then become enforceable if the party writes a signed letter disputing liability under the contract.[10] This cannot occur if the writing requirement needs the contract to be made in writing. Thus, this version of the writing requirement fulfills the reasons for the requirement better.

Finally, while the English section "has given rise to a considerable amount of difficulty over its short life",[11] this is unlikely to occur in New Zealand.[12] England has problems due to their strict joinder rule.[13] However, this paper is not proposing to change New Zealand's joinder rule. Problems have arisen because equitable mortgages

7 Rank, "Part performance: A Requiem," (1990) 134.n3 SJ 72, 72; Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 4.13.

8 Bently and Coughlan, "Informal dealings with land after section 2," (1990) 10.n3 LS 325, 325 fn 2.

9 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 2.9.

10 Commerce Clearing House New Zealand, *New Zealand conveyancing law and practice* (1989-) (updated 7/08/09) 2-236; McMorland, Sale of Land (2nd ed, 2000) para 4.11.

11 *Courtney v Corp Ltd* [2006] EWCA Civ 518, [1] per Arden LJ. These difficulties seem to be increasing, five years after s 2 came into force, there were four cases on the section: *Boscawen v Bajwa* (1995) 70 P & C R 391; *Commission for the New Towns v Cooper (Great Britain) Ltd.* [1995] Ch 259; *Firstpost Homes Ltd. v Johnson and Others* [1995] 1 WLR 1567; *United Bank of Kuwait Plc. v Sahib and Others* [1995] 2 WLR 94 Ch D (Note this includes cases where the contract was void due to the section and other avenues were in contention.). Last year there were sixteen cases: *Brightlingsea Haven Limited v Morris* [2008] EWHC 1928 (QB); *Cobbe v Yeoman's Row Management Ltd and another* [2008] UKHL 55 HL; *Crown Estate Commissioners v Roberts* [2008] 2 P & C R 15; *Halifax Plc, Bank of Scotland v Curry Popeck (A Firm), Pulvers (A Firm)* [2008] EWHC 1692 (Ch); *Hanoman v Southwark LBC* [2009] HLR 6; *Hawkins v Woodhall* [2008] EWCA Civ 932; *Herbert v Doyle and Another* [2008] EWHC 2663 (Ch); *Hutchison & Ors v B & DF Limited* [2008] EWHC 2286 (Ch); *Kalatara Holdings Limited v Andersen & anr, Wentworth-Stanley* [2008] EWHC 86 (Ch); *Looe Fuels Ltd v Looe Harbour Commissioners* [2009] L & TR 3; *McGuane v Welch* [2008] 2 P & C R 24; *Melhuish v Fishburn* [2008] EWCA Civ 1382 CA; *Mills v Birchall* [2008] BCC 471; *Newham LBC v Thomas-Van Staden* [2009] L & TR 5; *Oun v Ahmad* [2008] EWHC 545 (Ch) Ch D; *Underwood v Commissioners for Her Majesty's Revenue & Customs* [2008] EWCA Civ 1423 CA (Note this includes cases where the contract was void due to the section and other avenues were in contention.).

12 Problems also surround whether the section covers options, however this is outside the scope of this paper: Paul Jenkins, "Options and Contracts after the Law of Property (Miscellaneous Provisions) Act 1989" [1993] Conv 13, 17.

13 As lawyers frequently use side letters to tie up loose ends of the contracts, these are not incorporated under the strict rules of incorporation. As these are terms, and they are not included, the whole contract is invalid: *Record v Bell* (1991) 62 P & C R 192, 198-199.

are traditionally only evidenced in writing, by lodging the deeds.[14] New Zealand does not allow mortgages to come into existence this way.[15] In England contracting by correspondence is a common practice, which does not fulfill their writing requirement.[16] However, this does not appear to be common practice in New Zealand.[17] Finally, the New Zealand Law Commission was concerned about the effect this rule might have on parties who do not write and sign their contract, instead executing a conveyance to register their transaction.[18] While conveyances are not a direct concern of this paper, prima facie adopting this rule does not seem to affect conveyances. Once parties register their interest, it is irrelevant that there was no valid contract.[19] Parties do not always register long-term leases however. In this situation, then once the parties grant the lease they will have an equitable lease, which either side can enforce and it is irrelevant if there was no prior contract.[20]

2. *Who must sign?*

The law should require both parties to sign the contract, like England. New Zealand's law leads to unjustifiable one-sidedness. If Party A and Party B have entered a contract, but only Party B has signed the contract, then in a dispute the contract is enforceable against Party B, but Party B cannot enforce the contract against Party A.[21] The New Zealand Law Commission did not think this was a problem, saying if Party A enforces the contract against Party B, they acknowledge the contract.[22] However, this response misses the real concern, which is that only Party A could ever enforce the contract. This lack of mutuality is unjust.[23]

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14 *United Bank of Kuwait Plc v Sahib and Others* [1997] Ch 107; Ian Hardcastle, "A Sad Demise?" (1995) 139.n10 SJ 246, 247; Bently and Coughlan, "Informal dealings with land after section 2," (1990) 10.n3 LS 325, 340-341.

