PROPRIETARY ESTOPPEL AND THE FAMILY HOME

by

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the degree of Doctor of Philosophy
This dissertation poses the question whether the doctrine of proprietary estoppel can provide the basis for recognising a range of rights in relation to the family home. This question also necessitates a consideration of the doctrine of constructive trusts and the acquisition of rights under the Limitation Acts.

The dissertation proceeds to consider whether the nature of the relationship between parties to a dispute concerning the family home constitutes a heavily determining factor in the outcome of that dispute. It will emerge that in practice the doctrine of proprietary estoppel operates differently in respect of each of three broad categories of licence relationships:

i) Licence granted by resident family member

In this first category both parties are members of the same household who jointly occupy the property as their family home. In this context the term 'family' is used in a very broad sense. It includes not only relationships of blood and affinity but also all those relationships where there is interdependence and a common concern by the participants for each other's welfare. The shared values of the participants in these relationships and the meaning they attach to each other's conduct may well be similar to those shared values and meanings which exist between members of the family in its stricter legal sense. The concept of 'family' is as much a functional notion as a descriptive term. This broader concept of the family is more akin to the term 'household'.
ii) **Licence granted by non-resident family member**

In the second category the licensor and licensee are members of the same family but do not share the same house.

iii) **Licence granted by a stranger**

In the third category the licensee and his family have been granted occupation rights by someone who is not a member of their family.

Since the decision of the House of Lords in *Gissing v Gissing* it has generally been accepted that the elements necessary to found an implied trust (whether resulting or constructive) of the family home are limited in scope. The long-standing equitable doctrine of proprietary estoppel has therefore been revitalised, in an attempt to fill the gap left by the decision in *Gissing*. The theory of proprietary estoppel aims to avert the unconscionable outcome which would otherwise result where one party has been encouraged by the holder of a legal title to alter his position to his detriment in the expectation of some entitlement in the property concerned.

This dissertation contains an analysis of the case law of England, Northern Ireland, the Republic of Ireland, Australia and New Zealand, for the purpose of considering which forms of unconscionable conduct in the familial context are sufficient to give rise to the equity of proprietary estoppel. These jurisdictions have been selected because in each, proprietary estoppel has been used as a means of protecting rights in the family home. Each of the selected jurisdictions has recognised the limitations of the doctrine of constructive trusts in achieving that end. Canadian case law is also analysed to illuminate the relationship between the doctrine of proprietary estoppel and the doctrine of constructive trusts. It is noticeable that the Canadian courts have effectively ceased to use the doctrine of proprietary estoppel in the family home context, having replaced the doctrine by a creative use of the constructive trust.
This dissertation examines the doctrine of proprietary estoppel in terms of its function in recognising a range of rights in the family home. The major source material analysed in the dissertation consists of reported and unreported decisions; parliamentary papers; Law Commission reports and personal discussion with members of the English judiciary, lawyers and academic writers.

I am most grateful to the time so generously given to me for discussion by Sir Nicolas Browne-Wilkinson V-C, Professor H Pettit, J D Davies, John Dewar and Marc Owen.

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Mary Welstead

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration.
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INTRODUCTION

Throughout the second half of the twentieth century there has been a growing legislative concern to protect the occupation of those members of society who are not owner-occupiers of their homes. A significant number of statutes have been enacted to achieve that end. Homelessness is regarded by legislators, the judiciary and by society at large as a dangerous and deplorable state of affairs. It is dangerous in that it affects the stability of society. It is deplorable in that it is a basic right of every human being to be housed. Lord Scarman has compellingly argued that homelessness is a "critical element of the social conditions which provide a breeding ground for crime, marital breakdown, child abuse and neglect", and that homelessness "destroys man's chance of developing and maintaining stable human relationships". In Lord Scarman's view...
shelter is a human need ranking in priority with food and water, and a home is an essential condition of civilized life. Once these truths are seen, homelessness will be recognized for what it is: an affront to human dignity and the denial of a basic human right.

I THE SCOPE OF THE DISSERTATION

The focus of this dissertation is fixed upon one special group of people who remain at risk of finding themselves without a home. This group comprises essentially those who occupy property under some informal residential arrangement with a legal title holder. The dissertation confines itself to those persons who have a merely personal or non-contractual permission to live in their home. Such occupation is extremely vulnerable since the permission which underlies it may be revoked at any time provided that reasonable notice is given. The focus of this dissertation, thus fixed, permits a distinction to be drawn between different categories of relationship.

A Spousal relationships

In England the Matrimonial Homes Act 1983 has ameliorated the difficulties to a limited extent for married persons. Spouses who live in property owned by their

\footnote{See Robson v Hallett [1967] 2 QB 939; Aldin v Latimer Clark, Muirhead and Co [1894] 2 Ch 437; Armstrong v Sheppard and Short Ltd [1959] 2 QB 384; E & L Berg Homes Ltd v Grey (1979) 253 EG 473.}
partners are, of course, protected for the duration of their marriage. The 1983 Act has, however, no application once a marriage has been legally terminated. Unless the court awards a property transfer under divorce legislation, the occupier's existing rights are rendered extremely vulnerable. Furthermore the 1983 Act does not cover de facto relationships or even married persons who have been granted a licence by a third party.

B Other relationships

Although it has been regularly argued that those who live in a de facto marital relationship should have the same rights as those enjoyed by married partners, little attention has been paid to the protection of persons who live in other types of relationships.

C Relationships and residential arrangements

The residential arrangements examined in this dissertation arise in three different situations which all have their origins in some form of licence.

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9 See Tennant, [1980] CLJ 31, where it is argued that "the significant criterion for what is typically 'familial' should not be sexual activity (and certainly not the form it takes) but rather interdependence, mutual caring and permanence." See also The Times 28 January 1987 p 17 where the Reverend B E Marbert in a letter to The Times called for a recognition of the value and dignity of friendship and the protection of such relationships.
i) **Licence granted by resident family member**

In the first category of case, both licensor and licensee are members of the same household who jointly occupy the property as their family home. In this context the term 'family' is used in a very broad sense. It includes not only relationships of blood and affinity but also all those relationships where there is interdependence and a common concern by the participants for each other's welfare.10 The shared values of the participants in these relationships and the meaning they attach to each other's conduct may well be similar to those shared values and meanings which exist between members of the family in its

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10 The American courts have redefined the term 'family' for the purpose of determining what relationships comprise a family for the purposes of zoning regulations. 'Family', in that context, has been held to embrace the concept of the household. The decisions recognise that communal relationships which are not familial in the strict sense of the word nevertheless "achieve many of the personal and practical needs served by traditional family living." City of Santa Barbara v Adamson 610 P 2d 436 at 438 (1980). See also City of White Plains v Ferraioli 313 NE 2d 756 at 758; Gray, *Elements of Land Law*, p 1071. See also Rent Act 1977 Schedule I, Part I, Para 2 and Housing Act 1985, section 87 which provide for statutory succession to a protected tenancy by a member of the original tenant's family. The English courts have refused to widen the meaning of the term 'family' to include friends living in a platonic relationship (see *Carega Properties SA v Sharratt* [1979] 1 WLR 928) but have restricted it for the most part to relationships of blood and affinity. A limited recognition, as familial, has been granted to those relationships resembling marriage. Couples living as if married have been granted statutory tenancies (see *Dyson Holdings Ltd v Fox* [1976] QB 503). Cf *Helby v Rafferty* [1979] 1 WLR 13; *Harrogate BC v Simpson* (1984) 17 HLR 205.) An unsuccessful attempt was made to widen the definition of 'member of family' in the Housing Bill 1980. (see Parliamentary Debates, House of Commons, Official Report Col 675, 968 28 February 1980). See also *Salter v Lask* [1925] 1 KB 584 at 587 where Salter J was prepared to accept the possibility that the term 'family' could extend to members of the same household.
stricter legal sense. This concept of 'family' recognises that 'family' is as much a functional notion as a descriptive term. This broader concept of the family is more akin to the term 'household'.

ii) Licence granted by non-resident family member

In the second category of case, the licensor and licensee are members of the same family but do not share the same house.

iii) Licence granted by a stranger

In the third category of case, the licensee and his family have been granted occupation rights by someone who is not a member of their family.

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11See Bradney, (1979) 9 Fam Law at 244. In Wawanesa Mutual Insurance Co v Bell (1957) 5 CR 581 at 584 Rand J defined household as "a collective group living in a house, acknowledging the authority of a head, the members of which, with few exceptions, are bound by marriage, blood, affinity or other bond, between whom there is an intimacy and by whom there is felt a concern with and an interest in the life of all that gives it a unity. It may, for example, include such persons as domestic servants and distant relatives permanently residing within it. To some degree they are all admitted and submit to the collective body, its unity and its conditions, particularly that of the general discipline of the family head. They do not share fully in the more restricted family intimacy or interest or concern, but they participate to a substantial degree in the general life of the household and form part of it."
II  THE DOCTRINE OF PROPRIETARY ESTOPPEL

This dissertation poses the question whether the doctrine of proprietary estoppel can provide the basis for recognising a range of rights in relation to the family home. This question also necessitates a consideration of the doctrine of constructive trusts and the acquisition of rights under the Limitation Acts.

The dissertation proceeds to consider whether the nature of the relationship between parties to a dispute concerning the family home constitutes a heavily determining factor in the outcome of that dispute. It will emerge that in practice the doctrine of proprietary estoppel operates differentially in respect of each of the three broad categories of licence relationships outlined above. For instance, the rights granted in the family home may differ in accordance with whether the licensor is a member of the licensee's family or a stranger.

Since the decision of the House of Lords in Gissing v Gissing it has generally been accepted that the elements necessary to found a constructive trust of the family home are onerous to establish. The long-standing equitable doctrine of proprietary estoppel has therefore been

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12See Chapter Seven.
13See Chapter Six.
16See Chapter Seven.
17The doctrine dates back to the 16th century, see, e.g., Huning v Ferrers (1711) Gilb Eq 85, 25 ER 59; East India Co v Vincent (1740) 2 Atk 83, 26 ER 451 Att-Gen v Balliol College Oxford (1744) 9 Mod 407, 52 ER 538; Stiles v Cowper (1748) 3 Atk 692, 28 ER 1198.
revitalised, in an attempt to fill the gap left by the decision in Gissing.\textsuperscript{18} The theory of proprietary estoppel aims to avert the unconscionable outcome which would otherwise result where one party has been encouraged by the holder of a legal title to alter his position to his detriment in the expectation of some entitlement in the property concerned. In this dissertation the legal title holder who has allegedly encouraged an expectation will be referred to as the 'representor' even where the court finds the allegation unproven. The party who claims to have an expectation will be referred to as the 'representee'.

This dissertation contains an analysis of the case law of England, Northern Ireland, the Republic of Ireland, Australia and New Zealand, for the purpose of considering which forms of unconscionable conduct in the familial context are sufficient to give rise to the equity of proprietary estoppel. These jurisdictions have been selected because in each proprietary estoppel has been used as a means of protecting rights in the family home. Each of the selected jurisdictions has recognised the limitations of the doctrine of constructive trusts in achieving that end. Canadian case law is also analysed to illuminate the relationship between the doctrine of proprietary estoppel and the doctrine of constructive trusts. It is noticeable that the Canadian courts have effectively ceased to use the doctrine of proprietary estoppel in the family home context,\textsuperscript{18}

\textsuperscript{18}See the observations of Browne-Wilkinson LJ in Walker v. Walker (Unreported, Court of Appeal 12 April 1984).
having replaced the doctrine by a creative use of the constructive trust.19

III THE PERSPECTIVES OF THE DISSERTATION

Karl Llewellyn has urged legal researchers to recognise that finding out what the judges say is but the beginning of your task. You will have to take what they say and compare it with what they do. You will have to see whether what they say matches with what they do. You will have to be distrustful of whether they themselves know (any better than other men) the ways of their own doing, and of whether they describe it accurately, even if they know it.20

An attempt is made throughout this dissertation to take into account Llewellyn's exhortation to discover not only the verbalised ratio of a decision but also the latent reasons for that decision. Latent judicial reasons are of no less importance than the patent reasons given by the court for reaching its decision. They may even be of greater importance in certain circumstances. Frank, an

19See Chapter Seven.
American judge and one of the leaders of the American movement of realist jurisprudence\(^2\) recognised that opinions, then, disclose but little of how judges come to their conclusions. The opinions are often *ex post facto*; they are censored expositions. To study those eviscerated expositions as the principal bases of future judicial action is to delude oneself. It is far more unwise than it would be for a botanist to assume that plants are merely what appears above the ground, or for an anatomist to content himself with scrutinising the outside of the body.\(^2\)

The exposition of both types of reasons is essential if members of families are to be helped to predict whether litigation should be undertaken to protect their rights in the home.\(^2\)

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\(^2\) According to Llewellyn what judges do about disputes is as much the law as the legal ratio for the decision, Bramble Bush (1930) pp 8, 39. See also O Holmes, *The Path of the Law*, in *Collected Legal Papers* (1920) p 167. Latent reasons for a decision are often contained in judicial dicta which are totally irrelevant to the legal ratio of the case. Such dicta, if made public, may have more impact on societal consciousness of what is law than any formal statement of the legal rules, see Kantorowicz, (1937) 53 LQR at 326 Savigny and the Historical School; (1984) 272 EG 1295.
CHAPTER ONE

THE CONCEPT OF PROPRIETARY ESTOPPEL

Proprietary estoppel is an old and well-established concept,¹ although the term 'proprietary estoppel' was not in common use until the second half of the twentieth century. The expression 'estoppel by encouragement or acquiescence' was by far the more usual term for the concept.²

In this chapter the objectives and the development of the estoppel concept will be explored, prior to a consideration in the following chapters of its operation in the context of the family home.

I OBJECTIVES OF THE DOCTRINE OF PROPRIETARY ESTOPPEL

One of the fundamental principles of equity is the prevention of unconscionable dealings in relation to land.³ The doctrine of proprietary estoppel aims at the prevention of two specific types of unconscionability. First, it aims

²Spencer Bower and Turner continue to use this term to prevent any confusion between the doctrines of promissory estoppel and proprietary estoppel (see Spencer Bower and Turner, The Law Relating to Estoppel by Representation, (3rd Ed 1977) p 283 ff).
³See Crabb v Arun DC [1976] Ch 179 at 187 per Lord Denning MR.
at the prevention of detriment to the representee who alters his position on the faith of a representation concerning the acquisition of rights in or over land which has been made to him by the legal owner the representor. Second, it aims to prevent the representor profiting if he reneges on his representation. The representor might gain in two ways if equity did not intervene. First, he would obtain the benefit of retaining a right which he had purported to grant to the representee. Second, he might also benefit from the representee’s alteration of position. If, for instance, the representee has expended money on the property, the representor would clearly profit from that expenditure. The representee may, however, alter his position by working without wages for, or by taking care of, the representor. Such acts would equally benefit the representor.

The doctrine of proprietary estoppel thus provides an exception to the general rule that a person expending money on the property of another acquires neither rights in that property nor a right of compensation.

There is considerable uncertainty about the nature of the equitable right which the representee acquires because of the intervention of equity. In this dissertation the

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4See Grundt v Great Boulder Property Gold Mines Ltd (1937) 59 CLR 641 at 674; Thompson v Palmer (1933) 49 CLR 507 at 547.
5See Ramsden v Dyson (1866) LR I HL 129 at 140.
6Not all alterations of position will benefit the representor. See post at 91
7See Chapter Three.
8See Ramsden v Dyson (1866) LR I HL 129 at 141 per Lord Cranworth LC; Stilwell v Simpson (1983) 133 NLJ 894; Falcke v Scottish Imperial Insurance Co (1886) 34 Ch D 234 at 248; Savva v Costa and Harymode Investments Ltd (1981) 131 NLJ 1114.
right will be referred to as the 'inchoate equity' prior to the court hearing. The right will be referred to as the 'satisfied equity' after the court hearing which grants the representee a remedy. Where it is unnecessary to distinguish the 'inchoate equity' from the 'satisfied equity' the right will be referred to as the 'equity of estoppel'.

Unlike that other form of equitable estoppel — promissory estoppel\(^9\) — proprietary estoppel confers a right of action on the representee.\(^{11}\) Moreover, in the case of proprietary estoppel there need be no pre-existing contractual relationship between the parties\(^{12}\) and the remedy granted by the court is very much at the discretion

\(^9\)The nature of the 'equity of estoppel' will be considered in Chapter Five.

\(^{10}\)The doctrine of promissory estoppel is discussed in Snell's Principles of Equity, (28th Ed 1982) p 555. See also Spencer Bower and Turner, The Law Relating to Estoppel by Representation, (3rd Ed 1977) p 367. Attempts have been made to merge the doctrines of proprietary estoppel and promissory estoppel into a single equitable doctrine (see for example Amalgamated Investments and Property Co Ltd v Texas Commerce International Bank Ltd [1982] QB 84 at 122 per Lord Denning MR). The courts do not always distinguish clearly between the two doctrines, the term promissory estoppel is occasionally used when it is clear that the doctrine under consideration is that of proprietary estoppel (see for example Griffiths v Williams (1978) 248 EG 947; Maharaj v Jai Chand [1986] 3 All ER 107, in neither of these cases was there a pre-existing contractual relationship between the parties).


of the court. The doctrine, therefore, has a much wider application than that of promissory estoppel.