15 Property Law Act 2007, s 80; Property Law Act 1952, s 77.

16 Due to Law of Property (Miscellaneous Provisions) Act, s 2(3); *Commission for the New Towns v Cooper (Great Britain) Ltd.* [1995] Ch 259.

17 Commerce Clearing House New Zealand, *New Zealand conveyancing law and practice* (1989-) (updated 7/08/09) para 1-015; Real Estate Institute of New Zealand Incorporated, *Comments on Law Commission Preliminary Paper 30, Repeal of the Contracts Enforcement Act 1956* (Submission) (13/03/98) para 3.

18 New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 115.

19 *Frazer v Walker and Others* [1967] NZLR 1069, 1075-1077.

20 *Leitz Leeholme Stud Pty Ltd v Robinson* [1977] 2 NSWLR 544, 550-551 per Mahoney JA.

21 Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 75-76.

22 New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 104.

23 Great Britain Law Commission, *Transfer of land: formalities for contracts for sale etc. of land* (Law Com 164, London, 1987) para 4.8.

II. THE EXCEPTIONS

There are two types of exceptions, contract specific exceptions and the general equitable exception.

1. *Contract specific exceptions*

All four versions of the law exempt certain contracts from the writing requirement.[24] This paper proposes to maintain New Zealand's current exceptions for short-term leases and where an order of court, or the Registrar, orders a sale of land.[25]

2. *The equitable exception*

There are three options for how this section should allow the exception of equitable estoppel, by a silent statute, by indicating the exception, and by enacting the elements of the exception. England opted for the first option.[26] New Zealand's current part performance exception utilises the second option.[27] The US and British Columbia enacted the third option.[28]

(a) Solution 1

In England, courts were initially reluctant to recognise proprietary estoppel in oral land contract situations.[29] *Yaxley v Gotts*[30] was the first determinative case. Robert Walker L.J. decided:

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24 Property Law Act 2007, s 24(2); Law of Property (Miscellaneous Provisions) Act 1989, s 2(5) (Eng); Law and Equity Act 1996, s 59(1), s 59(2) (BC); Uniform Land Transactions Act 1975, s 2-201(b)(1) (US).

25 Property Law Act 2007, s 24(2).

26 Law of Property (Miscellaneous Provisions) Act 1989, s 2.

27 Property Law Act 2007, s 26.

28 Uniform Land Transactions Act s 2-201(b)(2), s 2-201(b)(4); Law and Equity Act 1996, s 59(3)(b), s 59(3)(c), s 59(4) (British Columbia); Alberta and Manitoba recommended similar sections, which were not enacted. Alberta Institute of Law Research and Reform, The Statute of Frauds and Related Legislation (Report 44, Alta, 1985) 58, 67-68: However the original statute of frauds applies (*Nywening v Melton Holdings Ltd* 2000 ABCA 141, [2000] 9 WWR 57); Manitoba Law Reform Commission, Report on the Statute of Frauds (Report 41, Winnipeg, 1994) 49: However the Legislature simply repealed the requirement, An Act to Repeal the Statute of Frauds 1982-83-84, s 1.

29 *Yaxley v Gotts* (2000) 32 HLR 547, 554 Outlined the five cases on the issue: *United Bank of Kuwait v Sahib* [1997] Ch 107, 144: In obiter dictum, Phillips LJ did not think extending the exceptions to the provision was necessary; *McCausland and Another v Duncan Lawrie Ltd. and Another* [1997] 1 WLR 38, 50 and *Bankers Trust v Namdar* 14/02/97, [1997] NPC 22, CA in *Yaxley v Gotts*, 554-555: Regarded an estoppel point as arguable, but did not decide; *Godden v Merthyr Tydfil Housing Association* 01/15/97, [1997] NPC in *Yaxley v Gotts*, 555: Rejected an estoppel by convention and brought up the public policy issue; *King v Jackson* [1998] 1 EGLR 30: Took estoppel point into account in deciding damages (*Yaxley v Gotts*, 555).