II FORMULATIONS OF THE DOCTRINE OF PROPRIETARY ESTOPPEL

A The law prior to Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd

The early cases on proprietary estoppel were predominantly concerned with fact situations where the conduct of the legal title holder was passive. These cases raised the question whether passive conduct could be interpreted as encouragement to the representee to believe that he had obtained rights in or over the legal title holder's property or whether his mistake was merely unilateral.

i) Lord Cranworth's formulation in Ramsden v Dyson

In Ramsden v Dyson, Lord Cranworth explained the doctrine of proprietary estoppel in the following terms:

if a stranger begins to build on my land, supposing it to be his own, and, I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me

13See, for example, Dann v Spurrier (1802) 7 Ves 231, 32 ER 94; De Bussche v Alt (1878) Ch D 286.
14A genuine unilateral mistake on the part of the representee cannot give rise to a plea of proprietary estoppel. The mistake must result from encouragement by the representor.
15(1866) LR I HL 129.
afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wholly impassive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.\footnote{16}

According to Lord Cranworth, two further requirements were necessary before the legal title holder would be bound by his passive conduct. First, the person building on the land had to believe that he was building on land over which he had obtained rights. Second, the legal title holder had to know that the land in truth belonged to him and not to the person expending money.\footnote{17}

ii) Fry J's formulation in Willmott v Barber

In Willmott v Barber\footnote{18} Fry J attempted to condense the requirements of proprietary estoppel into five probanda. These probanda were distilled from a line of nineteenth century decisions which were primarily concerned with interpreting whether a mistaken belief had been encouraged by the acquiescence of the legal title holder.\footnote{19} First,

\footnotetext{16}{Ibid at 140.}
\footnotetext{17}{Ibid.}
\footnotetext{18}{(1880) 15 Ch D 96 at 140.}
\footnotetext{19}{Ramsden v Dyson had been cited to the court in Willmott v Barber.}
the claimant of the 'equity of estoppel' must have made a mistake as to his legal rights concerning the property in dispute. Second, the claimant must have expended money or done some other act on the faith of his mistaken belief. Third, the possessor of the legal right must have known of his own right which is inconsistent with the right which the claimant maintains that he has obtained. Fourth, the possessor of the legal right must know of the claimant's mistaken belief in his right. Fifth, the possessor of the legal right must have passively or actively encouraged the claimant of the equity to expend money or otherwise to alter his position.

iii) Restrictive impact of the early formulations

These early formulations of the doctrine of proprietary estoppel were unhappily to stultify subsequent developments of the doctrine. The Willmott v Barber probanda were no more than one manifestation of the doctrine, yet they have been regarded as the definitive statement of the doctrine itself. The probanda have been regarded as essential requirements in all cases of proprietary estoppel and not only in cases which involved acquiescent conduct.20

This restrictive approach was promulgated in Spencer Bower's major work on estoppel,21 and hence perpetuated. It also led to the forcing of fact-situations into the

20See, e.g. Crabb v Arun DC [1976] Ch 179. This approach may be found even in cases decided after Taylors Fashions (see, e.g. Coombes v Smith [1986] 1 WLR 808).
Willmott v Barber framework to enable a plea of estoppel to succeed even though it was quite obvious that the framework was not relevant to them.²²

iv) Controversial features of the Willmott v Barber probanda

In more recent years the main controversy concerning the doctrine of proprietary estoppel has centred on the third and fourth probanda outlined by Fry J in Willmott v Barber.

a) Passive conduct

Where the representor's conduct was passive, it was not unreasonable to demand that he must know not only of the representee's mistaken belief but also of his own rights in the property before any 'equity of estoppel' was upheld against him. The representee could, after all, have been expending money or otherwise altering his position in reliance on some alternative arrangement between himself and the representor. For instance, the alteration of position by the representee could have been equally consistent with a tenancy agreement with the representor.²³ In these circumstances there would have been nothing to warn the owner of the property that he should assert his legal title. If he was unaware of his own legal rights, in such circumstances, there would have been nothing in the

²³See Pilling v Armitage (1805) 12 Ves Jun 79, 33 ER at 31 per Sir W Grant MR.
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representee's alteration of position which might have alerted him to intervene and tell the representee that he was expending money at his own risk.

Where there was no pre-existing relationship between the parties concerning the property, the nature of the claimant's alteration of position could be seen as an important factor in determining whether the representor had knowledge of the representee's belief. Substantial expenditure on another's land would not normally be undertaken without some belief that rights were being obtained in respect of that land. It would have been reasonable that such expenditure should alert the legal title holder to assert his rights. Without such knowledge of his own rights he could not be seen as encouraging the claimant by reason of his failure to prevent that expenditure.

b) Active conduct

Where the representor's conduct was of a positive nature it was always questionable whether all of the Willmott v Barber probanda were relevant. In Plimmer v Mayor etc of Wellington, for instance, the Privy Council rejected the necessity to prove that the representor had explicit knowledge of the representee's mistaken belief. Sir Arthur Hobhouse explained that Plimmer was not a case of

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25 See Pilling v Armitage (1805) 12 Ves Jun 79, 33 ER per Sir W Grant MR; Hamilton v Geraghty (1901) 1 NSWSR (Eq) 81.
26 (1884) 9 App Cas 699.
mere acquiescence by the representor, but was "a case in which the land owner has for his own purposes, requested the tenant to make the improvements." 27 The predecessor in title of the representor had clearly had knowledge of the expenditure on its land precisely because it had requested that expenditure. The land in question was the sea-bed, and it was clear that no-one would undertake improvements to the sea-bed without assuming he had or would obtain rights. These two factors led the Privy Council to decide that the strict approach of the earlier cases was not applicable in Plimmer's case.

v) Lord Kingsdown's formulation in Ramsden v Dyson

The decision in Plimmer was itself based on the dissenting judgment of Lord Kingsdown in Ramsden v Dyson. 28 Lord Kingsdown explained the doctrine of proprietary estoppel in terms of positive conduct by the representor. The relevant conduct of the representor could include "a verbal agreement with a landlord for a certain interest in land, or what amounts to the same thing, under an expectation, created or encouraged by the landlord that he will have a certain interest." 29 Lord Kingsdown's formulation of the principle is thus wider than that of Lord

27 Ibid at 712.
28 (1866) LR 1 HL 129 at 170, although Lord Kingsdown dissented on the basis of his different interpretation of the relevant facts, there was no disagreement among the judges on the principles laid down in the case (see Plimmer v Mayor etc of Wellington (1884) 9 App Cas 699 at 711 per Sir Arthur Hobhouse).
29 (1886) LR 1 HL 129 at 170, although Lord Kingsdown couched his observations in terms of landlord and tenant, it is accepted that his statement is of general application.
Cranworth in the same case.\textsuperscript{30} In \textit{Plimmer's case} the Privy Council recognised that knowledge by the representor of the representee's belief was not a necessary requirement when there had been an actual request by the former to improve his land. Knowledge of the representee's expenditure on the sea-bed was sufficient, in the Privy Council's view, to put any reasonable man on notice of the claimant's belief.

A principle similar to \textit{res ipsa loquitur} applies here. The representor cannot plead a lack of actual knowledge of the claimant's belief in these circumstances.

For the greater part of a century the decision in \textit{Plimmer's case} seems to have been largely ignored in England. The more rigid approach of Fry J in \textit{Willmott v Barber}\textsuperscript{31} has prevailed even in circumstances where it was inappropriate.

vi) \textit{Scarman LJ's formulation in Crabb v Arun DC}

The \textit{Willmott v Barber} probanda were adopted in more recent times in \textit{Crabb v Arun DC}.\textsuperscript{32} Both parties to the dispute in this case had conducted themselves in a manner which demonstrated that they shared the same common expectation. The expectation was that Mr Crabb would receive rights over the defendant's land. The precise details of the agreement, which involved the grant of a right of way, were left unspecified.\textsuperscript{33}

\begin{flushright}
\textsuperscript{30}Ibid at 140.  
\textsuperscript{31}(1880) 15 Ch D 96.  
\textsuperscript{32}(1976) Ch 179; \textit{Crane} (1976) 40 Conv (NS) 156.  
\textsuperscript{33}See also \textit{Central Street Properties Ltd v Mansbrook Rudd & Co Ltd} (1985) 279 EG 414.
\end{flushright}
Council subsequently refused to honour the expectation which it had shared with Mr Crabb. Scarman LJ held that

the court cannot find an equity established unless it is prepared to go as far as to say that it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff. In order to reach a conclusion on that matter the court has to consider the history of the case under the five headings to which Fry J referred.\(^3\)\(^4\)

Scarman LJ then proceeded to gloss over the fact that the representee had never had a mistaken belief as to his legal rights. Both parties shared the same belief that a right would be granted at some time in the future. Scarman LJ simply stated that this first probandum of Fry J had been satisfied.\(^3\)\(^5\)

B The decision in Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd

It was not until 1979 that any substantial judicial analysis was undertaken of the universal applicability of the Willmott v Barber probanda in all cases of proprietary

\(^3\)\(^4\)[1976] Ch 179.
\(^3\)\(^5\)Ibid at 195.
estoppel.\textsuperscript{36} In \textit{Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd}\textsuperscript{37} Oliver J undertook that analysis and recognised that a broader test of unconscionability was necessary to prevent "forcing those incumbrances into a Procrustean bed constructed from some unalterable criteria."\textsuperscript{38}

Counsel for the representor in the \textit{Taylors Fashions} case had argued that the \textit{Willmott v Barber} probanda should be applied in all cases of proprietary estoppel. He maintained that, whether the representor's conduct was active or passive, whether there was a mistaken belief or a common assumption, the representor must have had knowledge of both his own legal rights and the expectation of the representee. In these circumstances knowledge of the representee's alteration of position was insufficient.\textsuperscript{39}

The parties in the \textit{Taylors Fashions} case had conducted their relationship against a background of a tacit common assumption that the claimant of the equity had an unregistrable option to renew a lease which had been granted to him by the representor's predecessor in title. When it

\textsuperscript{36}However see \textit{Electrolux Ltd v Electrix Ltd} (1953) 71 RPC 23; \textit{Shaw v Applegate} [1977] 1 WLR 970 where doubt was cast on the applicability of the \textit{Willmott v Barber} probanda.\textsuperscript{37}[1982] QB 133.\textsuperscript{38}Ibid at 154. See also \textit{Riches v Hogben} [1986] 1 Qd R 315 at 319.\textsuperscript{39}[1982] QB 133 at 145. See also Spencer Bower and Turner \textit{The Law Relating to Estoppel by Representation} (3rd Ed 1977), p 288. \textit{Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd} [1970] 2 All ER 871. Cf \textit{Habib Bank v Habib Bank AG Zurich} [1981] 2 All ER 650; \textit{Moorgate Mercantile Co Ltd v Twitching's} [1976] QB 225; \textit{Amalgamated Investments v Texas Commerce} [1981] 1 All ER 935; \textit{Keen v Holland} [1984] 1 All ER 75; \textit{Sarat Chunder Dey v Gopal Chunder Laha} (1892) 19 LR Ind App 203 at 214 ff.
later emerged that options of this kind constituted a registrable interest, the representor took the opportunity, in the absence of due registration, to disclaim the option. The representor claimed that any acquiescence on its part in the claimant's expenditure on the property had been without knowledge that it had a legal right to defeat the unregistered option. Having disclaimed the option as soon as the true legal position became apparent the representor claimed that its conduct could not be seen as encouragement.

Oliver J gave judgment for the representor but at the same time rejected his argument outlined above. Whilst acknowledging that the representor's case was not "overburdened with merit", Oliver J recognised that it was not his function to impose his own idiosyncratic commercial morality on the strictly legitimate exercise of a right by the representor. Oliver J pointed out that the Willmott v Barber probanda could not be universally applied to all cases of proprietary estoppel. He accepted that they might be relevant in cases of total acquiescence by the representor, although even this was a matter of doubt. He emphasised that not all the probanda would be relevant where the parties shared the same expectation.

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40 See Beesly v Hallwood Estates Ltd [1960] 1 WLR 549.
41 [1982] QB 133 at 135.
42 Ibid. See also Haslemere Estates Ltd v Baker [1982] 1 WLR 1109 at 1119; Legione v Hately (1982-87) 46 ALR 1 at 18.
44 Referring to Inwards v Baker [1965] 2 QB 29 Oliver J said "there was no mistaken belief on either side. Each knew
Oliver J then proceeded to formulate for estoppel purposes a broader test of unconscionability which requires the court to consider "whether, in particular individual circumstances, it would be unconscionable for a party to deny that which knowingly or unknowingly he has allowed or encouraged another to assume to his detriment."\(^4^5\) On this wider view, knowledge by the representor of his own rights and the belief of the representee become merely relevant factors in determining whether there has been an encouragement by the representor. Oliver J acknowledged that the representor's knowledge might even be a determining factor in certain circumstances.

III THE REFORMULATION OF THE DOCTRINE OF PROPRIETARY ESTOPPEL

In the aftermath of *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* it has been generally assumed that the elements of proprietary estoppel can be condensed into two interlinked requirements distilled from Oliver J's broad test of unconscionability.\(^4^6\) First, there must be conduct, the state of the title but the defendant had been led to expect that he would get an interest in the land on which he had built and indeed, the overwhelming probability is that was indeed the father's intention at the time" ([1982] QB 133 at 152). Oliver J inferred that Scarman LJ's speech in *Crabb v Arun DC*, [1976] Ch 179 concerning the fourth probandum had to be construed in the sense that "the defendant must know merely of the plaintiff's belief which, in the event, turns out to be mistaken."\(^4^5\) *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 at 151; see also (1985) 101 LQR 305 at 306.\(^4^6\) See, e.g., *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84; *Cameron v Murdoch* [1983] WAR 321 at 350.
either express or tacit, by the representor, which encourages the representee reasonably to believe that he has acquired or will acquire rights in or over the representor's property. Second, the representee must prove that he has altered his position to his detriment in reliance on a belief which has been engendered by the conduct of the representor. If there is no encouragement by the representor, there can be no relevant detrimental alteration of position by the representee. The nature of this alteration of position may, of course, make it easier to infer that there was a relevant encouragement. The representor's knowledge of the representee's belief and of his own right become merely factors which the court must take into account in judging whether any given conduct constitutes encouragement.

Although Taylors Fashions seemed to provide a major clarification of the law of proprietary estoppel, the ruling of Oliver J left much ambivalence particularly concerning the requirement of knowledge as to the precise elements necessary to ground an estoppel claim.48

Throughout this dissertation it is suggested that the reformulation of proprietary estoppel outlined above can provide a useful framework for the analysis of the cases which involve property disputes in the context of the family home. These cases will be referred to throughout the

48See, e.g., Swallow Securities Ltd v Isenberg (Unreported, Court of Appeal 22 February 1985) per Cumming-Bruce LJ.
dissertation as the 'familial cases'. The reformulation of proprietary estoppel does not disregard the Willmott v Barber probanda entirely. The 'familial cases' decided under the Willmott v Barber rules can be analysed within this new framework, which equally permits an analysis of the cases to which the Willmott v Barber probanda have no applicability.
CHAPTER TWO
ENCOURAGEMENT

I INTRODUCTION

The 'equity of estoppel' cannot arise unless the conduct of the legal title holder can be viewed as an encouragement or representation to the estoppel claimant that rights in or over the property are being, or will be, granted to him. In the absence of encouragement, any detrimental alteration of position by the claimant can only be in reliance on a unilateral mistaken belief. Such action represents both a "folly" for the claimant and a gratuitous benefit for the legal owner who may retain the value generated by the claimant's alteration of position. Expenditure with the consent of the landowner, unaccompanied by any encouragement that rights in respect of the property are being created, can never found a claim of proprietary estoppel.

The difficulty facing the courts relates to the proper interpretation of conduct which the representee sees as encouragement but which the representor does not. The interpretation of such conduct is a particularly problematic task in the familial context. The representor and representee may be members of the same family; their activities are

1 Ramsden v Dyson (1866) LR I HL 129 at 141.
relationship may have been conducted against a background of shared informal familial values. In these circumstances little thought may have been given to the meaning of conduct until after the relationship has broken down. Where the parties to the dispute are not members of the same household, their relationship will probably have been conducted against a background of a different set of more formal values. The court’s task is to unravel the meaning given by the disputing parties to the conduct which is claimed as encouragement. Of necessity this task will be a value-ridden exercise which takes account of such factors as the nature of the relationship between the parties; the quality of the representor’s conduct and knowledge; the extent of the representee’s alteration of position and any familial and social consequences which might result from a recognition of conduct as encouragement.

II ENCOURAGEMENT MAY BE EITHER POSITIVE OR ACQUIESCENT

In Ward v Kirkland3 Ungoed-Thomas J rejected the existence of any distinction between mere acquiescence and positive acts of encouragement. In relation to both acquiescence and encouragement he pointed out that

the fundamental principle is unconscionable behaviour, and unconscionable behaviour can arise where there is knowledge by the legal owner of the circumstances in which the

3[1967] 1 Ch 194.
claimant is incurring the expenditure as much as if he was himself requesting or inciting that expenditure.4

Provided that certain conditions are fulfilled, inaction by the representor has always been accepted as a form of encouragement of the representee.5 In Dann v Spurrier6 Lord Eldon stated that

this court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title and the circumstances of looking on is in many cases as strong as using terms of encouragement; a lessor knowing and permitting these acts, which the lessee would not have done and the other must conceive he would not have done, but upon an expectation, that the lessor would not throw an objection in the way of his enjoyment.7

More recently Slade LJ has accepted that "in some circumstances passive conduct, even if unaccompanied by any words, may suffice to constitute the relevant encouragement, if the facts are such that it is reasonable for the other

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4Ibid at 239.
5One of the earliest cases in which inaction was accepted as encouragement was Steed v Whitaker (1740) Barn Ch 220 at 221, 27 ER 621 where the Lord Chancellor said "and another ingredient is, that the mortgagee has lain by, and let Samuel Steed go on and build upon the premises without giving him notice of the mortgage."
6(1802) 7 Ves Jun 232, 32 ER 94.
7Ibid at 95, 96. See also De Bussche v Alt (1877) 8 Ch 286 at 314.
party so to construe it." It is clear, however, that liabilities are not to be forced upon people behind their backs. The courts have found considerable difficulty in determining the circumstances in which silent conduct may lead to the acquisition of rights by the representee. To remain silent whilst a person alters his position to his detriment may be explicable in terms other than encouragement of that person's belief that he either has acquired or will acquire rights in the representor's property. The representor's silence may well be explained by the existence of some alternative agreement between the two parties, in which case the representor may believe that the claimant is altering his position detrimentally on the faith of that other agreement. In such circumstances the representor's knowledge of the actual belief entertained by the representee may well be a determining factor in raising an estoppel.10

III THE SUBJECT MATTER OF THE ENCOURAGEMENT

The encouragement provided by the representor must relate to land in which he either has or will have a proprietary interest.

8Warnes v Hedley (Unreported, Court of Appeal 31 January 1984).
9See, e.g., Denny v Jensen [1977] 1 NZLR 635 at 638.
10See, e.g., Brinnand v Ewens (1987) The Times 4 June per Cumming-Bruce LJ.
A  The encouragement must relate to a specific asset

In Layton v Martin, a former mistress of the legal title holder pleaded proprietary estoppel in an attempt to obtain financial provision out of her late lover's estate. The deceased had made her a written offer of "what emotional security I can give plus financial security during my life and financial security on my death". The plaintiff had moved into her lover's home in what she later alleged was reliance on this assurance. Scott J rejected the plea of proprietary estoppel, maintaining that such a plea could not arise otherwise than in connection with some specific asset.

B  The representor need not currently own the land

It is clear, however, that the property need not be owned by the representor at the time of the

12Ibid at 238, 239. In Western Fish Products Ltd v Penwith DC [1981] 2 All ER 204 at 218 it was held that proprietary estoppel cannot be pleaded where the claim relates to a representation concerning the representee's land. Megaw LJ stated that "there is no good reason for extending the principle further. As Harman LJ pointed out in Campbell Discount Company Ltd v Bridge [1961] 2 All ER 97 at 103, the system of equity has become a very precise one. The creation of new rights and remedies is a matter for parliament, not the judges." In Salvation Army Trustee Company Ltd v West Yorkshire MCC (1981) 41 P & CR 179, Woolf held that the equity of estoppel could arise in circumstances where encouragement had been given by the representor that he would purchase the representee's land. The representee had purchased new property on the faith of this assurance. Cf A-G of Hongkong v Humphreys Estate (Queen's Gardens) Ltd [1987] 2 All ER 387 at 394 per Lord Templeman.
13[1986] 2 FLR 227 at 239.
In Riches v Hogben the Full Court of the Queensland Supreme Court recently upheld a plea of proprietary estoppel even though the assurance made by the representor related to property which she did not yet own at the date of the representation. Kelly SPJ concluded that the obligation attaches not because of ownership of land but because of the expectation that she raised in the plaintiff and of his detrimental conduct subsequently encouraged by the defendant in reliance thereon. Having acquired the land, effect can and must now be given to that expectation.

C The expectation need not be one of proprietary right

The expectation of the representee, fostered by the encouragement of the representor, need not be concerned with a proprietary right. Any right in or over the land of the legal title holder will suffice. In Re Sharpe (A Bankrupt) Browne-Wilkinson J confirmed that representations for the purpose of proprietary estoppel may include rights (e.g., rights of mere occupancy licence) which are generally assumed to be non-proprietary.