30 *Yaxley v Gotts* (2000) 32 HLR 547.

> [t]he circumstances in which section 2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion of section 2 as a "no go area" for estoppel would be unsustainable.[31]

However, equity shall not override a statute enacted for public policy reasons. Parliament had enacted the writing requirement because, although it might produce individual instances of injustice, the overall need for certainty prevailed.[32] Therefore, estoppel must defer to the Act where an estoppel would validate an invalid contract.[33] However, Parliament enacted an exception to their writing requirement for constructive trusts.[34] Where estoppel overlaps with constructive trusts, it will not undermine the Act to allow a proprietary estoppel claim, it will not validate a contract Parliament declared invalid.[35]

The situation is unsettled. Some courts accepted *Yaxley*.[36] Others saw the matter as open to doubt.[37] The House of Lords in *Cobbe* created further confusion by mentioning in an obiter dictum that there should be no estoppel exception to section 2.[38] Lord Scott said that as estoppel is not an explicit exception to section 2, it could not be used to validate a contract that is invalid due to the section.[39] This is a very strict application of the public policy principle.[40] Courts are also divided on whether they accept *Cobbe*.[41]

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31 Ibid, 555.

32 Ibid, 555.

33 Ibid, 555.

34 Law of Property (Miscellaneous Provisions) Act 1989, s 2(5).

35 *Yaxley v Gotts* (2000) 32 HLR 547, 559-60 per Robert Walker LJ, 561 per Clarke LJ, 570 per Beldam L.J.

36 *Abdul Fazel Samad v Donovan Thompson, Fuerina Thompson* [2008] EWHC 2809 (Ch) Ch D, [129]; *Eyestorm Limited v Hoptonacre Homes Limited* [2007] EWCA Civ 1366 CA (Civ Div), [51]; *Scottish & Newcastle Plc v Lancashire Mortgage Corporation Limited* [2007] EWCA Civ 684 CA (Civ Div), [55]; *Margaret Peters v Fairclough Homes Limited* 2002 WL 31961996 Ch D, [24]; *Speciality Shops v Yorkshire and Metropolitan Estates Limited* [2003] 2 P & C R 31, [37]; *Aubergine Enterprises Ltd v Lakewood International Ltd* [2002] 1 W.L.R. 2149, [67].

37 *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [46], [51]; *Anderson Antiques (UK) Limited v Anderson Wharf (Hull) Ltd*, Philip Robert Akrill [2007] EWHC 2086 (Ch), [32], [34].

38 *Cobbe v Yeoman's Row* [2008] UKHL 55.

39 Ibid, [29].

40 Ibid, [29].

41 *Hutchison & Ors v B & DF Limited* [2008] EWHC 2286 (Ch) Ch D, [68]: Followed but not determinative; *Julian Roger Herbert v Leonard Doyle and Another* [2008] EWHC 1950 (Ch) Ch D, [15]: Expressed a view that he did not follow the dictum but left it open; *Brightlingsea Haven Ltd v Morris* [2008] EWHC 1928 (QB), [55]: Recognised a proprietary estoppel claim that took the form of a constructive trust.

English courts are struggling with the principle that equity shall not override a statute. While the English Law Commission thought it was obvious that estoppel would operate, the courts took a different view. England's solution is undesirable, as it has potential to produce much uncertainty. Furthermore, courts may also struggle with the nature of part performance and estoppel. Some see part performance and estoppel as operating in mutually exclusive areas;[42] some see part performance as a type of estoppel.[43] Others argue that they overlap, sharing either the same principle, or different principles.[44] If the courts follow either of the first two views, they may decline to recognise equitable estoppel as an exception to the writing requirement. Thus, to leave the exception to the courts without guidance is extremely uncertain.

(b) Solution 2

The second solution is to enact estoppel as an exception without defining the width of the exception, as New Zealand does with part performance.[45] An example of this is: 'This section does not affect the law relating to equitable estoppel'. The width of the exception would change with the doctrine. The New Zealand Law Commission expressed a positive view towards indicating exceptions.[46] Under this solution, the law would not stagnate, but could change with society. However, this increases uncertainty; the exception is only as stable as the doctrine.[47] Equitable estoppel is an unstable doctrine. The author submits this cost outweighs the potential cost of stagnant law. The writing requirement is meant to increase certainty; introducing uncertainty in the exception undermines this.[48]

(c) Solution 3

This brings the paper to the third solution: statutorily enacting estoppel's elements and remedy. This avoids the problems associated with the first two solutions. There

42 Bently and Coughlan, "Informal dealings with land after section 2," (1990) 10.n3 LS 325, 328-329.

43 Ibid, 330: The US holds this view, though historically proprietary estoppel came out of part performance.

44 Ibid, 331-332; *Waltons Stores (Interstate) Ltd v Maher* [1987-1988] 164 CLR 387, 405 per Mason CJ and Wilson J: Partially overlapping but different principles.