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14 See however P D Finn (ed), Essays in Equity (1985) at p 59 ff.
The expectation may relate to the acquisition of future rights

Some of the 'familial cases' involve representations concerning future acquisition of property by the representee after the representor's death. In Philip Lowe (Chinese Restaurant) Ltd v Sau Man Lee\(^1\) May LJ questioned whether such a representation could be seen as a relevant encouragement for estoppel purposes. He doubted, "whether any representation as to what will happen upon the representor's death or what will be in the representor's will can be construed as one involving an intention that there should be a present acquisition of that future right by the representee." He added that, "if one considers the alleged representation to take effect only upon death, the two are indeed inconsistent." These dicta are obiter since the case was decided on another point.

May LJ's restrictive approach is not reflected uniformly in the 'familial cases'. There is a long-standing precedent for the view that proprietary estoppel may extend to future rights, Lord Kingsdown's judgment in Ramsden v Dyson\(^2\) being good authority for this wider approach. In Re Basham (decd),\(^3\) moreover, the representor had throughout his lifetime constantly reassured the representee that she would inherit his property when he died. In upholding the representee's subsequent estoppel claim, Judge Edward Nugee QC confirmed that the principle of

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\(^1\)Unreported, Court of Appeal 9 July 1985.
\(^2\)(1866) LR 1 HL 129 at 170.
\(^3\)[1986] 1 WLR 1498.
proprietary estoppel extends to beliefs that future rights over the property will be granted.

If the claimant has a mere or speculative hope of obtaining rights in the property in the future rather than a firm expectation that he will receive rights, the plea of proprietary estoppel will fail. 21

IV THE ENCOURAGEMENT MUST BE FREELY GIVEN

A There must be no coercion

In the Irish case of Cullen v Cullen22 Kenny J rejected as evidence of encouragement conduct resulting from coercion. The representee had requested a doctor to see her husband, the representor, with a view to certifying him as mentally ill. The doctor did so and ordered his removal to a mental hospital. The representor escaped from his family with the aid of his parish priest in order to avoid such incarceration. The representor had authorised his wife to take over his property. This authorisation was on condition that his wife acknowledged his sanity and took all the necessary steps to have the order for his detention withdrawn. Kenny J acknowledged that the 'equity of

21 See Cullen v Cullen [1962] IR 268, where the estoppel claimant failed to obtain a transfer of title because he had merely a hope that the representor would make him a gift of the land. The claimant was, however, granted a long-term occupation right because he had been led to believe that he would not be removed from the land (post at chapter 6). See also Brady (1970) Ir Jur (NS) 239 for an interesting discussion of this case.

22 [1962] IR 268. There were two estoppel claims in Cullen, the discussion here relates to the first claim. The second claim is discussed post at 37.
estoppel' was discretionary and that the plaintiff made the statement that he was about to transfer his property to his wife because he believed that it was the only way by which he could remain free. It would therefore be grossly inequitable to regard the representee as being entitled to a transfer of the property. Kenny J was in any event anxious to avoid exacerbating the conflict between the members of the Cullen family. Had he found the relevant conduct to be encouragement he would have had to grant a remedy which would have further destroyed family relationships.²³

There is similarly some question whether the representor in Pascoe v Turner²⁴ was acting under pressure when he told his de facto wife that she could have the family home. The plaintiff was trying to calm down the defendant, who had become distraught after he confided to her that he was leaving her for another woman. In this case, however, the representor's initial assurance of entitlement was followed by acquiescence in the representee's subsequent improvements to the house and this acquiescence appears to have been freely given. Furthermore the representor's later conduct towards the representee was ruthless in the extreme.²⁵

B Who must give the encouragement?

The representor may give the encouragement himself or he may be held to have given the encouragement through

²⁴[1979] 1 WLR 431.
²⁵Post at 143.
his agent. In Swallow Securities Ltd v Isenberg,\textsuperscript{26} for instance, the encouragement relied upon by the claimant was that given by the resident porter of a block of flats who was the landlord's representative on the spot.

The representations of an agent are not, however, necessarily conclusive in this area. In Van den Berg v Giles,\textsuperscript{27} for instance, the solicitors acting as agents for the representor contradicted the encouragement given by the representor herself. She had actively encouraged the representee to carry out the improvements he was making to her property. Her solicitors had actively discouraged him from doing so. In the New Zealand Supreme Court Jeffries J found that the representor had deliberately misled and inveigled the plaintiff into spending very considerable sums of money on her property. The representor had made a shrewd assessment of the character of the plaintiff and his wife (who was described as "ingenious to the point of foolishness"). Jeffries J could find no criticism of the manner in which the representee had treated the representor and her husband, who were "considerably older than him and more experienced in the ways of the world." At all stages in their dealings, the representee appeared to have shown them courtesy and to have been completely open with them in the activities he undertook in connection with the house.\textsuperscript{28}

The amount of money spent by the representee was of overwhelming importance in the court's determination that it was not folly for him to continue renovating the

\textsuperscript{26}(1985) 274 EG 1028 at 1030. See also Ivory v Palmer (1976) 237 EG 411.
\textsuperscript{27}[1979] 2 NZLR 111.
\textsuperscript{28}\textsuperscript{Ibid} at 120.
representor's property in the presence of contradictory representations by the representor and her agent.

Permission given by a tenant for the carrying out of work on the owner's property is not sufficient to rank as encouragement by the owner. A tenant cannot, in this sense, be an agent of the landowner. If, however, the tenant subsequently acquires a freehold estate in the land, it is arguable that this has the effect of 'feeding the estoppel' which has arisen from his earlier representations.

Where the property is owned jointly, it must be shown that the encouragement was given by both or all of the joint owners. In the New Jersey case of Mahony v Danis the defendants were husband and wife and were together joint legal owners of the disputed property. It was claimed that the husband alone had encouraged the plaintiff to believe he had acquired rights in the property. The Supreme Court of New Jersey rejected any possibility of proprietary estoppel in these circumstances.

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31 Mahony v Danis 469 A 2d 31 (NJ 1983). See also Brownlee v Duggan (1976) 27 (3) NILQ 291 where the encouragement given by one of two joint owners was deemed to have been given also by the other joint owner in so far as he did not express his objection to the original representation.
C  To whom must the encouragement be given?

In the 'familial cases' the courts have taken a broad approach in determining the persons to whom representations can extend for the purpose of raising an estoppel claim. In Cameron v Murdoch the original encouragement had been given to the father and mother of the second plaintiffs. The Supreme Court of Western Australia nevertheless accepted implicitly that this encouragement was a continuing process where the plaintiffs had carried on their father's detrimental reliance. This decision can be contrasted with Jones v Jones where the entire family of the representee had acted to their detriment by uprooting themselves from their home and moving to the representor's property. There was no explicit discussion by the Court of Appeal of the exact identity of the representee. Roskill LJ, however, refused to extend the 'equity of estoppel' to the whole family and restricted it to the representor's son in his capacity as the current head of family.

The representee in Cullen v Cullen had given the relevant land over to her son. The decision of Kenny J related to the question whether the son, rather than the original representee, his mother, had fulfilled the burden of proving an alteration of position in reliance on the encouragement given by the legal title holder. The case does not explain precisely how the encouragement made

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34Ibid at 443.
35[1962] IR 268. (The discussion here relates to the second estoppel claim).
initially to the mother had subsequently been extended to her son. It may be that in such cases the original positive encouragement can be treated as being replaced by the silent acquiescence of the legal title holder in respect of the improvements being made. This silent acquiescence then becomes a separate encouragement, thereby permitting an estoppel to be raised in favour of the person who alters his position in reliance on the silent acquiescence.

The encouragement given by the representor may be as to the acquisition of rights in his property by some party other than the representee. The third party is clearly not the representee in such circumstances; it is still for the original representee to show that he has altered his own position and suffered detriment in reliance on the representation. In Shaida v Kindlane Ltd, for instance, a company encouraged one of its employees to act to his detriment in the belief that his wife would be granted a conveyance of the family home which belonged to the company. The plea of proprietary estoppel succeeded here.

V THE BELIEF OF THE REPRESENTEE MUST COINCIDE WITH THE TERMS OF THE ENCOURAGEMENT

Unless the court finds (or imposes) a concordance between the conduct claimed as encouragement and the belief of the representee, there can be no successful claim of

Shaida v Kindlane Ltd (Unreported, Chancery Division 22 June 1982).
proprietary estoppel. The representee may well believe that he is acquiring rights in the representor's property. However, the encouragement given by the representor may relate to entirely different rights from those expected by the representee.

It is always a difficult question whether the representor's conduct can be seen as a relevant encouragement or as indicative merely of some alternative arrangement such as a tenancy or licence. The courts have taken into account a number of interrelated factors in determining whether there is concordance between the encouragement and the belief. Among the important factors are the nature of the representor's conduct, the relationship between the parties, the likely relative detriment suffered by the parties or their families as a result of the decision, the knowledge of the representor and the general social impact of recognising the conduct as encouragement. The 'familial cases' will now be considered from this perspective.

A Explicit representations concerning rights in the representor's property

Where the representor makes an explicit representation that rights in or over his land are to be granted to the representee, there is patently a correlation between the terms of the encouragement and the terms of the representee's belief. In such circumstances the only

37 See Hinde, McMorland and Sim, Land Law (Butterworth 1978) Vol 1 at 371, for a comprehensive discussion of licences.
question left for the court is usually whether there has
been a detrimental alteration of position in reliance on the
representation. \(^3\) Such cases will be referred to hereafter
as the 'common assumption' cases.

A clear example of this type of case may be found in
Dillwyn v Llewelyn. \(^3\) Here a clearly worded memorandum
recited that

Hendrafoilan, together with my other freehold
estates, are left in my will to my dearly
beloved wife, but it is her wish, and I
hereby join her in presenting the same to our
son, Lewis Llewelyn Dillwyn for the purposes
of furnishing himself with a dwelling
house. \(^4\)

This memorandum was accepted as unequivocal evidence of
encouragement by the representor. \(^4\)

\(^3\) See Chapter Three.
\(^3\) (1862) 4 De GF & J 517, 45 ER 1285.
\(^4\) Ibid. See also In re Hume ex parte Official Assignee
(1909) 28 NZLR 793.
\(^4\) For other cases of unequivocal encouragement, see Pascoe v
Turner [1979] 1 WLR 431 (where the representor made an
unequivocal assurance to the representee on a number of
occasions that "the house is yours"); Greasley v Cooke
[1980] 1 WLR 1306; Shaida v Kindiane Ltd (Unreported,
Chancery Division 22 June 1982); Dodsworth v Dodsworth
(1973) 228 EG 1115; Van den Berg v Giles [1979] 2 NZLR
11; Thomas v Thomas [1956] NZLR 785; Pearce v Pearce
[1977] 1 NSWLR 170; In re Basham, decd [1986] 1 WLR 1498;
Riches v Hogben [1986] 1 Qd R 315; Maharaj v Jai Chand
Likewise in *Inwards v Baker*[^42] and in *Jones v Jones*[^43] the terms of the representors' encouragement were beyond question. In the former case a father had suggested that his son should "put the bungalow on [his] land and make the bungalow a little bigger"[^44]. In the latter case a father had purchased a house for his son and had requested that he should come and live in it, thereby incurring expenditure. The father had said, "It's your place...because I owe you a lot"[^45]. In *Griffiths v Williams*,[^46] the representor and representee were mother and daughter respectively. The mother had repeatedly assured her daughter that for the rest of her life she could live in the family home, which belonged at this stage to the mother.

In all these cases the representor obtained benefits, both financial and practical, from the representee's alteration of position. Such benefits tend to reinforce the courts' view that an explicit encouragement has been given. In *Riches v Hogben*,[^47] however, there was no real benefit to the representor from the representee's alteration of position. The court nevertheless recognised that an explicit encouragement had been made. Here the representee had given up a protected tenancy and uprooted his family from England and transported them to Australia. The court was reinforced in its view that there was an explicit encouragement to the representee because his loss would have been very real had the plea of estoppel failed.

[^42]: [1965] 2 WLR 212.
[^46]: (1978) 248 EG 947.
There has been very little discussion of the knowledge required in the representor where the representation has taken the form of an explicit assurance of rights. The representor's knowledge of his own rights has not arisen for consideration, and in circumstances of express and unequivocal encouragement by the landowner proof of such knowledge would seem not to be a necessary requirement. The representor's knowledge of the claimant's belief has been so clearly satisfied that there is no need of further discussion.

B Acceptance of the representee's expenditure on the shared family home

A sharing of the representor's property by the representee may be brought about by the representee's lack of land or capital or the need of either the representor or the representee to be cared for. Circumstances of these kinds commonly underlie the 'familial cases', although evidence of the precise nature of such family arrangements is frequently sparse. The arrangements may have commenced in circumstances of residential crisis and little concern may have been given to the long-term future. A certain optimism is often present at the commencement of shared

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48 See ante at 19
49 See the comments of Speight J in Lepel v Huthnance (Unreported, Supreme Court of Auckland 6 July 1979).
49 See Rogers v Eller (Unreported, Court of Appeal 20 May 1986) in which Croom-Johnson LJ referred to such arrangements as "non-arrangements". See also Hardwick v Johnson [1978] 1 WLR 683 at 688 per Lord Denning MR.
living arrangements; an optimism which may have turned to a
cynical view of the agreement in the situation of discord
which later faces the parties and the court.51

Members of families who live together conduct their
lives within the institution of the family. This
institution has an accumulation of cultural associations and
meanings which have emerged from the subjective evaluations
of familial behaviour by society at large.52 These
meanings provide a framework for the interpretation of the
behaviour of individual members of the family by other
members of that family. Within the jurisdictions
considered in this dissertation there may be different
understandings based on social class or ethnic origin which
are confined to that social class or ethnic group.53
Within a given social class or ethnic group there will be a
considerable common understanding about the nature of any
relationship. It is therefore somewhat paradoxical that
the case law should contain so many disputes over the
meaning of familial conduct where both parties to the
dispute have been living together. Whilst a relationship
continues amicably, the shared values of the family are such
that the meanings of behaviour will not be questioned; they
do not require to be.54 The precise significance of any
particular event will not be verbalised. It is only when

51 See Tunley v James (Unreported, Court of Appeal 7 April
1982).
52 See P L Berger and T Luckmann, The Social Construction of
53 See, for example P Willmott and M Young, Family and
54 See Rogers v Eller (Unreported, Court of Appeal 20 May
1986) in which Slade LJ said "arrangements between members
of the same family living happily in the same house are
often of a very indeterminate nature."
the relationship breaks down that the meaning of events will assume significance.\(^5\)\(^5\)

In such circumstances the courts have to place their own interpretations on events in order to decide whether acceptance of expenditure by the representor should be viewed as encouragement in the estoppel context. For the most part the courts have been fairly liberal in interpreting expenditure as encouragement in these circumstances. They have recognised that members of families, living together, have undertaken some sort of mutual support obligation.\(^5\)\(^6\) This obligation may need to be continued even after family breakdown. In such circumstances the courts have very readily accepted that financial expenditure gives rise to an inference of encouragement. The courts have not demanded proof in these situations of actual knowledge of the representee's belief. Knowledge of alteration of position in these circumstances appears to be accepted as knowledge of the representee's belief.\(^5\)\(^7\)

In *Morris v Morris*\(^5\)\(^8\) for example the New South Wales Supreme Court granted a remedy based on proprietary estoppel (even though the estoppel doctrine had not been specifically pleaded).\(^5\)\(^9\) In this case the representee had gone to live

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\(^5\)\(^7\) Cf Gross v French (1976) 238 ER 39 at 41.
\(^5\)\(^8\) [1982] 1 NSWLR 61.
\(^5\)\(^9\) The English Courts have insisted that proprietary estoppel must be specifically pleaded. See Halsbury's Laws of England Vol 16, 4th Ed, Para 1516; Bishop v Jones (unreported Court of Appeal 16 October 1985); *In re Stanley Palmer* (Unreported, Court of Appeal 12 April 1984).
with his son and daughter-in-law in their property, having sold his own residential unit. The evidence concerning the precise nature of the arrangement was minimal. McClelland J found that there was no discussion as to the duration of the proposed living arrangements, or as to what was to happen if the theretofore harmonious relationship between the parties broke down or as to what was to happen if the defendants wanted to sell the house...Nor was there any discussion as to the characterization of the proposed application by the plaintiff of the proceeds of sale of his unit.60

McClelland J found that "the plaintiff spent money on the defendant's property in the expectation, induced or encouraged by the defendants that he would be able to live there indefinitely as a member of the family."61 The plaintiff's expenditure of money was assumed to be evidence that the defendants had encouraged him in his expectation that he would be accommodated indefinitely.62

Cf Snook v London and West Riding Investments Ltd [1967] 1 All ER 518 at 528 per Diplock LJ; Tunley v James (Unreported, Court of Appeal 7 April 1982) per Stephenson LJ.
60[1982] 1 NSWLR 61 at 62.
61[1982] 1 NSWLR 61 at 63.
62In Plimmer v Mayor of Wellington (1884) 9 App Cas 699 at 713 Sir Arthur Hobhouse maintained that the claim by the representee would not fail where it was unclear precisely what rights the representor was encouraging the representee to believe he was acquiring. See also Denny v Jensen [1977] 1 NZLR 635 at 638; Baumgartner v Baumgartner [1985] 2 NSWLR 406 at 624; Vinden v Vinden [1982] 1 NSWLR 624; Broughall v Hunt (Unreported, Chancery Division 1 February 1983).
In Walker v Walker Browne-Wilkinson LJ also rejected the trust claim of the plaintiff who lived with his son and daughter-in-law (the present defendants). The plaintiff had given the defendants over £5000 to spend on the property. There was no evidence of any intention to create a beneficial interest in favour of the plaintiff. Browne-Wilkinson LJ considered that, if proprietary estoppel had been specifically raised, he might have been prepared to accept such a plea. He stated that there was "a common understanding that the father was to have a home in the new house." However, both the evidence and the judge's findings were diverted from the crucial points because a resulting trust had been pleaded rather than a constructive trust. The latter claim (unlike the former) embraces the doctrine of proprietary estoppel. McClelland J's approach in Morris and the dicta of Browne-Wilkinson LJ in Walker v Walker accepted that family arrangements are more likely to result from a "common understanding" between the parties rather than from any specific representation. The common understanding in these cases is somewhat unclear. In neither case was there any discussion between the parties about the more specific aspects of the arrangements. It appears in Morris, for instance, that McClelland J attempted to impute to the parties the agreement which they might have reached themselves had they given the matter thought. He acknowledged the difficulties in ascertaining from a standpoint of conflict the precise terms of an

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63 Unreported, Court of Appeal 12 April 1984.
64 Ibid.
65 See Chapter 7.
66 Unreported, Court of Appeal 12 April 1984.
arrangement reached by the parties at a time of accord. He resolved this dilemma by taking a broad approach to the interpretation of conduct involving financial expenditure as encouragement.

In *Phillip Lowe (Chinese Restaurant) Ltd v Sau Man Lee* the parties were *de facto* husband and wife, sharing the property with the husband's first wife. Chinese custom refers to the second wife as a 'little wife'. The Court of Appeal recognised that it "must of course decide this case in accordance with English law, not in accordance with Chinese custom". Nevertheless the Court of Appeal recognised that it "must have the custom in mind as at least part of the background against which the parties in this litigation lived, acted towards one another and may or may not have agreed, the one with the other." According to May LJ, the man's responsibility to his little wife "is very much the same as his responsibility for his first wife...what the little wife can expect if the relationship should cease must...be a matter for bargain and agreement between the parties."

The 'little wife' claimed that her *de facto* husband had encouraged her to believe that the house would be hers. She had improved the property by repairing and decorating it. The Court of Appeal rejected the defendant's claim.

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67 See also *Tunley v James* (Unreported, Court of Appeal 7 April 1982) where there were equal difficulties in ascertaining the precise terms of an arrangement made at a time of accord when the parties were now in bitter dispute.
68 Unreported, Court of Appeal 9 July 1985.
69 Ibid.
70 Ibid.
relationship between the parties could be viewed as quasi-polygamous. Policy reasons may have prevented the Court of Appeal from recognising encouragement in a quasi-polygamous relationship.

C Acceptance of expenditure from a member of the representor's family on property not currently shared as the family home

When members of families are not living together, their relationships are likely to be governed by more formal social conventions than when they are living together. The meaning of conduct when families are living apart may be more complex than when they are living together. In deciding whether the acceptance of financial expenditure from a member of the representor's family constitutes encouragement in these circumstances, the courts have taken account of the level of expenditure by the representee and the effect any decision would have on other members of the extended family or on society at large. A combination of these factors rather than any one factor alone tends to influence the courts' determination of encouragement in any given case.

i) Level of expenditure

In the complex Australian case of Cameron v Murdoch71 the plaintiffs and the defendants were members of a large

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71[1983] WAR 321. (The decision was affirmed by the Privy Council (1986) 63 ALR 575).
extended family living apart from each other. Brinsden J accepted that the plaintiffs had been encouraged to believe that they would obtain rights in the representors' property. He was influenced by the substantial nature of the plaintiffs' expenditure. The plaintiffs had spent more than thirty years improving extensive farmland.

By contrast the expenditure of the representee in *JN Elliot & Co (Farms) Ltd v Murgatroyd* was minimal. She had expended limited sums on furnishing a property belonging to her father, the representor. The latter had agreed that she could occupy the property but did not specify the time period. The New Zealand Court of Appeal accepted that there was an encouragement to the representee that she could live in the property but only for as long as it pleased the representor.

ii) Familial consequences

The court's inference of a relevant encouragement by the representor from the acceptance of financial expenditure from a member of his family may depend on the consequences such an inference would have for other members of the family. In *Warnes v Hedley*, for instance, the Court of Appeal was required to consider whether the plaintiff had given her son and daughter-in-law any encouragement as to long-term rights in her property. She had allowed her son and daughter-in-law to use her property as their own family home. She had on occasion visited this home and had viewed

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72Unreported, New Zealand Court of Appeal 12 September 1984.
73Unreported, Court of Appeal 31 January 1984.
the extensive and expensive works which they had carried out. May LJ recognised that "here was a mother or a mother-in-law who on the evidence, saw the work that was being done in the couple's matrimonial home." May LJ accepted that "she no doubt liked what she saw when she visited...but in my judgment the evidence went no further than that." The representor would have lost her major financial asset had the Court of Appeal accepted the representees' claim of encouragement. Between the alleged representation and the court hearing the representor had herself become homeless. One of the representees, by contrast, had acquired an alternative home for herself and the children. The mere expression of pleasure at improvements which have been made did not necessarily, according to the Court of Appeal, constitute encouragement. Actual knowledge of the claimant's belief was held to be necessary in these circumstances.

In Rogers v Eller[74] the representor was the brother of the representee. The representor was frequently absent from the disputed property, spending nine months of the year at sea with the Merchant Navy. For some forty years he had allowed the representee to live in and expend money on his home. The Court of Appeal held that his conduct was not to be interpreted as encouragement to the representee that she had acquired a permanent right to live in the property. In the Court's view he had merely represented to his sister that she had a bare licence to remain there so long as the

[74] Unreported, Court of Appeal 20 May 1986.
arrangements were congenial to him or at most during the period while her children were minors.

In Rogers v Eller the representee had claimed as relevant encouragement that: (1) she had been permitted to live in the property for forty years; (2) she and her former husband had been permitted to maintain and improve the property; (3) the representor had accepted her care during his six-month illness; and (4) the representor had failed to recover possession when the last of her children had left home. Slade LJ said that

it is to be expected that in such circumstances close relatives in the position of the defendants, no doubt hoping and expecting that they would continue to live in the property, by keeping the plaintiff well satisfied with their continued presence and wishing to improve their own comfort at the same time, would contribute by carrying out work to the property, even at substantial expense, and also by giving other assistance to the plaintiff in one way or another.75

Slade LJ thus interpreted both the conduct of the representor and the belief of the representee as not entitling the latter to obtain any long-term rights in the home. In reaching this conclusion, the court was particularly influenced by the fact that the representor had

75Ibid.
already bought out the representee's share in the property on their mother's death. To give the representee a new share would unjustly deprive the representor of a capital asset. Slade LJ also recognised that there were no longer young children of the family who required a home.

In Savva v Costa and Harymode Investments Ltd\textsuperscript{76} the representor had allowed the representee, his former de facto wife, to improve the house in which she was then living, apart from the representor, with their two children. The representor's consent to the improvements was seen as referable simply to an agreement that the plaintiff and the children could live there as licensees. The plaintiff had knowledge that the representee was improving the property but he did not know of her actual belief that she had rights beyond those of a mere licensee. The representor had no intention of evicting the representee and the Court of Appeal accordingly held that she did not need the protection of proprietary estoppel. Oliver LJ emphasised that the decision "in no way determined the question of the plaintiff's right to continue in occupation of the property". Oliver LJ warned that "the plaintiff would be entitled, if her enjoyment of the property is terminated in the future, to invoke that principle in support of a claim to an irrevocable licence."\textsuperscript{77} The plaintiff's occupation had not yet been disturbed and the defendant had assured the court that he had no intention of terminating the occupation currently enjoyed by the plaintiff and the children.

\textsuperscript{76}(1981) 131 NLJ 1114.
\textsuperscript{77}Ibid.
In J N Elliot & Co (Farms) Ltd v Murgatroyd, Somers J pointed out that the representor had already given a half-share in the farm to the representee and almost the same to her brother. To recognise the representee's expenditure as leading to an inference of encouragement of "a life occupancy of farm property would be at odds with that virtual equality."

In Cameron v Murdoch, Brinsden J took a broad approach in relation to encouragement and particularly in relation to the requirement of the representor's knowledge. In advance of the court hearing of the estoppel claim, none of the representors knew what his or her legal rights over the property were. The administrator of the estate had "developed procrastination into a fine art" and this resulted in eight defendants disputing the plaintiffs' claim to the property. The estoppel claim succeeded in spite of the absence of knowledge by the defendants of the precise nature of their legal rights. The court also held that there was no requirement that the representor should have actual knowledge of the representee's belief. In the present case every member of the extended family knew vaguely that the plaintiffs had altered their position and were continuing to do so to their considerable detriment. Knowledge of this alteration of position, although tenuously evidenced, was deemed to be sufficient knowledge to support the plaintiffs' claim of encouragement. The defendants would be well provided for from the original representor's

78 Unreported, New Zealand Court of Appeal 12 September 1984.
80 Ibid at 324.
estate; they would therefore not suffer unduly from the court's finding of a relevant encouragement.

iii) Societal consequences

Although parties in such a close relationship as mistress and lover may regard themselves as members (at least whilst the relationship continues) of a de facto family, the courts have been very reluctant to recognise an 'equity of estoppel' when the parties do not actually live in the same property. In such circumstances the courts have generally rejected the acceptance by the representor of financial expenditure as evidence of encouragement. If the courts were to permit claims in these circumstances, any mistress improving property would be granted an 'equity of estoppel'.

In Coombes v Smith Judge Jonathan Parker QC made explicit the policy reasons for rejecting a mistress's claim that she had been encouraged to believe that she had been granted a right to remain permanently in the property. The judge accepted counsel's observation "that if the plaintiff in the instant case has an equity to remain in occupation of the property, then a similar equity may be

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91Cf Jackson v Crosby (No 2) (1979) 21 SASR 280.
92[1986] I WLR 808.
expected to arise in the majority of cases where there is a dispute over property between man and his mistress."

The representor had provided a house for the representee and the child of their relationship but did not live with them. When the estoppel claimant had asked him to place the property in joint names, the representor had assured her that she need not worry because "he would provide a roof over her head". It would not seem unreasonable that the representee should have inferred from this that she had obtained a permanent right of occupation. This, however, the judge did not accept. He explained somewhat obscurely that

a belief that the defendant would always provide her with a roof over her head is, to my mind, something quite different from a belief that she had a legal right to remain there against his wishes.

The parties had not discussed what should happen in the event of a breakdown in their relationship. The representation was therefore deemed to lack the clarity required for the purposes of an estoppel claim.
In Fruin v Fruin the disputed property was of substantial value. The plaintiff was able to realise that value by defeating the defendants' claim in estoppel. The defendants, the third generation of an extended family (the plaintiff representing the second generation) had cultivated land as a smallholding whilst living in caravans on the site. The defendants claimed that their grandmother (the plaintiff's mother) had told them to keep up the good work which their father had commenced. She had also permitted them to place their mobile homes on the site. This conduct was held by Cumming-Bruce LJ to relate to a mere licence granted to the defendants by the grandmother. The basis for this decision was that the alleged representor could not have been expected to make a representation which would effectively involve giving the representee absolute rights in valuable freehold building land. Such an outcome would have left the representor's daughter, (the present plaintiff), without a penny. Any decision to recognise the representor's acceptance of expenditure as an encouragement relating to the acquisition of long-term rights over his property by the representee would have left valuable development land under-utilised.

In J N Elliot & Co (Farms) Ltd v Murgatroyd Somers J gave an additional reason for his inference that there had been a minimal encouragement as to a temporary occupation

86 Unreported, Court of Appeal 15 November 1983.
87 The decision in Fruin was particularly unfortunate in that the grandmother had left a will granting the plaintiff and the defendants equal shares in the proceeds of sale of property on condition that the defendants removed their caravans from the site on the death of the testatrix. The defendants had had no means of knowing this condition.
88 Unreported, New Zealand Court of Appeal 12 September 1984.
right. He declared that any other view "would be likely to affect the future of the farm over a long period of years. Any assumption of the father about her occupation must surely have fallen well short of this." The Court of Appeal was concerned, moreover, to protect the commercial viability of the farm.

D Acceptance of expenditure on property where representor and representee are strangers

i) Where neither party is a financial institution

The legal interpretation of conduct between strangers is assessed against the background of those wider customary rules which govern society as a whole. Strangers are not expected to behave in an unquestioning benevolent manner towards each other in their dealings with property. Consequently in these circumstances the courts have been reluctant to accept a plea of estoppel which would interfere with the rights of the legal title holder unless certain stringent conditions are met. These conditions relate to the legal title holder's knowledge of his own rights and of the belief held by the representee.

a) Constructive knowledge of the representee's belief

In Pilling v Armitage the Master of the Rolls explained that where a legal title holder sees a stranger

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89 Ibid per Somers J; see also McBean v Harvey [1958] NZLR 25.
90 (1805) 12 Ves Jun 79, 33 ER 31.
laying out money on his land he is normally under a duty to speak out. It is readily understood that a person spending money on a stranger's land must be under a mistaken belief that he has rights over that land. Failure to speak out in such circumstances will usually be seen as encouragement to the person improving the land that his belief is correct.

In *Hamilton v Geraghty* the defendant was aware of the fact that a stranger was building a house on the defendant's land. The defendant remained silent about her rights and in consequence was held to have encouraged the stranger to believe that he had acquired rights in the land. Knowledge that a stranger is building a house on land that is not his appears to be equated with knowledge that he believes that he must have a right over that land. In such circumstances, knowledge of this alteration of position normally places a duty on the legal owner to intervene.

b) Representor's actual knowledge of his own rights

In *Pennell v Nunn* the bankrupt plaintiff claimed that the liquidator had, by inaction, led him to think that

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91Ibid at 33. See also *Gregory v Mighell* (1811) 18 Ves Jun, 34 ER 341 where the Master of the Rolls said that the representor had "permitted the plaintiff to remain in possession and to make expenditure upon the land for eight years, before he brought an ejectment. He must have known that the expenditure was made upon the faith of the agreement." See also *Plimmer v Mayor of Wellington* (1884) 9 App Cas 69 at 712.

92(1901) 1 NSWSR (Eq) 81.

93Unreported, Chancery Division 2 April 1982. See also *Shaw v Applegate* [1978] 1 All ER 123 at 131 where the plaintiffs were uncertain as to their legal rights but were aware of the defendant's activities. They took no action at first. Buckley LJ explained that "it should not... be
the liquidator was asserting no claim to the land on which
the plaintiff had built his home. Judge Finlay QC rejected
the claim as outrageous. The bankrupt had done everything
to prevent the liquidator from discovering the true
ownership of the property. The liquidator's inaction was
without any semblance of knowledge of his own rights over
the property and could not therefore be seen as
encouragement. 94

c) Actual knowledge of the representee's belief

In Pilling v Armitage95 the court acknowledged that the
nature of the representee's expenditure on the land might
relate to a pre-existing agreement between the parties
rather than to any alternative belief held by the
representee. The representor's acquiescence in expenditure
by the representee in such circumstances was not conduct
which could be viewed as encouragement unless the
representor had actual knowledge of the belief held by the
representee.

the policy of the court to push people into litigation until
they are really sure that they have got a genuine complaint
and have got a case in which they are likely to succeed, and
acquiescence at a time when the parties are in doubt as to
what their true rights are, could...seldom satisfy the tests
I have been discussing". See also Canadian Pacific Railway
Company v The King [1931] AC 414 at 430 per Lord Russell.
94 See also Svenson v Payne (1945) 71 CLR 531. Cf Stiles v
Cowper (1748) 3 Atk 692, 28 ER 1198.
95 (1805) 12 Ves Jun 79, 33 ER 31.
(1) Pre-existing licences

In E & L Berg Homes Ltd v Grey the defendants had occupied a mobile home on the plaintiff company's site for twenty-six years. The first defendant was an employee of the company. The plaintiff's representative had told the defendants that the site was to be re-developed and suggested that it might be in their interest to find alternative land for their mobile home if land became available. The plaintiff's representative also said that he did not think that the company would bother to evict the defendants. The latter continued to live on the site and actually purchased a more luxurious mobile home and improved the land surrounding it. The plaintiff's representative was aware of these improvements.

Brandon LJ interpreted the words of the plaintiff's representative as a warning of the precarious nature of their rights, a warning which he thought the defendants had foolishly ignored. According to Brandon LJ, "a statement by way of representation, a promise, in order to found an estoppel must be clear and unambiguous." Furthermore, the plaintiff's acquiescence in the defendants' improvements was without actual knowledge of the defendants' belief. The defendants' expenditure could readily be understood by the plaintiff as related to the bare licence which it conceded had been granted to the defendants some twenty-six years ago. In these circumstances the defendants had merely a unilateral and mistaken belief in their rights

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1979) 253 EG 473.
Ibid at 477.
See also In re Stanley Palmer (Unreported, Court of Appeal 7 July 1984).
which can never give rise to an estoppel claim. It is open
to question whether the Court of Appeal would have made the
same decision if the defendants had built a house
constructed of bricks and mortar.\(^9\)

The concept of a
licence whose scope may fluctuate to embrace further
development of land was used as a means to defeat the
estoppel claim. To have permitted the defendant to remain
on the site would have left a valuable building plot
undeveloped. As the Court of Appeal implied, this would
not have made any commercial sense.\(^10\)

\(\text{(2) Unilateral change in parties' relationship}^{10}\)

The representee's belief may change unilaterally during
the course of his relationship with the representor. At
the commencement of the relationship they may have been in
agreement with each other as to the nature of the rights
which were to be granted. The encouragement given by the
representor relates only to the agreement at the
commencement of the relationship. It does not extend to
any new and uncommunicated belief which has subsequently
been adopted by the representee.

The Northern Irish case of \textit{Devlin v N I Housing}
Executive\(^10\) is an interesting illustration of the situation
described above.\(^10\) The defendant housing authority had

\(^{9}\)Estoppel claims involving caravans as the family home have
been remarkably unsuccessful, see, e.g., \textit{Fruin v Fruin}
(Unreported, Court of Appeal 15 November 1983); \textit{Williams v
Coleman} (Unreported, Court of Appeal 27 June 1984).

\(^{10}\)\(1979\) 253 EG 473 at 477.

\(^{10}\)\(1982\) 3 NILR BJ 1.

\(^{10}\)See also \textit{Avondale Printers and Stationers Ltd v Haggie
(1979)} 2 NZLR 124.
encouraged the plaintiff to believe that it would permit her to change her status from that of tenant to that of owner-occupier jointly with her nephew. The plaintiff and her nephew then began to improve the property but, unknown to the defendant, intended that the nephew should be the sole owner-occupier. The common assumption on which the plaintiff and defendant initially acted had thus been revised unilaterally. As soon as the housing authority discovered this, it objected and ordered the improvement works to cease. Lowry LCJ held that "it is impossible for a person to be guilty of acquiescence unless it is shown that he knew what was going on or at least was wilfully blind to it."\(^{103}\) The Chief Justice clearly stated that knowledge of "what was going on" encompassed what was actually in the mind of the plaintiff and not the mere fact of the improvement works.

(3) **Pre-existing tenancies**

Where there is a pre-existing tenancy, the courts have been reluctant to infer that any encouragement given by the landlord relates to anything other than the existing agreement. In *Stilwell v Simpson*,\(^{104}\) the defendant tenants were told by the plaintiff landlady that "they would be alright for the house...they would be secure in the

\(^{103}\)(1982) 3 NILR BJ 1, 20, 21. See also Denny v Jensen [1977] 2 NZLR 635 at 638; McBean v Harvey [1958] NZLR 25 at 30. In Rod v Wellington City Corporation [1919] NZLR 595 at 601 it was held that there must be "actual knowledge unless the circumstances are such that the only explanation of the representee's behaviour is that he is mistaken as to his right."

house" after her death. Sir Douglas Frank QC, acting as a Deputy High Court Judge, interpreted this statement to mean that their tenancy would remain undisturbed which it has. The judge held that it was impossible to interpret the plaintiff's words as sufficient encouragement to found an estoppel. The words could equally mean that the defendants' residential security would be protected by means of a statutory tenancy under the Rent Act.