45 Property Law Act 2007, s 26; See also Contracts Enforcement Act 1996, s 2(3)(c).

46 New Zealand Law Commission, *The Property Law Act 1952* (NZLC PP16, Wellington, 1991) para 121.

47 *See for instance*, *TA Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88: Tipping J's survey of law amply demonstrates changes in the doctrine, which flow on to affect the width of the exception.

48 Bently and Coughlan, "Informal dealings with land after section 2," (1990) 10.n3 LS 325, 332-333. This applies in New Zealand too, see pages 12, 14.

are two costs to this solution. First, the law will potentially stagnate. Second, the courts will now face a new section to interpret, which could produce temporary uncertainty. This paper will demonstrate this uncertainty is limited below.[49] Therefore, these costs are more acceptable than the uncertainty associated with the first two solutions. This conclusion raises a new issue, how should we enact the elements of estoppel?

British Columbia and the US can aid us in answering this question. The relevant British Columbian section is:

> Section 59(3) A contract respecting land or a disposition of land is not enforceable unless
>
> …
>
> (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
>
> (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
>
> (4) For the purposes of subsection (3)(b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.

The relevant US section is:

> Section 2-201(b) A contract not evidenced by a writing satisfying the requirements of subsection (a) but which is valid in other respects, is enforceable if: ...
>
> (2) the buyer has taken possession of the real estate, and has paid all or part of the contract price; ...
>
> (4) the party seeking to enforce a contract, in reasonable reliance upon the contract and upon the continuing assent of the party against whom enforcement is sought, has changed his position to his detriment to the extent that an unjust result can be avoided only by enforcing the contract.

Section 59(3)(b) of the British Columbian section and section 2-201(b)(2) of the US section can be rejected. These focus on the evidentiary elements of part performance.[50] Section 2-201(b)(2) does this because regardless of who is seeking to enforce the agreement, if the purchaser has done certain acts, the contract is enforceable.[51] This paper has opted for an equitable, not an evidentiary exception.

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49 Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 105. See page 64.

50 Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, Vancouver, 1977) 71-72: This base prevents fraud; Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (Ontario, 1987) 108.

51 Richard R. Powell and Patrick J. Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2][b][iii].

Section 59(3)(c) was enacted to cover estoppel cases.[52] This paragraph is a potential option for New Zealand. However, it provides less certainty, as it is quite abstract. First, it is not clear that a defendant must acquiesce to the plaintiff's actions. Second, it does not make the requirement of detriment clear, though requiring an inequitable result in effect requires detriment.

Section 2-201(b)(4) has multiple interpretations. The British Columbian Law Commission thought that it covered estoppel cases.[53] US commentators believe it demonstrates the equitable theory of part performance.[54] There are three potential reasons for the confusion. First, no state adopted the section.[55] Second, in the US, part performance is seen as an emanation of estoppel.[56]

Third, the use of 'reliance' may cause confusion. In New Zealand, 'reliance' denotes wider acts than fulfilling an obligation or exercising a right under the contract.[57] It equates to estoppel not part performance. However, in the US 'reliance' equates to

52 Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, Vancouver, 1977) 72-73: Note this Report does not use the term 'estoppel' but clearly covers our version of estoppel; It is far wider than their doctrine of part performance, *see* Fridman, *The Law of Contract in Canada* (5th ed, 2006) 223-232; Bridge, "The Statute of Frauds and Sale of Land Contracts," (1986) 64.n1 Can Bar Rev 58, 104 – Thinks this section protects reliance.

53 Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, Vancouver, 1977) 72-73.

54 Powell and Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2][b][iii]; Uniform Land Transactions Act 1975 § 2-201 Commentary 3; Allison Dunham, "Reflections of a statutory draftsman: Land Transactions Acts," [1981] 6 S Ill U L J 549, 558-559; It is almost identical to American Law Institute, *Restatement of the law, Contracts 2d* (1979) § 129 which is part performance (Commentary (a)). Note, § 2-201 Commentary 3 actually says it is like American Law Institute, *Restatement of the law, Contracts 2d* (1979) § 197. Others recognise § 2-201(b)(2) as part performance but are ambiguous about § 2-201(b)(4): Jon W Bruce, "An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act," [1980-1981] 10 Stetson L Rev 1, 6 and fn 33. *See also*: Barbara Taylor Matttis, "UTLA and USLTA in Coursebooks and Classrooms," [1995-1996] 20 Nova Law Review 1099-1100.

55 Ronald Benton Brown, "Whatever Happened to the Uniform Land Transactions Act?," [1995-1996] 20 Nova Law Review 1017-1028, 1018. The relevant section does not seem to have played a role in the Act not being adopted: Brown, "Whatever Happened to the Uniform Land Transactions Act?," [1995-1996] 20 Nova Law Review 1017-1028; Richard B Amandes, "The Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act Twenty Years Later: Why Have There Been No Adoptions?," [1995-1996] 20 Nova Law Review 1033-1035. The New York State Bar Association objected to the revision of the Statute of Frauds, as part of a wider rejection of the Act: Marion W Benfield, "Wasted Days and Wasted Nights: Why the Land Acts Failed," [1995-1996] 20 Nova Law Review 1037-1062, 1054. If they objected to the relaxed writing requirement, this does not concern this paper (Bruce, "An Overview of the Uniform Land Transactions Act and the Uniform Simplification of Land Transfers Act," [1980-1981] 10 Stetson L Rev 1, 6). Even if they objected to the part performance test, this paper does not propose to use the exception as a part performance exception.

56 Bently and Coughlan, "Informal dealings with land after section 2," (1990) 10.n3 LS 325, 330.

57 *TA Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 101, 108, 109.

part performance. 'Reliance' is used to indicate that part performance includes actions both in performance of contractual obligations and in pursuance to contractual rights.[58] US Commentators cite examples of entering into possession and making improvements to the land to support their claim that part performance includes reliance.[59] They further claim that these actions or payment of the contract price or provision of domestic services are required for part performance.[60]

However, in the National Conference on the Act, the example mentioned was a tract builder entering into contracts because of an agreement to purchase land, which is reliance in the estoppel sense.[61] Furthermore, US Commentators also accept that cases of part performance have occurred in situations where the actions discussed in the previous paragraph were not present, in "estoppel-like decisions".[62] Finally, the case cited for the claim that part performance includes reliance talks of a party changing their position in pursuance of the contract in a way that is so connected to the contract that the defendant is aware it is in reliance on the contract.[63] This looks like reliance in the estoppel sense. However, this is simply an issue of the extent that the US doctrine of part performance overlaps with estoppel. Regardless, the same word denotes a different doctrine in the US and in New Zealand.

Despite these differences between the US and New Zealand, this paragraph is a promising formulation. The paragraph outlines the elements of equitable estoppel. Firstly, there must be a contract (the clear and unequivocal promise and the first part of reasonable reliance). Secondly, there must be reliance. Furthermore, the section

58 Powell and Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2][a], § 81.02[2][c]; American Law Institute, *Restatement of the law, Contracts 2d* (1979) § 129 Comments (a), (b), (d). Note, their law of part performance is quite different to our own, *see* Powell and Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2], § 81A.02[3][f].

59 Powell and Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2][c][i]; Caroline N Brown, *Statute of Frauds*, Vol. 4 *Corbin on Contracts*, ed. Joseph M. Perillo, Revised edition (1997) § 18.7; American Law Institute, *Restatement of the law, Contracts 2d* (1979) § 129 Comments (a), (b), (d).

60 Powell and Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2][c][i].

61 National Conference of Commissioners on Uniform State Laws, *Proceedings of National Conference of Commissioners on Uniform State Laws: Uniform Land Transactions Act* (6-9 August 1974, Hawaii) 99-100.

62 Powell and Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2][c][i].

63 *Brown v Hoag* 35 Minn. 373, 29 N.W. 135 (1886), 137. Brown, *Statute of Frauds*, Vol. 4 *Corbin on Contracts*, ed. Joseph M. Perillo, Revised edition (1997) § 18.7 note 2; Powell and Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2][c][i] fn 108.

requires continuing assent, which is required for reasonable reliance.[64] Thirdly, the section requires the reliance to be to the detriment of the party seeking to enforce the contract. This does not make it clear whether it is broad or narrow detriment, which should be clarified.

An issue arises over the words 'an unjust result can be avoided only by enforcing the contract'. This is an alternative to the unconscionability requirement. In the US, it has a narrow focus of non-compensable harm.[65] Therefore, it is appropriate to replace 'unjust' with 'unconscionable', to reflect New Zealand's nomenclature and to avoid the possibility that New Zealand courts use the narrower US focus.[66]

The New Zealand section must also differ from its US counterpart by referring to an 'agreement', rather than a 'contract'. The proposed writing requirement requires a contract to be made in writing to be valid; an oral agreement is not a valid contract. The term 'agreement' recognises this distinction while making it clear that the agreement would be a contract if not for the writing requirement.