Again in Swallow Securities Ltd v Isenberg a pre-existing tenancy led the Court of Appeal to reject an estoppel claim. The defendant had informally agreed that W should take over the defendant's tenancy of the plaintiff company's property, although this arrangement had no legal force. W subsequently spent £40,000 on the property and, because the plaintiff's agent had acquiesced in this expenditure, W claimed to have acquired an 'equity of estoppel'. Cumming-Bruce LJ found that the plaintiff's agent, the porter knew all about the fact that the work had been procured and was taking place. Indeed the porter helped by making arrangements for a skip in which to place the waste building material. Cumming-Bruce LJ nevertheless held that the plaintiff had not "induced an expectation" in W. Although the plaintiff's agent knew of W's expenditure he did not know that W was acting on her own behalf. W's alteration of position was equally consistent with the possibility that it was being undertaken on behalf of the

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105 Stilwell v Simpson (1983) 133 NLJ 894 at 895.
106 See Rent Act 1977, S.2 (1).
107 (1985) 274 EG 1028. The defendant attempted to prevent her eviction by the plaintiff landlord by arguing that an 'equity of estoppel' had arisen in favour of W, her alleged tenant.
defendant tenant. Actual knowledge of W's belief would be necessary to found an estoppel claim here.

ii) Where one of the parties is a financial institution

The analysis of proprietary estoppel in this dissertation is primarily concerned with claims by members of families that rights have been obtained in the family home. However, the doctrine of proprietary estoppel has also been employed to resolve questions of priorities between members of families and financial institutions. The following section deals with 'familial cases' which fall mainly into the latter category.

a) Importance of commercial consequences

Relationships with financial institutions are invariably formal. There is a general acceptance "that banks are in business to make money and that they offer services to the customer only if they can profit from them."\(^{109}\) Thus these types of relationships are formalised against the background of an expectation that the parties will comply with rules of conduct which have regard to certain broad commercial consequences of the transaction. The strict controls which constrain financial institutions often oblige them to adopt a tough-minded approach in their dealings with customers.\(^{109}\) Moreover, the caselaw


\(^{109}\) For example see Building Societies Act 1986 s 45.
demonstrates that the courts have also tended generally to the view that the interests of the institution should be preferred to those of the customer.\textsuperscript{110}

Where a financial institution has lent money to a family member in order to finance the purchase or improvement of the latter's property, the courts have sometimes viewed the borrower's conduct as a form of encouragement which may found an estoppel claim in favour of the financial institution. The acceptance of the loan by the borrower appears to override any possible interpretation of the borrower's conduct as other than relevant encouragement to the lender for the purposes of estoppel. The courts have frequently made the implicit assumption that financial institutions are protected there will be widespread repercussions throughout the commercial world which will affect society at large.

b) The representor’s knowledge is irrelevant

Even where the representor’s conduct has been wholly acquiescent, the judges have tended to dispense with any requirement that the representor should be aware not only of his own rights but also of the belief of the representee.

In Midland Bank v Farmpride Hatcheries Ltd\textsuperscript{111} the second defendant had sought an overdraft from the plaintiff bank and had remained silent about his long-term licence to

\textsuperscript{110}See, however, the comments of Judge Myerson in R v Newton (The Times, 6 January 1987).
\textsuperscript{111}(1981) 260 EG 493.
occupy part of the property which was then charged to the bank. The Court of Appeal later viewed this silence as significant. The bank had not asked about the existence of any occupancy which might reduce the value of its security. The defendant's deliberate silence was regarded by the Court of Appeal as conduct which encouraged the bank to believe that its loan to the second defendant's company was secure. The Court inferred from this deliberate silence that the defendant had knowledge of the bank's belief. Shaw LJ emphasised that "it would have been obvious to a schoolboy, let alone a man of business" that if the representor were to offer company property as a security for an advance, the lender would regard his licence to occupy that property as his home as reducing the value of that security. The representor's silence in relation to the licence could not be ascribed to mere oversight or inadvertance on his part.112

Shaw LJ accepted that a prospective purchaser or lender normally has a duty to inquire whether the defendant's occupancy concealed a proprietary interest in his favour. If, however, the occupier induced the representee to believe that he had no interest, such an enquiry is no longer necessary. In effect the doctrine of notice has been reversed at this point.

112 According to Shaw LJ "collateral and irrelevant matters were described by [the defendant] with profuse particularity; but not a word about the licence. It is impossible to escape the conclusion that [the defendant] intended to conceal the existence of the licence." (1981) 260 EG 493 at 495.
In *Anglia Building Society v Lewis* the defendant claimed that proceedings for possession by the mortgagee should be set aside because she had an overriding interest under section 70(1)(g) of the Land Registration Act 1925. The plaintiff building society claimed that the defendant was estopped from alleging such an interest. The Court of Appeal held that the defendant had represented to the building society that its interest would take priority. This representation was regarded by the Court of Appeal as consisting of silent conduct. Counsel for the defendant had argued that there should be an investigation of the extent of the knowledge of the defendant as to her rights at the date when the mortgage deed was entered into by her husband. The Court of Appeal accepted that the Judge at first instance had failed to consider that the representor had no knowledge of her own rights. The Court of Appeal nevertheless decided in favour of the building society on other grounds. Had the defendant succeeded, she would have been allowed to stay in the property with no further payments to the building society and if the property were sold at a later date, obtain her share of the inflated proceedings of sale. It is rare for judges to verbalise their concern that financial institutions should suffer loss, but precisely this concern is implicit in *Anglia Building Society v Lewis*.

Browne-Wilkinson LJ did verbalise disquiet at the possibility of loss by financial institutions in *Bristol and West Building Society v Henning*. Here, the defendant, a

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113 Unreported, Court of Appeal 29 January 1982.
114 [1985] 1 WLR 778.
de facto wife, claimed that she had an 'equity of estoppel' permitting her to occupy the family home in priority to any rights vested in the plaintiff building society. Browne-Wilkinson LJ pointed out the "risk that the common sense answer may get lost in the many different technicalities which can arise." The mortgage was granted to the society by a de facto husband with the full knowledge and approval of the defendant wife. There was a joint project between them to buy the property with the assistance of a mortgage, and without the mortgage loan it was clear that the house could never have been bought. The defendant, according to Browne-Wilkinson LJ,

had unsuccessfully tried to find some way of paying the instalments under the mortgage, the logical result of her argument (if right) is that she is entitled to stay in possession indefinitely without making any payment. That would be a strange result which I would be reluctant to reach.\(^{11\dagger}\)

In order to prevent such a result Browne-Wilkinson LJ was compelled to hold that the defendant's silence at the date of mortgage had provided encouragement to the building society to believe that she was postponing her right to its rights under the mortgage. By imputing to the defendant knowledge which she probably did not have, Browne-Wilkinson LJ was able to give judgment in favour of the building society.

\(^{11\dagger}\)Ibid at 781. See also Paddington Building Society v Mendelsohn (1985) 50 P & CR 244; Martin (1986) Fam Law 315; Welstead [1985] CLJ 354.
society. The woman had said in evidence that she had never thought about the building society's belief but that, had she done so, she would have appreciated that it believed that she was postponing her equitable right in its favour. The Court of Appeal was significantly influenced by the fact that the representor had knowledge of and accepted the representee's alteration of position in her favour. It was not, however, necessary that she should have known the precise nature of the building society's belief.

The balance of legal protection seems to fall in favour of institutional lenders which, of course, have access to infinitely better legal advice than is generally available to owners of informally acquired equitable rights. In *Williams and Glyn's Bank Ltd v Boland*¹¹⁶ Lord Denning MR said

> it is utterly wrong that a lender should turn a blind eye to the wife's interest or the possibility of it - and afterwards seek to turn her and the family out - ...If a bank is to do its duty, in the society in which we live, it should recognise the integrity of the matrimonial home. It should not destroy it by disregarding the wife's interest in it - simply to ensure that it is paid the husband's debt in full - with the high interest rate now previously. We should not

¹¹⁶[1979] Ch 312.
give monied might priority over social justice.\textsuperscript{117}

The courts seem nowadays less mindful of these words. By rejecting any requirement of actual knowledge, on the part of the totally passive representor, the courts have steadily eroded informal property rights by reference to the same equitable principles which gave rise to the estoppel rights in the first place.\textsuperscript{118}

\textbf{E} No expenditure on the representor's property or other significant alteration of position which benefits the representor.

Where the representee's alteration of position does not benefit the representor, the courts have been unwilling to infer a relevant encouragement. In \textit{Munday v Munday},\textsuperscript{119} for instance, a divorce settlement left the wife in occupation of the former family home, a farmhouse. The husband continued to farm the adjacent land from his father's farmhouse close by. Prior to the divorce he had given his wife permission to graze her horses on two of his fields. She had continued to graze her horses on these fields and earned a small income for herself by doing so. The plaintiff husband subsequently wished to take these fields back into cultivation. The defendant now claimed that she had been induced to believe that the arrangement was permanent. Oliver LJ resolved the dispute in favour of the

\textsuperscript{117}Ibid at 332, 333. A similar view was taken by the House of Lords in its decision in the same case, ([1981] AC 487).
\textsuperscript{118}See Welstead [1985] CLJ 354.
\textsuperscript{119}Unreported, Court of Appeal 20 November 1980.
husband, holding that this arrangement involved a mere licence. Any alternative view of the arrangement would have ruined the farming business and prejudiced the position of the husband who had granted substantial overdraft facilities to finance the farm. Furthermore it was unnecessary to use proprietary estoppel to protect the wife because her husband was happy to grant her a licence over other fields for her horses.\textsuperscript{120}

In \textit{Williams v Coleman}\textsuperscript{121} the plaintiff widow (who was physically disabled) had agreed with the defendant that he could accommodate his greyhounds on her land. Subsequently he installed a caravan on her land to which she raised no objection. Fox LJ explained her failure to raise any objection on the simple ground that "she was a lady under a severe disability and it may be that she wanted to avoid trouble." The Court of Appeal had no difficulty in rejecting the defendant's plea of estoppel. The defendant's alteration of position was insignificant and equivocal. The plaintiff was not even aware that the defendant was actually living in the caravan.

Where the representee's alteration of position is minimal and confers no benefit on the representor, it seems that the crucial element consists in the latter's knowledge of the representee's actual belief rather than of his alteration of position.

\textsuperscript{120}Ibid. See also \textit{Savva v Costa} and \textit{Harymode Investments Ltd} (1981) 131 NLJ 1114.
\textsuperscript{121}Unreported Court of Appeal 27 June 1984.
CHAPTER THREE
DETRIMENTAL ALTERATION OF POSITION AND RELIANCE

1 INTRODUCTION

In Willmott v Barber\(^1\) Fry J's second probandum for successful estoppel claims stated that the representee must have expended some money or must have done some act (not necessarily upon the representor's land) on the faith of his belief. The modern reformulation of this probandum requires that there be some ultimately detrimental change of position by the representee in reliance on the representation engendered by the representor's encouragement.\(^2\) A relevant alteration of position need not initially be detrimental to the representee. In many situations the fact that he has altered his position may at first be to his advantage. However, the required element of detriment lies in the damage caused by this alteration of position if and when the representor subsequently resiles from his representation. The cases considered in this chapter demonstrate that there is a widespread misunderstanding in the present context of the real meaning of the term 'detriment'.

The notion of detrimental reliance by the representee contains two component ideas. First, there must be an alteration of position which is judged to be detrimental at

\(^1\)(1880) Ch D 96 at 105-106 (ante at 14, 15).
the date the representor resiles from his representation.

Second, this alteration of position must occur in reliance on the representor's representation.

II THE DOCTRINAL NEED FOR DETRIMENTAL ALTERATION OF POSITION

In Grundt v The Great Boulder Pty Gold Mines Ltd, Dixon J explained that detrimental reliance is essential because the very purpose of any estoppel is to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain.  

If at the moment of resiliation the representee is no longer suffering a detriment, there will no longer be any 'inchoate equity' left which requires to be satisfied by the

3(1937) 59 CLR 641.

4Ibid at 671. See also Thompson v Palmer (1933) 49 CLR 520 at 547; Reed v Sheehan (1982) 39 ALR 260 at 275, 276.
court. Such a result may follow either because the representee has voluntarily accepted adequate compensation from the representor or because he has freely returned to his original position. In such circumstances all detriment has been spent; unconscionability has ended.  

III MODERN ATTEMPTS TO DISPENSE WITH THE REQUIREMENT OF A DETRIMENTAL ALTERATION OF POSITION

In Greasley v Cooke, Lord Denning MR suggested that proof of detriment was unnecessary. He thought it to be sufficient if the party, to whom the assurance is given, acts on the faith of it - in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it. This dictum has caused some confusion and has led to a belief that Lord Denning MR was in fact attempting to dispense completely with the requirement of detriment. The representee in Greasley v Cooke had clearly acted to her detriment, as Lord Denning MR recognised. She had worked for the defendants without wages over a period of thirty years when she could have left and obtained a job elsewhere. The alteration of position represented by her labours was no detriment to her

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5 See Appleby v Cowley (1982) The Times, 14 April. In Vinden v Vinden [1982] 1 NSWLR 618 at 625 Needham J held that once the representor had accepted the representee's periodic payment of outgoings of his property, he could not subsequently defeat the estoppel claim by seeking to prevent the representee from continuing such payments.


7 In Moorgate Mercantile Co Ltd v Twitchings [1976] QB 225 at 241 Lord Denning had agreed with the views expressed by Dixon J in Grundt v The Great Boulder Pty Mines Ltd (1937) 59 CLR 641 at 675 as to the requirement of detriment.
so long as she received the benefit of a roof over her head but detriment was clearly threatened if this benefit were taken away from her.

Lord Denning MR's dictum in Greasley v Cooke has been subsequently interpreted in the sense that the claimant need not show that he or she has suffered any detriment during the period while the representation holds good, but must simply show at this stage that his or her position has been altered. Such alteration of position will then be adjudged as raising an estoppel (or not) in terms of the detriment which later ensues when the representor resiles. In Watts v Story, for instance, Dunn LJ explained that Lord Denning MR's dictum in Greasley v Cooke did not state any new proposition of law. For Dunn LJ it mattered not "whether one talks in terms of detriment or whether one talks in terms of it being unjust and inequitable for the party giving the assurance to go back on it." He found it difficult to envisage circumstances which would give rise to unconscionability unless the representee had suffered some prejudice or detriment as a result of the representor's resiliation.

Lord Denning MR's dictum in Greasley v Cooke may equally be interpreted as fostering a broader approach to detriment along lines which mirrored the decision in Mantindrai v Quaglia. Here a majority in the Supreme

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8[1980] 1 WLR 1306.
11[1980] 1 WLR 1306 at 1311.
12(1981) 26 SASR 101 at 106, 116. This case relates to promissory estoppel, but it is generally accepted that the
Court of South Australia held that detriment flowing from the resiliation itself was sufficient to found an estoppel claim. In a dissenting judgment, however, Cox J rejected this wide view of detriment. He maintained that the use of the term 'detriment' in such circumstances resulted in "attenuating the word as to deprive it of any real meaning," because if detriment can be considered as damage resulting from resiliation alone, a representee could be said to suffer detriment in virtually all cases of proprietary estoppel. If the majority view of the Supreme Court in *Je Maintiendrai* is correct it may not be unreasonable to dispense completely with the requirement of detriment.

IV DETRIMENTAL ALTERATION OF POSITION IN THE 'FAMILIAL CASES'

A Substantial expenditure of money or labour on the representor's property

Where the representee's alteration of position involves substantial financial outlay or the equivalent value in labour on the representor's property, the courts have accepted without question that detriment is present for the purpose of an estoppel claim. In such cases the representor clearly receives a major benefit if he is

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permitted to resile from his own undertakings whilst the representee stands to suffer a quantifiable loss. In Pilkington v Llewelyn,14 for example, the claimant had spent £14000 on building a new residence for himself on the representor's land.15

B  Limited expenditure of money or labour on the representor's property

Where the representee's outlay on the representor's property involves a less substantial contribution of money or labour, the nature of the relationship between the disputing parties and their respective circumstances may play an important role in any subsequent judicial determination of whether such an alteration of position constitutes a relevant form of detriment.

i) Where the parties are members of the same family

The decision of the Court of Appeal in Jones (A.E.) v Jones (F.W.)16 illustrates the value-laden nature of the courts' exercise in determining the question of detriment. The son of the now deceased representor had been led to

14 (1862) 4 DE GF & J 517, 45 ER 1235.
believe that the disputed property was his, and had accordingly spent £1000 on the property. The plaintiff, the executrix and beneficiary of the representor's estate, was the stepmother of the representee. The Court accepted that the representee's expenditure constituted a relevant detrimental alteration of position not least because he had also given up a job and an alternative home in order to take up residence in his father's property. It is clear that such actions are likewise accounted as relevant detrimental alterations of position. However, in coming to this conclusion the Court of Appeal also considered the parties' circumstances and the nature of their relationship. The plaintiff was well aware of the arrangement which the representor had made with the representee. The representor had benefited by accepting £1000 from the claimant; he had also enjoyed the social contact of his son and family living near him in his old age. The plaintiff was already securely housed.

A similar approach was taken in Pascoe v Turner, where the parties to the dispute were de facto husband and wife. The representee had expended merely £230 on repairs and improvements to the representor's property. Cumming-Bruce LJ was prepared to take a broad view of detriment in the context of a quasi-matrimonial relationship. He held that the representee's minimal expenditure was "substantial in the sense that that adjective is used in the context of estoppel." Cumming-
Bruce LJ also considered that the depletion of the representee's capital, by the representor, prior to the breakdown of the parties' relationship (and therefore prior to the representation) as a relevant detrimental alteration of position. He explained that even though her expenditure and effort can hardly be regarded as comparable to the change of position of those who have constructed buildings on land over which they had no legal rights...the court has to look at all the circumstances. When the plaintiff left her she was...a widow in her middle fifties. During the period that she lived with the plaintiff her capital was reduced from £1500 to £1000.20

It is most unusual for the courts to take account of expenditure prior to the representation as relevant to the question of detriment. In Pascoe v Turner the Court of Appeal demonstrated clearly that it regarded all the circumstances of both parties as significant in determining the question of detriment. The representor was wealthy by comparison with the representee. He had benefited by her expenditure during the relationship and was now himself securely housed. In upholding the woman's estoppel claim,

277). See also In re Basham (decd) [1986] 1 WLR 1498 at 1505, where the claimant had instructed solicitors at her own expense in connection with a boundary dispute on the representor's land.

the Court of Appeal specifically voiced its concern that she be securely housed.\textsuperscript{21}

The Irish case of \textit{Cullen v Cullen}\textsuperscript{22} illustrates well the way in which the relationship between the representor and representee may help to determine whether a detrimental alteration of position is proven. In \textit{Cullen} a claim of estoppel was rejected on the ground, \textit{inter alia}, that the representee had suffered no detriment. \textit{Cullen} is of particular interest as it was not the representee who pleaded proprietary estoppel. It was in fact the representee's son, the defendant in \textit{Cullen}, who claimed that his father, the plaintiff, had no right to prevent him from entering the family business premises which also served as the family home. The defendant claimed that the property now belonged to his mother, the representee, on the basis of proprietary estoppel and that he was therefore present on the premises as her licensee. For her part, the representee claimed that she had been encouraged to believe that the representor had given her the family business and that she had therefore expended her own resources on this business. Against this confusing background Kenny J held that the representee had suffered no lasting detriment in that she could have repaid the expenditure of her own money on the business from the proceeds of the business at any time.

Throughout his judgment, Kenny J demonstrated his concern that the warring members of the Cullen family should

\textsuperscript{21}Ibid.
\textsuperscript{22}[1962] IR 268
be reconciled and not torn apart by the litigation. An acceptance of the representee's expenditure as a detrimental alteration of position would have led to a deterioration in family relationships, a deterioration Kenny J was anxious to avoid.\textsuperscript{23}

\textbf{ii) Where the parties are not members of the same family}

Where the parties to the dispute are unrelated, the courts have been more cautious in accepting that the representee has suffered detriment from an alteration of position involving limited financial outlay. The courts in such circumstances may examine the representee's expenditure of money and labour, balancing it against the benefits received by him from the representor. Where the latter outweigh the former, detriment is deemed to have been 'spent' and cannot then be claimed as such by the representee.

In \textit{Stilwell v Simpson},\textsuperscript{24} the representee had expended money and labour, on improving his flat (which was in any case the subject of a Rent Act protected tenancy). The representee maintained that he had been encouraged in this expenditure by the defendant landlord (this allegation was rejected by the court). The representee's expenditure was also rejected as a detrimental alteration of position by Sir Douglas Frank QC, sitting as a Deputy High Court judge. He explained that the representee

\textsuperscript{23}Ibid at 289.

\textsuperscript{24}Unreported, Queens Bench 21 June 1983. See (1983) 133 NLJ 1114.
has had the benefit of the works and will continue to have the benefit of them...he will go on living there. I do not from my part see how he has any equitable right to recover that expenditure or notional expenditure incurred for his own benefit.25

The judge did not take into account, however, that the defendant landlord stood to receive would also get the benefit of the representee's expenditure when his statutory tenancy came to an end. Nevertheless, the representee was not at risk of losing his home, and this fact may have influenced the courts' determination of the question of detriment.

C  Expenditure on outgoings on the representor's property

In Vinden v Vinden26 the representee had met the everyday financial obligations of running the family home. He had also paid the mortgage for a short period of time. This expenditure was considered to be a relevant detrimental alteration of position, the Supreme Court of New South Wales likening the case to Plimmer v Mayor of Wellington27 and Inwards v Baker.28 Objectively the detrimental alteration of position in the latter two cases (where there had been substantial expenditure on land) was considerably

25Ibid. See also E & L Berg Homes Ltd v Grey (1977) 253 EG 473, where both Brandon and Ormrod LJJ took a similar approach in their determination of encouragement.


27(1884) 9 App Cas 699.

greater than in *Vinden v Vinden*. Furthermore the representee's expenditure in *Vinden* was not continuing at the time of the court hearing, having been terminated in consequence of a family dispute. In *Vinden v Vinden* the court nevertheless accepted that this expenditure had enabled the representee's father, the representor, to retire early and this benefit to the latter was viewed as relevant to the adjudication of detriment. Needham J held that as long as the son was prepared to pay the outgoings, even though he was currently frustrated from doing so, there was a relevant detrimental alteration of position. There was also evidence in *Vinden v Vinden* that when the representee took over the mortgage instalments both he and the representor had envisaged that this state of affairs would be permanent. The representor subsequently won a Trifecta\(^{29}\) which permitted him to discharge the mortgage. The Court was not prepared to deny a remedy in these circumstances.

In *Griffiths v Williams*,\(^{30}\) by contrast, Goff LJ implied that detriment can be established only if the representee's expenditure on the representor's property is of a capital nature. In the instant case the representee's expenditure on outgoings was to be regarded merely as "current payments for the benefits which she was enjoying by being allowed to live in the house."\(^{31}\) These

\(^{29}\)A Trifecta is the equivalent of a Treble in the English betting system, if successful it results in substantial gains.  
\(^{30}(1978)\) 248 EG 947.  
\(^{31}\)Ibid. The representee's expenditure on capital payments was accepted as a relevant detrimental alteration of position.
dicta must, however, be considered in context. In Griffiths v Williams the representee claimed a life-long occupation right as satisfaction for her 'inchoate equity'. In Vinden v Vinden\textsuperscript{32} the claim was merely to a right to stay in the property as long as the outgoings were paid. It is clear that the court will take account of the nature of the claim in determining the questions of detriment. Where the claim involves a less substantial 'satisfied equity', the courts may be prepared to accept evidence of a less substantial detriment.

D Other Conduct

i) The detrimental alteration of position must be financially quantifiable

In the familial context the claimant’s alteration of position is less likely to involve expenditure of money or even substantial labour on the representor’s property. In order that such conduct should be accepted as a detrimental alteration of position for the purpose of proprietary estoppel, the impact of the alteration of position must be quantifiable in financial terms. Spencer Bower explains that

the alteration of position which it is incumbent on the representee to establish must involve a change of position in the practical or business affairs or condition to the representee. Similarly, the 'damage',

\textsuperscript{32}[1982] 1 NSWLR 618.
'loss' or prejudice which the representee must show to have resulted, in a natural change of causation, from the alteration of position means, and only means, actual and temporal damage...some loss of money or moneysworth, which admits of quantification and assessment.33

In Riches v Hogben34 the Full Court of the Supreme Court of Queensland has recently confirmed that detriment for the purpose of an estoppel claim can be founded on an alteration of position which involves no expenditure of money or labour on the representor's property. Here the claimant had given up his rent-free council house in England, sold his possessions at less than their value and travelled to Australia with his family where he had been promised that he would be given a house by his mother, the representor who lived in Australia. The representee's alteration of position was not clearly related in any way to the property of the representor. However, the detriment resulting from his alteration of position was substantial and financially quantifiable. Re Basham (decd)35 provides a further illustration of this type of detrimental alteration of position. Here a representee had worked in her stepfather's business for many years without wages. After her mother's death she cared for her stepfather by preparing meals for him and looking after his home.36 Judge Edward

36See also Greasley v Cooke [1980] 1 WLR 1306.
Nugee QC held that these acts, together with relevant inaction\(^3\) by the representee and her family constituted detrimental acts for the purpose of proprietary estoppel. Judge Edward Nugee QC observed that although neither the representee's action nor her inaction was by itself significant, the cumulative effect was detrimental to the representee.\(^3\) The representee's acts could all be financially quantified.

ii) Confusion between alteration of position and detriment

Judicial dicta suggest that it is tempting to confuse a representee's alteration of position with the damage which attaches to his altered position on the withdrawal of the original representation. Although the latter must be capable of quantification in terms of financial loss, there is no similar requirement that the former should be so quantifiable. Indeed, in many situations the claimant derives a benefit from the initial alteration of position. Confusion is made even more likely where the representee's alteration of position involves no financial loss until resiliation takes place.

In *Greasley v Cooke\(^3\)* the representee's alteration of position was twofold. **First** she worked without wages for the Greasley family. **Second** she refrained from finding alternative employment. Inaction can be as much an alteration of position as active conduct if the claimant

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\(^3\)Post at 97

\(^3\)In *re Basham (decd)* [1986] 1 WLR 1498 at 1505.

\(^3\)[1980] 1 WLR 1306.
would have acted in some other way had it not been for the representation.\footnote{Post at 97} It is possible, both before and after the representor resiles from his representation, to attribute a financial value to wageless labour undertaken by the representee. The quantification is clearly the measure of the wages foregone by the representee. By contrast, the effects of refraining from finding alternative employment cannot be quantified in monetary terms until the representor has resiled from his representation. Such a quantification is possible only when it has become clear whether the representee has been able to find employment once resilation takes place. The detriment resulting from the representee's alteration of position is measured in terms of the value of current wages.

In 	extit{Watts v Story}\footnote{(1984) 134 NLJ 631.} the Court of Appeal implicitly considered detriment in terms of the alteration of position itself rather than the damage resulting from that alteration at the time of the resiliation. The representee was the thirty year old grandson of the deceased representor. His grandmother had told him that she would leave her house to him in her will, and this representation was reinforced by a misleading letter from her solicitor. The representee claimed that he had suffered six different elements of 'detriment'. He claimed first, that he had left a Rent Act protected tenancy; second, that his girlfriend had given up her job; third, that he had incurred both removal expenses and the aggravation associated with moving house; fourth, that he had helped his grandmother pack her effects and had
himself moved her and these effects to the Isle of Wight; 
fifth, that he had undertaken responsibility for all the 
outgoings and expenses of the disputed property, Apple 
House; sixth, that he would face problems in finding a new 
home in a difficult property market. It is significant 
that most of these 'detriments' claimed by the representee 
involved no financial loss prior to the withdrawal of the 
representation.

The Court of Appeal in Watts v Story made no attempt to 
analyse the requirement of detriment in any detail but 
rejected outright the existence of any detrimental 
alteration of position. Dunn LJ simply stated that

although the categories of detriment are not 
closed, the detriment alleged to have been 
suffered in this case is less in degree than 
the detriment suffered in any of the previous 
cases which have been drawn to our attention 
in which claims on the basis of proprietary 
estoppel have been upheld.

The representee had clearly suffered quantifiable 
damage after the representor's resiliation. The main damage 
suffered by the representee, was that flowing from the loss 
of the Rent Act protected tenancy. This is a financially 
quantifiable loss. It would be difficult for the 
representee to find another such tenancy.

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43Ibid.
44Ibid.
The second claim of detriment, rejected by the Court of Appeal was that the representee’s girlfriend had given up her job. Yet in Re Basham (dec’d) it was accepted that detriment can result to a representee from a third party’s alteration of position if the representee’s life is so bound up with that of the third party.

The third, fourth and fifth forms of ‘detriment’ claimed in Watts v Story were clearly acts from which financially quantifiable consequences could and did flow. The final detriment claimed – the problem of finding a new home in a difficult property market – was again financially quantifiable. The difference between property prices at the time the representation was made and at the time of the court hearing could be said to represent the loss suffered, and in times of high inflation this loss would be substantial.

In Watts v Story Slade LJ made it explicit that the court must balance out the benefits received by the representee against the six ‘detriments’ claimed by him. Rent-free occupation of a house for two years was accordingly seen as sufficient compensation for the representee’s detrimental alteration of position. Slade LJ thought that it was neither possible nor desirable to

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45[1986] 1 WLR 1498 at 1505. See also Shaida v Kindlane Ltd (Unreported, Chancery Division 22 June 1982) where it was accepted that a detrimental alteration of position can be undertaken by a representee to give rights to a third party.
46See also Dodsworth v Dodsworth (1973) 228 EG 1115.
attempt to define the precise extent of the prejudice or
detriment which must be established by a claimant who is
relying on an allegation of something other than the
expenditure of money. He merely stated that

before allowing the claim in such a case, the
court...has to be satisfied that when all the
circumstances are taken into account, the
detriment or prejudice is such that it would
be inequitable to allow the party who made
the relevant representation to go back on
it.\textsuperscript{48}

In Watts v Story the Court of Appeal attached weight to
the fact that the defendant had received other benefits
under the will of his grandmother. Moreover he was young
and living on social security. The decision implicitly
suggests that his occupancy of the disputed property was in
no way in need of protection. The Court of Appeal's broad
approach to the question of detriment intimates that an
estoppel claim is likely to fail if, when all the
representee's circumstances are taken into account, he has
sufficient finances to be able to rehouse himself. Such an
approach ignores the basal purpose of the doctrine as
outlined by Dixon J.\textsuperscript{49} Proprietary estoppel is a
compensatory remedy for loss suffered from an alteration of
position on the faith of a representation. It should not
be granted or denied on the basis that the representee has

\textsuperscript{48}Ibid.
\textsuperscript{49}Ibid.
sufficient resources to meet his current needs and can therefore afford to stand that loss himself.

iii) Conduct which does not benefit the representor

There are dicta in Grant v Edwards[50] which suggest that in the 'familial cases' the alteration of position must relate to the joint lives of the parties to the dispute. These dicta may imply some requirement that there be a benefit to the representor in addition to the financially quantifiable loss which is suffered by the representee. The decision in Riches v Hogben[51] makes it clear, however, that the representee's alteration of position need not necessarily benefit the representor. Yet the 'familial cases' demonstrate that there is a tendency by the courts to reject a claim of a relevant detriment if the alteration of position does not benefit the representor.

In Thwaites v Ryan,[52] for instance, the representee had left his wife and had moved into the representor's home in order to care for him. It seems that the representee obtained somewhat greater benefits than the representor from this alteration of position, and accordingly the representee was deemed not to have suffered detriment in any true sense. Fullagar J gave the main judgment of the Supreme Court of Victoria. He declined to view the representee's alteration of position as that of a loving husband and father who gave

[50][1986] 2 All ER 426 at 439 per Sir Nicolas Browne-Wilkinson V-C (see post at 317).
[51][1986] 1 Qd R 315.
up "as one making a sacrifice, the comforts and companionship of a happy marriage and loving family, and foreswore the warmth of his accustomed although precariously rented hearth", in order to act as an unpaid servant, housekeeper, nurse and companion of an old man. On the contrary, Fullagar J considered that when the representee left his home his marriage was finished in all but name. Indeed the representee was very content to escape from his family and readily fell in with the suggestion of the representor "who had just lost by death the male companion with whom he had cohabited for many years, that he alone should take the place of the dead cohabitant in every respect." 53 Furthermore the representee had not taken good care of the representor.

Had Fullagar J considered the representee’s alteration of position and consequent damage at the moment of resiliation, he might have found that the representee had suffered detriment. What the representee would have done if he had not gone to live with the deceased was unknown, although it is likely that he would have had to seek out alternative accommodation. He lost that opportunity by accepting the representor’s offer.

A close reading of Thwaites v Ryan suggests that Fullagar J had regard to the totality of circumstances involved in the case in rejecting the plaintiff representee’s claim that he had suffered a detrimental alteration of position in terms of the doctrine of

53 Ibid at 87.
proprietary estoppel. These circumstances included facts which appear to be totally irrelevant to a claim of proprietary estoppel.54 Throughout the case, Fullagar J was highly critical of the representee's social conduct. He referred specifically to the plaintiff's alcoholism and hinted at the existence of a homosexual relationship between the plaintiff and the representor. A further reason for the rejection of the estoppel claim may have been the fact that the plaintiff was one of two joint plaintiffs. The other plaintiff was his wife who had suffered no detriment and by the time the case came to court the first plaintiff was dead.

iv) **Detriment and policy considerations**

In Coombes v Smith55 policy considerations were clearly of importance in the approach taken by the court in determining the question of detriment. The representee was the mistress of the representor. She had left her husband to live in a house provided for her by the representor. The first act claimed by her as a detrimental alteration of position comprised the fact that she had allowed herself to become pregnant by the representor. Judge Jonathan Parker QC simply stated without explanation that he was "unable to treat the act of the plaintiff in allowing herself to become pregnant as constituting detriment in the context of proprietary estoppel."56 However, pregnancy outside the

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context of a long term relationship and without the security of a home is normally regarded by society as a detrimental alteration of position. There seems to be no clear reason why pregnancy should not be treated as relevant detriment for the purpose of an estoppel claim.

The second act claimed as detriment by the representee was that she had left her husband, with whom she was unhappy, in order to move into the representor's property. The judge accepted the submissions of counsel for the representor that "whenever a woman moves into a house provided by a man, she must have come from somewhere else; and that if the mere fact of that inevitable change were sufficient as detriment, there would be detriment in every case." On this basis the 'equity of estoppel' would be withheld simply on the ground that too many women would otherwise be able to make estoppel claims if leaving one home and moving into another were automatically accepted as relevant detriment. Such a view disregards the possibility that women like the representee in Coombes v Smith might still leave their husbands and seek alternative accommodation rather than move in with men whom they knew would resile from their representations.

In Coombes v Smith the third and fourth acts claimed as detriment by the representee took the form of giving birth to and taking care of the child of the relationship. These acts were also, without further discussion, disallowed as relevant detriment. There has traditionally been a

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57 Ibid at 816.
reluctance in claims for damages in contract or tort to accept that the birth of a child after the failure of a sterilisation operation can give rise to a compensatable claim.\(^5\) Nevertheless there has been an acceptance in such claims that pregnancy inevitably leads to a loss of income by the mother which can result in an award of damages.\(^9\) There seems to be no reason, other than one based on policy considerations, why this loss of income should not constitute a detriment sufficient to found an estoppel claim.

The representee in Coombes v Smith had also spent money and labour on the decoration of the property. The court rejected this act as detriment without further explanation, the assumption seeming to be that the representee had already enjoyed the benefits of such improvements.

Finally, the representee in Coombes v Smith claimed that she had deliberately refrained from looking for a job. The judicial response to this claim was that the representer had been content to pay the bills and that the representee had not therefore needed a job. This claim of a detrimental alteration of position was also rejected. The court failed to take account of the fact that the representee would quite clearly suffer detriment once resiliation took place. It was predictable that she would find difficulty in finding a job, having absented herself from the employment market for

\(^5\)See, e.g., Jones v Berkshire Area Health Authority (Unreported, Court of Appeal 2 July 1986) per Ognall J; Gold v Haringey Health Authority [1987] 2 All ER 888 at 890 per Lloyd LJ. See also, Symmons (1987) 50 MLR 269.

\(^9\)See Emeh v Kensington and Chelsea and Westminster Area Health Authority [1984] 3 All ER 1044 at 1051 ff.
seventeen years. The representor had benefited from the representee's alteration of position but implicit in the decision of the court was the idea that he had benefited less than the representee. The representor was paying a small amount of maintenance to the representee for their child. He was also prepared to permit the representee to continue in occupation until their child reached the age of seventeen.60

The decision in Coombes v Smith61 can be contrasted with that of the Privy Council in Maharaj v Chand.62 The de facto claimant in this case was accepted as having acted to her detriment by altering her position in giving up her flat, supporting her de facto husband's application to the Housing Authority for a family home and looking after him and their children in that home as a wife and mother. The unspoken judicial value judgment in Maharaj v Chand was that the closer a relationship is to marriage, the more worthy it is of protection. The representee in Coombes v Smith63 was a mother and mistress not a de facto wife.

The courts have generally adopted a restrictive approach to the question whether relevant detriment can be founded on an alteration of position which involves no financial expenditure. This tendency results from the inclination of the courts to merge the doctrines of proprietary estoppel and constructive trusts. The latter

60See also Savva v Costa and Harymode Developments Ltd (1981) 131 NLJ 1114.
63[1986] 1 WLR 808.
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doctrine (considered later in this dissertation)\textsuperscript{64} may require a different form of detrimental alteration of position.

E Inaction as detriment

There has been little discussion in the 'familial cases' of whether inaction on the part of the representee can be accounted as a relevant detrimental alteration of position. It may be quite reasonable for a representee to refrain from certain action once he has been encouraged to believe that rights over the representor's property will be obtained. In such circumstances the representee's inaction may constitute a detrimental alteration of position if the representee would have taken certain action in the absence of the representor's encouragement. Inaction was, for instance, accepted as a relevant detriment in \textit{Re Basham (decd)}.\textsuperscript{65} Here the inaction was that of the representee's husband in that he had refrained from selling land to raise capital and had declined to take a job away from the representor's home town. If the husband had moved away, the representee would no longer have been in a position to look after the representor. The latter received an obvious benefit from the second incident of inaction.

\textsuperscript{64}Post at 313
V Detrimental Alteration of Position: a ranked order of circumstance

The courts have tended to impose some form of ranking upon the various kinds of alteration of position which are relevant to claims of proprietary estoppel. At the top of this hierarchy of circumstance is financial expenditure which is directly related to the property in dispute. At the bottom of the hierarchy is conduct totally unrelated to property. The lower down the ranking the alteration of position is deemed to be, the more likely the court is to consult a wider range of personal and extraneous circumstances in determining the question of detriment.