This paper proposes to follow British Columbia and the US and enact that an agreement that fulfills the estoppel elements is another way to make a valid agreement.[67] This paper uses the term 'valid instead of the term 'enforceable' that applies in British Columbia and the US because those jurisdictions require writing for enforceability, not validity. Nevertheless, validating the agreement achieves the same result as enforcing the contract. This is the expectation remedy, which was justified in chapter four.

64 See page 39.

65 *See* Powell and Rohan, *Powell on Real Property* (1968-) (updated 06/09) § 81.02[2][b][ii], § 81.02[2][b][iii]; American Law Institute, *Restatement of the law, Contracts 2d* (1979) § 129 Comments (a), (b), (d): Examples focus on whether restitution is available.

66 *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 35-36.

67 This means once the party has fulfilled the estoppel requirements, the terms of the agreement will apply and they have a specifically enforceable agreement. Thus, the vendor will be a constructive trustee for the purchaser, *see* Palmer, "Constructive Trusts," in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, 2009) 347-348. This coincides with the view that proprietary estoppel establishes a proprietary right prior to the court awarding a remedy, Cooke, *The Modern Law of Estoppel* (2000) 130-135.

As mentioned above, there is some uncertainty surrounding how the courts will interpret this section. In particular, courts may look to the US section, thereby bringing back part performance. However, this risk is minimal. First, unlike the US, the proposed section requires writing for validity. Thus, there is no room for part performance. Second, the new law is not a wholesale reproduction of the US section. Third, the law simply enacts court's current test apply for estoppel. Finally, New Zealand courts often refer to Law Commission reports on interpretation difficulties.[68]

III. THE NEW LAW

A section based on England for the writing requirement, the current New Zealand exceptions for specific contracts, and the US for equitable estoppel is the best law. A potential replacement for s 24 of the Property Law Act 2007 may thus look like:

[**24 Contracts for land**

(1) An agreement for the disposition of land is only valid if it fulfills either subsection (2), (3) or (4).

(2) The agreement is a contract not covered by subsection (4) and the contract is made in writing and signed by the parties to the contract.

(3) An agreement that is not a contract where—

  (a) the parties have entered an oral or partly written agreement that would be a contract but for subsection (2); and

  (b) the party seeking to enforce the agreement has relied to their detriment on this oral agreement; and

  (c) the party against whom the agreement is sought to be enforced has acquiesced or assented to this reliance; and

  (d) it would be unconscionable for the party against whom the agreement is sought to be enforced to not uphold the agreement.

(4) In this section, disposition does not include—

  (a) a short-term lease; or

  (b) a sale of land by order of a court or through the Registrar.]

(5) For the avoidance of doubt, in subsection (3)(b) the detriment concerned is the detriment that would occur if the agreement were denied.

This section produces a writing requirement and an exception that upholds the primary reason for the requirement, consumer protection.[69] In effect, estoppel is not an exception, but an alternative avenue for producing a valid agreement.[70] As estoppel is more difficult to fulfill than the writing requirement, it is likely that people will continue writing, to ensure they get a valid contract.

68 *R v Howard* [1987] 1 NZLR 347, 352.

69 See page 13.

70 As the remedy of estoppel is upholding the agreement, there is no reason to frame it as an exception.

CONCLUSION

This paper started out with a problem, part performance. Part performance's incoherency produces uncertain and inconsistent law. Therefore, this paper set out to produce the best possible law. The first element of the law that this paper considered was the writing requirement. Having a writing requirement for land contracts is desirable for consumer protection reasons. Therefore, we cannot avoid the problem of part performance by abolishing the rule for which it is an exception. The second element of the law that this paper considered was the exceptions to this rule. There are two types of exceptions. The first type adjusts the writing requirement. The second type is a general equitable exception, the focus of this paper. This paper concluded that a general equitable exception is justified. It can prevent injustice while also upholding consumer protection.

This led the paper on a quest to determine whether the traditional estoppels or modern equitable estoppel the best general equitable exception to the writing requirement. The traditional estoppels proved to be an inadequate replacement for part performance. These doctrines cannot help someone seeking to divest themselves of an interest in land. As part performance concerns fraud and evidence, not solely property, it helps parties seeking an interest in land and parties seeking to divest themselves of an interest in land. This two-sidedness is positive; fraud can occur on both sides of a transaction.