VI Burden of proof of detrimental alteration of position

The onus of proof that any alteration of position is detrimental is on the claimant of the 'inchoate equity'. Counsel for the representee in Coombes v Smith had argued that once the representee had proven that she had changed her position the onus shifted to the representor to prove that this change of position was not detrimental. This argument was rejected on the grounds that it was a misreading of the judgments in Greasley v Cooke. In this case it was held that there was a rebuttable presumption, that where the alteration of position is proven to be detrimental to the representee, it was done in reliance on the representation made to her.

[1986] 1 WLR 808 at 821.
[1980] 1 WLR 1306 at 1311, 1313.
VII The detrimental alteration of position must be in 
reliance on the representation

Not only must there be a detrimental alteration of position by the representee. There must also be a causal link between the alteration of position and the representation. The alteration of position must have been undertaken in reliance on the representor's assurances. If there was no assurance, either explicit or implicit, there can clearly be no detrimental reliance. Any damage suffered by the claimant as a result of his alteration of position in these circumstances is his own fault. He is not a victim of any unconscionable conduct on the part of the representor.

A) Burden of proof of reliance on the representation

In Griffiths v Williams Goff LJ confirmed that once a representee has established a detrimental alteration of position, the burden of proof shifts to the representor to

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See, e.g., Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133 at 156; Coombes v Smith [1986] 1 WLR 808 at 820; Avondale v Haggie [1979] 2 NZLR 125 at 144.


(1977) 248 EG 947. This approach is not new. It was first put forward in Reynell v Sprye (1852) 1 de G M & G 660 at 707, 708, 42 ER 710 at 728, 729 and subsequently followed in Smith v Chadwick (1882) 20 Ch D 27 at 44, 54. See also Greasley v Cooke [1980] 1 WLR 1306 at 1313 per Waller LJ.
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A) Burden of proof of reliance on the representation

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show that the detrimental alteration of position was not in reliance on the representation. Counsel for the appellant in Griffiths v Williams had claimed that, although the representee had undoubtedly altered her position, she had not proved that she had done so in reliance on the representation.\(^1\) Goff LJ took into account the familial nature of the relationship between the representor and the representee, who were respectively mother and daughter. The representee admitted that she had not thought about the assurances (i.e., that she could live in her mother's house for her life time) when she incurred the expenditure on improvements to their shared family home. Goff LJ, however, shared the view of the judge at first instance that it was clear that the representee

was reluctant to admit, even to herself that in spending her own money on housekeeping and house improvements, she was thinking of her own inheritance rather than the care and comfort of her mother.\(^2\)

The court was not prepared to disregard the unselfish sacrifices made by a loving daughter in caring for her elderly mother merely because she could not claim to have spent her days carefully calculating the benefits she might receive in return for these sacrifices. The court found that, if the representee had thought that her future occupational security was at stake "she would have had to think whether she was not obliged to look more closely to

\(^1\)Griffiths v Williams (1977) 248 EG 947 at 948.  
\(^2\)Ibid.
her own future."\(^3\) The reason she did not think in this direction was entirely related to the repeated assurances that her life-long home was secure. Goff LJ's recognition of the 'inchoate equity' arising here followed from his willingness to have regard to the nature of familial relationships. Such relationships do not operate on a cost-benefit analysis approach to life but are more concerned with familial obligations based on love and duty. On this basis Goff LJ realistically imputed the existence of a causal link between the representation and the representee's detrimental alteration of position.

In Greasley v Cooke,\(^4\) the Court of Appeal also held that it was unnecessary for the representee to prove that he had relied on the representor's assurances. Lord Denning MR quoted from his own decision in Brikom Investments Ltd v Carr,\(^5\) where he had held that once a representation has been made with the intention that another should act on it. He suggested that

it is no answer for the maker to say: 'You would have gone on with the transaction anyway'. That must be mere speculation. No-one can be sure what he would, or would not, have done in a hypothetical state of affairs which never took place...once it is shown that a representation was calculated to influence the judgment of a reasonable man

\(^3\)Ibid.
\(^4\) [1980] 1 WLR 1306.
\(^5\) [1979] QB 467.
the presumption is that he was so influenced.\(^7^6\)

Accordingly in *Greasley v Cooke* Lord Denning MR held that it should be presumed that the representee had acted on the faith of statements of the representor which had been calculated to convey to her that she would have a secure home for life. Waller LJ confirmed that if the court sees that on the face of it a statement is of such a nature as to induce a person to alter his position, the inference is that if he altered his position he acted on that inducement.\(^7^7\)

More recently in *Re Basham (dec'd)*\(^7^8\) the representor submitted that the representee's alteration of position could be attributed to her natural love and affection for the representor rather than to any reliance on the representation made to her. Judge Edward Nugee QC rejected this argument on three grounds. First, he held that the representee's conduct went well beyond that expected of a stepdaughter. Second, the incidents accepted by the court as a relevant detrimental alteration of position were undertaken not only by the representee but also by her husband (who had no particular affection for the representor).\(^7^9\) Third, there was no proof that the representee had not acted in reliance on the representation.

\(^ {7^6} \)Ibid at 482, 483.  
\(^ {7^7} \)Greasley v Cooke [1980] 1 WLR 1306 at 1313.  
\(^ {7^8} \)[1986] 1 WLR 1498.  
\(^ {7^9} \)Ibid at 1505.
B) Erosion of the principle that the burden of proof is on the representor

The more recent 'familial cases' disclose a tendency towards erosion of the principle that the burden of proof of reliance is on the representor. The representee's alteration of position is increasingly understood in terms of reliance on some alternative state of affairs and not as reliance on the particular encouragement given by the representor. This more restrictive approach is especially evident in those cases where the representee claims that his belief derives from a non-explicit assurance on the part of the representor. In Coombes v Smith, for instance, the representee had pleaded that her conduct in becoming pregnant, in leaving her husband to move in with the representor and in forbearing to look for a job marked a reliance on her belief that she would receive rights in the representor's property. Judge Jonathan Parker QC refused to accept that this conduct (even if recognised as a relevant detrimental alteration of position) had been undertaken in reliance on any belief as to her rights. He maintained that "the reality is that the plaintiff decided to move...because she preferred to have a relationship with, and a child by, the defendant rather than continuing to live with her husband." He found that "there is no evidence that she left her husband in reliance on the defendant's assurance that he would provide for her if and when their relationship came to an end."
The judgment in Coombes v Smith effectively ignored the fact that the claimant might have acted partly for emotional reasons and partly in reliance on some belief that she would obtain long-term rights. The course of events might well have been different if she had known that she would receive no rights in the representor's property. There could be a dual motive for her behaviour.

In Philip Lowe (Chinese Restaurant) Ltd v Sau Man Lee, the claim of the de facto wife was that she believed she would obtain rights in the plaintiff's property. This claim was ultimately rejected on the basis that she had not acted in reliance on the plaintiff's representation. Under Chinese custom a de facto wife is known as a 'little wife'. Her de facto husband has responsibilities towards her in a similar manner as he has responsibilities to his legal wife. The representee had carried out various works and repairs and decoration to the plaintiff's property. May LJ failed to recognise any duality of motive on the part of the representee. He upheld the first instance judgment against her claim on the ground that the work which she did... was not done because she claimed any right to live there but because she worked for the sake of the family. She was a member of the family, this was family property, and she played her

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82 Unreported, Court of Appeal 9 July 1985.
part in improving it, repairing it and redecorating it as she thought necessary.83

Again, in Warnes v Hedley,84 May LJ found that the financial detriment claimed by the representees was related to the fact that they had moved into a new family home and their first baby was due to be born. May LJ was not therefore prepared to view the representees' alteration of position as constituting any reliance on an assurance that they had long-term rights in the representor's property. The Court of Appeal may also have been prejudging the issue of detrimental reliance by finding that occupation of a rather grand house for twelve years had been in itself ample compensation for any expenditure on that house.

In Murgatroyd v J N Elliot (Farms) Ltd,85 the New Zealand High Court accepted the claim of the representee that she had abandoned her city life to return to a house provided by her father, the representor. She had expended minimal effort decorating and furnishing the property. She claimed that she had acted in the belief that she had received long-term rights over the property. However, the New Zealand Court of Appeal86 took the view, some four years later, that the claimant's alteration of position was consistent with a mere temporary arrangement between herself and her father that she should occupy the house only so long as was convenient to both of them. This temporary

83Ibid.
84Unreported, Court of Appeal 31 January 1984.
85Unreported, High Court of New Zealand 15 October 1980.
86J N Elliot & Co (Farms) Ltd v Murgatroyd (Unreported, New Zealand Court of Appeal 31 January 1984).
arrangement had been duly carried out. The court inferred that the representee's detrimental reliance was on the faith of this temporary arrangement.

Estoppel claimants in the familial context may find the element of reliance difficult to establish if the courts continue to erode the principle that the burden of proof of reliance rests on the representor.
CHAPTER FOUR

SATISFACTION OF THE 'INCHOATE EQUITY'

I  INTRODUCTION

Once a court recognises the existence of an 'inchoate equity' founded in proprietary estoppel, it must, according to Scarman LJ in Crabb v Arun DC, turn its attention to two further questions, the extent of the 'inchoate equity' and the remedy appropriate to satisfy the 'inchoate equity'.

II  THE RELATIONSHIP BETWEEN THE EXTENT OF THE 'INCHOATE EQUITY' AND THE SATISFACTION OF THE 'INCHOATE EQUITY'

Lord Kingsdown's judgment in Ramsden v Dyson has been widely regarded as providing the classic definition of the extent of the 'inchoate equity'. He held that the court must examine the representee's expectation in order to decide the extent of the 'inchoate equity'. If this is correct, the extent of the 'inchoate equity' may not in reality raise be a separate question in its own right. Where the representor's conduct engenders an explicit expectation in the representee,

2(1866) LR 1 HL 129.
3Ibid at 170. This view was taken by the court in Griffiths v Williams (1978) 248 EG 917 at 948 per Goff LJ; Shaida v Kindlane Ltd (Unreported, Chancery Division 22 June 1982) per Judge P V Baker QC. In Snell's Principles of Equity (28th Ed 1982) p 561, it is stated that the extent of the 'inchoate equity' is "to have made good, so far as may fairly be done between the parties, the expectations of A (the representee) which O (the representor) has encouraged. A's expectation or belief is the maximum of the equity."
the question of the extent of the 'inchoate equity' merges with the question of expectation. The justice of any given case may of course require the courts to take a flexible approach to the satisfaction of the 'inchoate equity'. There may, for instance, be overriding factors which prevent the satisfaction of an 'inchoate equity' in a manner commensurate with the representee's expectation. In such circumstances the court will grant some alternative remedy. Here the remedy granted, rather than the representee's expectation, will itself be the measure of the extent of the 'inchoate equity'. Similarly, where there is doubt about the precise nature of the representee's expectation the court must find some way of satisfying the indeterminate expectation. A claim will not fail merely because "the interest to be secured has not been expressly indicated." An analysis of the 'familial cases' suggests that it is the manner in which the 'inchoate equity' is satisfied which ultimately determines the extent of the 'inchoate equity'. The court decides how best to do justice to the often vaguely expressed expectations of the parties by taking into account all the circumstances of the case. The solution which the courts deem to be fair and just represents in effect the extent of the 'inchoate equity'; the extent of the 'inchoate equity' becomes merged with the satisfaction

1Plimmer v Mayor etc of Wellington (1884) 9 App Cas 699 at 713 per Sir Arthur Hobhouse. Lord Wensleydale's judgment in Ramsden v Dyson (1866) LR 1 HL 129 at 171 expressed a similar view that the 'inchoate equity' will not fail for lack of certainty as to the nature of the expectation. See also Denny v Jensen [1977] 1 NZLR 35 at 638.
2Plimmer v Mayor etc of Wellington (1884) 9 App Cas 699 at 713 per Sir Arthur Hobhouse. See also Thompson [1980] Conv 406.
of that equity. In *Crabb v Arun DC,* 6 for instance, Scarman LJ failed to distinguish clearly the separate nature of the extent of the 'inchoate equity' and its satisfaction.7

III THE REMEDIES

A Order for transfer of the fee simple

The most valuable remedy available to any estoppel claimant is a transfer of the fee simple in the property. A compulsory transfer of a fee simple estate from representor to representee bears some resemblance to the 'clean break' provision in divorce legislation.8 Such a remedy may sever finally the relationship between representor and representee, a relationship which may well have broken down prior to the dispute either because of the dispute or because of the death of the representor.9 In

6[1976] 1 Ch 179.
7That there are close links between the extent of the 'inchoate equity' and its satisfaction is suggested in *Griffiths v Williams* (1978) 248 EG 947; *Jackson v Crosby (No 2)* (1979) 21 SASR 280 at 288; *Burridge* [1982] CLJ 290 at 308.
8Matrimonial Causes Act 1973 Section 25A(2) (as introduced by Matrimonial and Family Proceedings Act 1984 Section 3) states that where the court decides to exercise its financial powers in favour of a party to the marriage it shall be the duty of the court to decide whether it would be appropriate to terminate all financial obligations between the parties.
9In most cases involving claims of proprietary estoppel, there has been a breakdown of the relationship between the representor and the representee prior to the property dispute in question. Where the representor has died (a common occurrence in the 'familial cases') the deceased's personal representatives may have been in dispute with the representee prior to the representor's death. The personal representatives and the representee may often be related in some way.
the resolution of estoppel issues, a complete break in the relationship of the plaintiff and the defendant is usually preferable to any alternative remedy. The representee is left with an absolute interest in the property which avoids the problems associated with alternative remedies. A court-ordered transfer of a fee simple may simply be a realistic reflection of the fact that alternative remedies such as a right of occupancy for life may tie up the land for the lifetime of the representee without necessarily giving him the powers to manage that land effectively.\footnote{See the discussion post at 130 on the relationship between proprietary estoppel and the Settled Land Act 1925.}
The grant of an absolute interest to the representee permits him to protect his family’s occupancy if he so desires. There is some doubt in any event whether remedies involving rights of occupancy extend to the representee’s family.\footnote{See Jones v Jones [1977] 1 WLR 438 at 443 per Roskill LJ. Cf Jones at 442 per Lord Denning MR.}
The transfer of a fee simple in the disputed property is thus an extremely potent (but rarely) awarded remedy.\footnote{Dillwyn v Llewelyn (1862) 4 De GF & J 517, 45 ER 1285; Thomas v Thomas [1956] 1 NZLR 785; Pascoe v Turner [1979] 1 WLR 431; Shaida v Kindlane Ltd (Unreported, Chancery Division 22 June 1982); Cameron v Murdoch [1983] WAR 321; Riches v Hogben [1986] 1 Qd R 315; In re Basham, decd [1986] 1 WLR 1498.}

B The grant of a right of occupancy

In the majority of cases the successful estoppel claimant is awarded a less valuable remedy in the form of a mere right of occupancy in the disputed property.
In Re Sharpe (A Bankrupt) Browne-Wilkinson J recognised that the grant of rights of occupancy may represent a possible remedy in estoppel cases. He accepted that Lord Kingsdown's well-known statement in Ramsden v Dyson had been extended in the modern case law so that it is now established that, if the parties have proceeded on a common assumption that the plaintiff is to enjoy a right to reside in a particular property and in reliance on that assumption the plaintiff has expended money or otherwise acted to his detriment, the defendant will not be allowed to go back on that common assumption and the court will imply an irrevocable licence or trust which will give effect to that common assumption.

It is in fact debatable whether Browne-Wilkinson J's statement actually extends the principle enunciated in Ramsden v Dyson. It is arguable that the principle in Ramsden v Dyson has always applied to rights of occupancy. Shared occupancy in return for financial payment is now a more frequent occurrence, and it is simply the case that the rule is being more frequently invoked.

14(1866) LR 1 HL 129.
16(1866) LR 1 HL 129. See Woodman (1980) 96 LQR 336 at 338.
17See, e.g., Willmott v Barber (1880) 15 Ch D 96 where the principle of proprietary estoppel was formulated in sufficiently broad terms to include occupation rights.
Rights of occupancy, albeit long-term, have certain drawbacks for claimants of 'inchoate equities'. They are not assignable and may even, in certain circumstances, be revocable.  

C Reimbursement of expenditure

Another possible means of satisfying the 'inchoate equity' of estoppel takes the form of a simple reimbursement of expenditure. This may be a particularly appropriate remedy where the disputing parties are no longer able to live together amicably or where one of them has already left the disputed property prior to the court hearing. It may be the case that the estoppel claimant would prefer such a remedy in any event. The courts have, however, granted financial remedies even more widely, sometimes in instances where the representee had received a clear encouragement in terms of some right of occupancy in the land itself and would greatly have preferred such a remedy.

Moriarty has argued that monetary solutions may also be appropriate in those estoppel claims in which the representee had an expectation of joint occupancy.

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18 See post at
19 The Australian courts have accepted that an equitable lien may be granted to satisfy the 'inchoate equity' where reimbursement of expenditure is regarded as the correct remedy. See, e.g., Hamilton v Geraghty (1901) 1 NSWSR (Eq) 81 at 91; In re Whitehead [1948] NZLR 1066 at 1072; Morris v Morris [1982] 1 NSWLR 61 at 66; Pearce v Pearce [1977] 1 NSWLR 170 at 177.
According to this argument, the expectation in such a situation is that there has been an oral grant of a joint interest in the property. Moriarty therefore concludes that it is frequently in the nature of joint ownership "for a person who expects occupation to end up, sometimes with money instead and it is this...which explains why money is sometimes the remedy in the estoppel cases as well." It is not entirely clear that Moriarty's efforts to circumscribe the flexibility of the judicial remedy are supported in the 'familial cases'. These cases demonstrate that substantial judicial discretion exists as to whether the relevant expectation related to an absolute interest in the property or to an occupation right or to a mere right to reimbursement of his expenditure. The content of the expectation is only one of the factors to be taken into account in determining the extent of the estoppel remedy.

One major disadvantage of simple financial reimbursement is that in times of rapid house inflation any delay in searching for alternative accommodation may leave a representee homeless. Even reimbursement of expenditure plus interest may not be sufficient to provide a new home.\(^2\)\(^1\)

\(^2\)\(^0\) (1984) 100 LQR 370 at 386. See also Thompson [1986] Conv 406 at 407.
\(^2\)\(^1\) See, e.g., \textit{Dodsworth v Dodsworth} (1973) 228 EG 1115.
D Constructive Trust

In Hussey v Palmer Lord Denning MR (referring to his own decision in Inwards v Baker) suggested that the 'inchoate equity of estoppel' could be satisfied by the remedy of a constructive trust. The precise nature of this remedial constructive trust is uncertain. It is suggested that it dates only from the court hearing and in this respect differs from a constructive trust based on common intention. The latter type of constructive trust is considered in more detail later in this dissertation. The former type of constructive trust has not, as yet, been granted as a means of satisfying an 'equity of estoppel' in any of the 'familial cases'.