This brought the paper to the most attractive option, modern equitable estoppel. Equitable estoppel is concerned with unconscionability, not property. Thus, like part performance, it is two-sided. This alternative is conceptually coherent. The traditional estoppels share a common ground, which equitable estoppel taps in to. The elements of part performance and estoppel are prima facie different, but on deeper examination, this paper established that equitable estoppel covers similar cases to part performance. The remedy for equitable estoppel is a significant issue. However, courts generally award an expectation remedy, which is justified in the area of this paper's concern, as proportionality concerns are minimised.

The final issue for equitable estoppel was uncertainty. To minimise this uncertainty, this paper advocated the third option for incorporating equitable estoppel, enacting both its elements and remedy. As this equitable estoppel is justified, so is the enacted version. Thus, this paper concluded by setting out two ways to make a valid agreement, by producing a contract that fulfills the best possible writing requirement, or by fulfilling the elements of equitable estoppel. This paper has removed the problem of part performance and improved the law.

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APPENDICES

APPENDIX A: RELEVANT STATUTORY SECTIONS

New Zealand – Property Law Act 2007

Section 24 – Contracts for disposition of land not enforceable unless in writing:

(1) A contract for the disposition of land is not enforceable by action unless—
  (a) the contract is in writing or its terms are recorded in writing; and
  (b) the contract or written record is signed by the party against whom the contract is sought to be enforced.

(2) In this section, disposition does not include—
  (a) a short-term lease; or
  (b) a sale of land by order of a court or through the Registrar.

Section 26 – Doctrine of part performance not affected:

Sections 24 and 25 do not affect the operation of the law relating to part performance.

British Columbia – Law and Equity Act 1996

Section 59:

(1) In this section, "disposition" does not include
  (a) the creation, assignment or renunciation of an interest under a trust, or
  (b) a testamentary disposition.

(2) This section does not apply to
  (a) a contract to grant a lease of land for a term of 3 years or less,
  (b) a grant of a lease of land for a term of 3 years or less, or
  …

(3) A contract respecting land or a disposition of land is not enforceable unless
  (a) there is, in a writing signed by the party to be charged or by that party's agent, both an indication that it has been made and a reasonable indication of the subject matter,
  (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
  (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

(4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by that party or on that party's behalf of a deposit or part payment of a purchase price.

(5) If a court decides that an alleged gift or contract cannot be enforced, it may order either or both of
  (a) restitution of a benefit received, and
  (b) compensation for money spent in reliance on the gift or contract.

…

(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

England – Law of Property (Miscellaneous Provisions) Act 1989

Section 2:

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

(5) This section does not apply in relation to—

(a) a contract to grant such a lease as is mentioned in section 54(2) of the M1 Law of Property Act 1925 (short leases);

(b) a contract made in the course of a public auction; or

(c) a contract regulated under the Financial Services and Markets Act 2000, other than a regulated mortgage contract;

and nothing in this section affects the creation or operation of resulting, implied or constructive trusts.

(6) In this section—

"disposition" has the same meaning as in the Law of Property Act 1925;

"interest in land" means any estate, interest or charge in or over land [F2 or in or over the proceeds of sale of land].

"regulated mortgage contract" must be read with—

(a) section 22 of the Financial Services and Markets Act 2000,

(b) any relevant order under that section, and

(c) Schedule 2 to that Act.

(7) Nothing in this section shall apply in relation to contracts made before this section comes into force.

(8) Section 40 of the Law of Property Act 1925 (which is superseded by this section) shall cease to have effect.

United States – Uniform Land Transactions Act, National Conference of Commissioners on Uniform State Laws, Uniform Laws Annotated: Civil Procedural and Remedial Laws (1975):

Section 2-201:

(a) Notwithstanding agreement to the contrary and except as provided in subsection (b), a contract to convey real estate is not enforceable by judicial

proceeding unless there is a writing signed by the party against whom enforcement is sought or by that party's representative which:

(1) contains a description of the real estate that is sufficiently definite to make possible an identification of the real estate with reasonable certainty;

(2) except as to an option to renew a lease, states the price or method of fixing the price; and

(3) is sufficiently definite to indicate with reasonable certainty that a contract to convey has been made by the parties.

(b) A contract not evidenced by a writing satisfying the requirements of subsection (a) but which is valid in other respects, is enforceable if:

(1) it is for the conveyance of real estate for one year or less;

(2) the buyer has taken possession of the real estate, and has paid all or part of the contract price;

(3) the buyer has accepted a deed from the seller;

(4) the party seeking to enforce a contract, in reasonable reliance upon the contract and upon the continuing assent of the party against whom enforcement is sought, has changed his position to his detriment to the extent that an unjust result can be avoided only by enforcing the contract; or

(5) the party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that the contract for conveyance was made.

APPENDIX B: NEW ZEALAND AND MANITOBAN RESIDENTIAL HOUSE SALES

New Zealand

Year	Total Residential House Sales	Population	Residential Sales per Capita
2008	56,056	4,268,900	0.0131
2007	92,101	4,228,300	0.0218
2006	102,042	4,184,600	0.0244
2005	104,459	4,133,900	0.0253
2004	107,082	4,087,500	0.0262
2003	120,108	4,027,200	0.0298
2002	101,541	3,948,500	0.0257
2001	75,734	3,880,500	0.0195
2000	65,332	3,857,800	0.0169
1999	78,653	3,835,100	0.0205
Average over 10 year period	**90,311**	**4,045,230**	**0.0223**

Sources:

http://apps.reinz.co.nz/reportingapp/?RFOPTION=Report&RFCODE=R100 (Accessed on 30/08/09).

http://www.stats.govt.nz/methods_and_services/access-data/tables/national-pop-estimates.aspx (Accessed on 1/09/09).

Manitoba

Year	Total Residential House Sales	Population	Residential Sales per Capita
2008	14,301	1,208,000	0.0118
2007	14,716	1,193,500	0.0123
2006	13,777	1,184,000	0.0116
2005	13,429	1,178,300	0.0114
2004	12,754	1,173,600	0.0109
2003	12,040	1,163,800	0.0103
2002	11,727	1,156,600	0.0101
2001	12,001	1,151,400	0.0104
2000	11,182	1,147,300	0.0097
1999	11,487	1,142,400	0.0101
Average over 10 year period	**12,741**	**1,169,890**	**0.0109**

Sources:

http://www.realestatemanitoba.com/statistics (Accessed on 30/8/09).

www.winnipeg.ca/cao/pdfs/population.pdf (Accessed on 1/09/09).

APPENDIX C: SUBMISSIONS TO THE LAW COMMISSION ON THE REPEAL OF THE CONTRACTS ENFORCEMENT ACT 1956 PRELIMINARY PAPER

Name	View
Angelo, Tony. (13/01/98).	For repeal.
Cadenhead, DCJ. *Repeal of the Contracts Enforcement Act* (29/01/98).	For repeal for land.
Fenton, R T. *RE: Preliminary Paper 30: Repeal of the Contracts Enforcement Act 1956* (20/02/98).	For repeal.
Laxon, W A. *Repeal of the Contracts Enforcement Act 1956* (15/01/98).	For repeal.
Nottage, Luke. *Submission to the New Zealand Law Commission re Repeal of the Contracts Enforcement Act 1956 (Preliminary Paper 30, December 1997)* (April 1998).	For repeal.
Building Owners & Managers Association of New Zealand Inc. *BOMA Comments on "The Repeal of the Contracts Enforcement Act 1956 – A Discussion Paper"* (23/03/98).	Against repeal.
Butterworth, Warren. *Should Land Contracts have to be in Writing?* (18/03/98).	Against repeal.
New Zealand Law Society. *Submission to the Law Commission Preliminary Paper Repeal of the Contracts Enforcement Act* (9/03/98).	Against repeal.
New Zealand Institute of Valuers. *NZIV Submission on "The Repeal of the Contracts Enforcement Act 1956 – A Discussion Paper"* (12/03/98).	Against repeal.
Peacock, Susan J. *Proposed Repeal of the Contracts Enforcement Act 1956* (21/02/98).	Against repeal.
Pidgeon, C R. *Abolition of the Contracts Enforcement Act* (22/12/97).	Against repeal.
Real Estate Institute of New Zealand Incorporated. *Comments on Law Commission Preliminary Paper 30, Repeal of the Contracts Enforcement Act 1956* (13/03/98).	Against repeal.
Tripe, J R L. (27/2/98).	Against repeal.
Williamson, Neil. *Repeal of the Contracts Enforcement Act 1956* (08/01/98).	Against repeal.
Ministry of Justice. *Preliminary Paper 30: Repeal of the Contracts Enforcement Act 1956* (30/04/98).	No final view but expressed opinions against repeal.
Rae Nield. *Re: Contracts Enforcement Act* (16/01/98).	Queried the basis on which the Law Commission justified their claim that Manitoba had successfully repealed the writing requirement.