IV FLEXIBILITY IN SATISFYING THE 'INCHOATE EQUITY'

Following Plimmer's case there is little doubt that the courts have maximum flexibility in deciding on an appropriate remedy for the purpose of satisfying the 'inchoate equity'. The relief granted can be refined to

22[1972] 3 All ER 744 at 748.
24See also In re Basham (decd) [1986] 1 WLR 1498 at 1504. In Pearce v Pearce [1977] 1 NSWLR 170 Helsham CJ approved of these dicta.
25See Muschinski v Dodds (1985) 62 ALR 429 at 450.
26See post at 242
27This flexibility in satisfying the 'inchoate equity' is stressed in Plimmer v Mayor etc of Wellington (1884) 9 App Cas 699 at 713; Crabb v Arun DC [1976] Ch 179 at 189; Griffiths v Williams (1977) 248 EG 947 at 949; Denny v Jensen [1977] 1 NZLR 635 at 638; Greasley v Cooke [1980] 1 WLR 1306 at 1312; Morris v Morris [1982] 1 NSWLR 61 at 64;
take into account all the facts of any given situation. The creativity of the courts' approach is illustrated by the wide variety of remedies which can be found in the 'familial cases'. The creativity of equity is no new phenomenon. Brady, for instance, describes the decision in the Irish case of Cullen v Cullen as reaffirming “the willingness of the courts, at least in the context of equitable estoppel, to act in the classical equitable fashion, ex aequo et bono” in order to determine in the circumstances of each case how the 'inchoate equity' should be satisfied.

This judicial approach raises a number of important questions. Is there any logical and coherent pattern to this creativity? Is it possible to explain why a particular remedy was awarded in any given situation? Even more important, perhaps, is it possible to forecast with any certainty what remedy the court will grant once the facts of a dispute are accepted as giving rise to the 'inchoate equity' of estoppel?


30See Moriarty, Licences and Land Law: Legal Principles and Public Policies, (1984) 100 LQR 376 at 379; In re Sharpe (A Bankrupt) [1980] 1 WLR 219 at 226 per Browne-Wilkinson J. See also Cowcher v Cowcher [1972] 1 WLR 425 at 430 where Bagnall J upheld the need for certainty. He maintained that "in any individual case the application of established principles of property law may produce a result which appears unfair. So be it: in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice that flows from the application of sure and settled principles to proved or admitted facts. So in the field of property law
Moriarty has attempted to explain in one all-embracing theory the principles which guide the courts in determining precisely which remedy they will grant in satisfaction of the 'inchoate equity'. Moriarty's theory, although elegantly constructed, is dangerously alluring. For Moriarty there are very simple explanations for the granting of any particular remedy in a given case. He has hypothesised that the satisfaction of the 'inchoate equity' is no more than a judicial sanctioning of "orthodox property rights simply denuded of formality in their creation".

On this basis, Moriarty has suggested that the remedy to be granted in any case can readily be predicted by asking what the representee would have received if he had been formally granted the right which he claimed he was granted informally. Moriarty has argued for instance that in the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past child bearing; simply that its progeny must be legitimate - be precedent out of principle. It is as well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit."


Cajal warned of "the invincible attraction of theories which simplify and unify seductively...when the simple schemes stimulate and appeal to tendencies deeply rooted in our minds, the congenital inclination to economy of mental effort and the almost irresistible propensity to regard as true what satisfies our aesthetic sensibility by appearing in agreeable and harmonious architectural forms - as always reason is silent before beauty. The case of Phryne repeats itself." (Recollections of My Life, quoted in The Pursuit of Nature, ed Alan Hodgkin et al, (1937) p 43.) Phryne was a Greek hetaira who, when placed on trial, won an acquittal by displaying her extraordinary beauty to the judges.

(1984) 100 LQR 376. Moriarty, while accepting that judicial discretion exists, has attempted to circumscribe that discretion by forcing it into a framework of orthodox property principles.
there was "no unambiguous, albeit oral, present of the land itself; only an assurance that he [the son] could build on it and live there. The son in fact had only an expectation of being allowed to stay there." Accordingly, Moriarty concluded that the court could not have awarded a transfer of the fee simple as it did in Dillwyn v Llewelyn but quite properly granted only an occupation right. In the latter case, Moriarty argued, the memorandum clearly established the representor's intention to give land to his son. Some doubt is cast on Moriarty's argument by the reasoning of Lord Westbury LC in Dillwyn v Llewelyn itself. Here the Lord Chancellor explicitly rejected the submission that the extent of the donee's interest depended on the terms of the memorandum. He held that the 'inchoate equity' claimed by the donee and indeed the satisfaction of that equity depended on the totality of the transaction. In the words of the Lord Chancellor, "no one builds a house for his own life only, and it is absurd to suppose that it was intended by either party that the house at the death of the son, should become the property of the father." In the familial context the representee's expectation may be so ambiguous that the courts must consider other factors before deciding on the appropriate remedy. Even where the extent of the 'inchoate equity' is ascertainable

36(1862) 4 De GF & J 517, 45 ER 1285.
37Dillwyn v Llewelyn (1862) 4 De GF & J 517 at 522, 45 ER 1285 at 1287.
from the clearly evidenced expectation of the representee, the courts tend to look at all the circumstances in order to determine the remedy. There may be factors present which reinforce the courts in their view that it would be not only just but also practicable to give effect to the unambiguous expectation. There may even be factors which necessitate the grant of a more extensive remedy than that suggested by the representee's expectation. In certain other cases factors may be present which militate against the representee's expectations being satisfied.

V FACTORS RELEVANT TO THE SATISFACTION OF THE 'INCHOATE EQUITY'

The 'familial cases' disclose a number of overlapping factors which the courts regard as relevant to their selection of the appropriate remedy in claims of estoppel. Some of the factors have already been employed by the courts to determine whether a relevant encouragement or a relevant detrimental alteration of position has been proved. Most of the factors bear a remarkable resemblance to those 'matters' to which the court is directed to have regard in exercising its powers under sections 23 and 24 of the Matrimonial Causes Act 1973 when reallocating property on divorce.38 Indeed Harpum has called for a statutory solution to the adjustment of non-matrimonial property

38 Matrimonial Causes Act 1973, Section 25 (as amended by Matrimonial and Family Proceedings Act 1984, Section 3).
rights in situations of conflict. He has proposed "a broad statutory discretion (broader than that conferred by the Matrimonial Causes Act 1973 because the situations are far more varied) to adjust the rights of cohabitees when they live together." The trigger for discretion, he has suggested, could be a situation of total or partial economic dependence by one cohabitee on the other. It may be that the courts' approach to the satisfaction of the 'inchoate equity' provides a non-statutory, albeit partial, solution to Harpum's demands. In the majority of the 'familial cases' where a remedy was granted, the disputed property was owned by a member of the representee's family. It may not be unreasonable in such circumstances for the courts to exercise a broad discretion in determining the future of the property.

Consideration will now be given to each of the factors which the courts regard as relevant to the satisfaction of the 'inchoate equity', in order to illustrate its influence on the operation of judicial discretion in the 'familial cases'. These factors are scattered in a fairly indiscriminate manner throughout the cases. It is unusual

4 Ibid.
5 Shaida v Kindlane Ltd (Unreported, Chancery Division 22 June 1982) was one of the rare household cases where the representee succeeded in safeguarding his family home against a company. However, it must be noted that the representee did pay the full value in return for the transfer of the fee simple and the house was completely separate in a physical sense from all other company property. See also J N Elliot & Co (Farms) Ltd v Murgatroyd (Unreported, New Zealand Court of Appeal 12 September 1984).
to find a case where one particular factor alone determines the outcome, and it is in fact much more usual to find several factors present in any given case.

A  The expectation held by the representee

In *Shaida v Kindlane Ltd*, there was a direct representation by the defendant company that it would transfer the disputed property to the plaintiff's wife. The property had originally been purchased by the company for occupancy by the plaintiff and his family. Judge P V Baker QC held that where the representee's expectation was based on an unequivocal representation, this expectation should normally form the basis of the satisfaction of the equity. The court ordered a transfer of the legal title on condition that the plaintiff paid the defendant the sum of money previously agreed. The plaintiff's expectation had always been that he would have to pay for the property prior to conveyance.

B  Financially quantifiable loss

Where the representee has suffered considerable direct financial loss, in reliance on his expectation, the courts have seemed more prepared to order a transfer of the fee simple in the disputed property.

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*Unreported, Chancery Division 22 June 1982.*
In *Dillwyn v Llewelyn*, for instance, the plaintiff's alteration of position involved the expenditure of some £14,000—a not inconsiderable sum of money in 1862—on building a house on his father's land. The financial quantification of the substantial detriment flowing from the representee's alteration of position was an important factor in the satisfaction of the 'inchoate equity'. An order was made for a transfer of the fee simple to the representee.

In *Cameron v Murdoch*, the Supreme Court of Western Australia granted an order declaring that the representees were entitled to acquire the freehold of valuable farmland in Western Australia. The representees had to make a payment to the defendants of two-thirds of the value of the land in return for the transfer. The case involved a dispute within a large extended family over ownership of the farmland. The expectation of the representees had been that they would eventually be allowed to succeed to ownership of the farmland. To have granted less than a transfer of the fee simple would have caused serious loss to the representees who had expended considerable money and labour in farming the land over some thirty-four years.

In *Pascoe v Turner*, the Court of Appeal took into account not only the financial loss resulting from the representee's detrimental reliance but also the depletion in

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43 (1862) 4 De GF & J 517, 45 ER 1285.
44 [1983] WAR 321 (affirmed without further comment by the Privy Council (1985-86) 63 ALR 575).
45 [1979] 1 WLR 431.
the representee's financial resources prior to the date of
the representor's encouragement. The parties had lived
together in a de facto relationship. The representee had
only a small amount of capital when she entered into the
relationship. She had used this money for the benefit of
both herself and the representor even before the representor
had encouraged her to believe that their family home would
be transferred to her. The totality of the representee's
financial loss both prior to and after the representor's
encouragement was taken into account by the Court in
 awarding a transfer of the fee simple. Cumming-Bruce LJ
recognised that the representee's financial loss was
objectively not substantial. Her loss did, however,
represent a high proportion of her total available capital.

Riches v Hogben46 is the only case in which the
transfer of a fee simple estate has been ordered even though
the detrimental alteration of position by the representee
had not benefited the representor financially. Here,
however, the representee's alteration of position was
substantial in terms of its effect on the representee. The
representee was the son of the representor. The
representee had given up his council house and job in
England and had transported himself and his family to
Australia. The representor who was already living in
Australia had led the representee to believe that she would
provide a house for him there.

In the New Zealand case of Taylor v Taylor\textsuperscript{47} the performance of an agreement between spouses that a wife should transfer land to her husband was delayed because of technicalities relating to registration. The wife subsequently refused to complete the transaction. The court refused to grant a transfer of the land to the husband. Instead Shorland J granted him a mere reimbursement of his financial outlay on the property, a garden shed, together with exclusive occupancy of that shed until he was repaid in full. By the time the case came to court the garden shed had become the husband's home. There was no detailed discussion of proprietary estoppel by Shorland J, whose decision to grant a much less valuable remedy than a fee simple transfer is explicable only on the particular facts of the case.\textsuperscript{48} The representee had made no major improvements to the shed and had therefore - at

\textsuperscript{47}[1956] NZLR 99.
\textsuperscript{48}Moriarty, (1984) 100 LQR 376 at 384, 387 has argued that the decision in Taylor v Taylor can be explained in terms of the function of proprietary estoppel. If its function is to enable the informal creation of property interests in land, according to Moriarty, one must always ask the question what interest was intended to be created by the representor. As the representor gave the land to the representee for the purpose of building a matrimonial home, the intention of the representor was to create a joint interest. A grant of monetary compensation to the representee was simply a reflection of what the court would have done if there had been a formal creation of a joint interest at law. The court in such circumstances would have ordered sale if the purpose of the trust no longer existed and both parties would then have received a financial share of the proceeds of sale. Moriarty's argument is, however, unsound even within the framework of his own hypothesis. The representee was led to believe that he was the sole owner of the property. Had this belief been formalised under the Property Law Act 1952 (NZ) he would have had a right to the whole property. Furthermore the representee did not receive a share in the value of the property but simply the capital which he had spent on it.
least in superficial terms - suffered little detriment from his alteration of position. The case illustrates how the courts appear to attach considerable weight to financial loss by the representee in consequence of direct expenditure on the property. Correspondingly little attention has been given to the quantifiable loss suffered by the representee in terms of the opportunity-cost involved in not seeking an alternative home. Where financial expenditure on the representor's property is minimal the courts have generally been reluctant to grant a transfer of the entire fee simple.49

C Benefits gained by the representor from the parties' relationship

In the familial context it is highly likely that the representee's alteration of position will take the form of minimal financial expenditure or domestic labour. Where this type of detrimental reliance occurs, the courts have been particularly ready to take into account the benefits accruing to the representor from the representee's conduct.

In Re Basham (decd)50 the representee and representor were stepdaughter and stepfather respectively. The representee had helped the representor to run his public house for many years, during which time she had received no

wages. When the representor required nursing care, the representee undertook that care and also provided him with meals. The substantial benefits thus received by the representor were factors which reinforced the court in its view that it should give effect to the representee's clear expectation (as engendered by the representor's explicit encouragement) that she would eventually succeed to his property. The court ordered a transfer to the representee of the fee simple in the disputed land.

In Greasley v Cooke\textsuperscript{51} both parties to the dispute had lived communally as members of the same family. The representee had worked in the representors' shop and had cared for the representors' mentally ill sister without any financial reward. She had also kept house for all the members of the representors' family. The representors had therefore benefited considerably from the representee's alteration of position, and the Court of Appeal accordingly granted the representee a right of occupancy for as long as she wished.\textsuperscript{52}

In the New South Wales case of Vinden v Vinden,\textsuperscript{53} the defendant's alteration of position was fairly minimal; he had paid the representor, his father, $10 a week rent and contributed half of the household expenses. For two years he had undertaken mortgage payments but these had ceased by

\textsuperscript{51}[1980] 1 WLR 1306.
\textsuperscript{53}[1982] 1 NSWLR 618.
the time the case reached the court. The payment of current outgoings has generally been seen by the courts not as a detrimental alteration of position but merely as payment for benefits received. The detriment in such a situation is deemed to have been spent. In Vinden the defendant’s short-term expenditure on the mortgage had considerably benefited the representor by permitting him to retire at an earlier date than would otherwise have been possible. The acceptance of this benefit was a significant factor inclining the court towards the award of a right of occupancy for so long as the representee was prepared to pay the outgoings on the home.

In Maharaj v Chand the representee was the de facto wife of the representor. They had lived together in the property with their two children. The representee had contributed her own minimal earnings to maintain the household. She had also cared for the children of the family. The representor had received significant benefits from the representee’s contributions. Again a long-term right of occupancy was granted to the representee by the Privy Council.

See, e.g., E & L Berg Homes Ltd v Grey (1980) 253 EG 473; Appleby v Cowley (1982) The Times 14 April; Griffiths v Williams (1977) 248 EG 947. Such remedies such as this are problematic in that it is uncertain in what circumstances they may be brought to an end. See also Hardwick v Johnson [1978] 1 WLR 683.

56 See also Griffiths v Williams (1977) 248 EG 947 where Goff LJ recognised the benefits obtained by the representor, an elderly lady, from the representee’s conduct. The representor would not have been able to remain in her home had it not been for the representee’s care. See also Thomas v Thomas [1956] 1 NZLR 785.
D Nature of the representee's claim

In Inwards v Baker\(^{58}\) the expectations of the representee were not dissimilar to those of the representee in Dillwyn v Llewelyn.\(^{59}\) In Inwards v Baker, however, the Court of Appeal granted the representee a mere right of occupancy for so long as he required the property as his home. The representee had spent a substantial sum of money on building a bungalow on the representor's land. Some question inevitably arises as to why the fee simple was not transferred to him. Although it can be argued quite cogently that the Court of Appeal should have awarded a transfer of the fee simple to the representee,\(^{60}\) such a remedy would have been neither necessary nor just to the plaintiffs, the personal representatives of the now deceased representor.

It is clear in any event that the representee in Inwards v Baker\(^{61}\) had claimed not a transfer of the fee simple in the property but merely a right to remain living there.\(^{62}\) Moriarty has, however, rejected this as irrelevant on the ground that if the son in Inwards v Baker became tired of his bungalow, he could turn around and

\(^{58}\) [1965] 2 QB 29.
\(^{59}\) (1862) 4 De GF & J 517, 45 ER 1285. See also Maudsley (1965) 81 LQR 183; Crane (1967) 31 Conv (NS) 332 at 342.
\(^{62}\) See also Jones (AE) v Jones (FW) [1977] 1 WLR 438;
require his father to compensate him, even if the father was quite happy for the son to go on living there.63

Moriarty’s argument here may be flawed. Once the 'inchoate equity' has been satisfied, the court will not normally alter the remedy unless new circumstances arise.64

E. Housing needs of the parties

The respective housing needs of the representor and representee may influence the courts in their satisfaction of the 'inchoate equity'. Where the representor is securely housed elsewhere, the courts will not normally disturb the representee's occupancy of the disputed property65 if he requires the property as his family home.

In Hardwick v Johnson66 the representor had allowed her son and daughter-in-law to occupy property as their family home. When the marriage subsequently broke down and the son had left the property, the Court of Appeal refused to terminate the daughter-in-law’s occupancy. She had a young child who

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65See Maharaj v Chand [1986] 3 All ER 107 at 111, where the Privy Council implied that the representor’s need for housing might be a relevant factor in satisfying the 'inchoate equity' if there were children. The Privy Council, however, accepted that the representor’s need for housing was not a relevant factor here.
Where the representor and the representee have shared the property as their family home prior to the dispute, the grant of an occupation right to the successful estoppel claimant will generally be an inappropriate remedy. Joint occupation is usually possible only when the relationship between the parties is amicable. When the relationship has broken down, a financial remedy may be the only realistic solution open to the court.  

The representee in *Morris v Morris*,  

for instance, had sold his own home in order to move in with the representors, his son and daughter-in-law. He had handed over the proceeds of sale of his former home to the representors, who had built an extension to accommodate him. There had been no discussion between the parties as to what would happen to the representee if their living arrangements did not work out. The common assumption when the extension was built was that the plaintiff would be able to live with the representors indefinitely. The relationship between the parties to the dispute subsequently deteriorated primarily because of the marital disharmony between the representors. McClelland J decided to grant the plaintiff an equitable charge over the

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67 In Rogers v Eller (Unreported, Court of Appeal 20 May 1986) Slade LJ implied that the Court would take into account the existence of young children who required a home in its determination of the question of encouragement. See also Savva v Costa and Harymode Investments Ltd (1981) 131 NLJ 1114.

68 See Dodsworth v Dodsworth (1973) 228 EG 1115.

required a home; the representor was securely housed elsewhere.

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68 See Dodsworth v Dodsworth (1973) 228 EG 1115.

property with interest to accrue at 10% per annum. The representee had, in any event, already left the property and was securely housed elsewhere. A resumption of residence by the representee was not a realistic possibility.

F Legal impediments

There may be legal obstacles which prevent the court from satisfying the 'inchoate equity' in a manner which would give effect to the representee's expectations.

i) Settled Land Act 1925

The question has arisen whether the Settled Land Act 1925 is brought into play by the grant of an irrevocable licence for life in satisfaction of the representee's expectation. If this were so, the representee would become a tenant for life under the Settled Land Act and would enjoy all the powers attendant on this status. In strict terms the tenant for life derives benefit only to the extent of his own equitable interest, being otherwise a mere fiduciary of the legal estate. He is invested with certain statutory powers to manage and dispose of the land. These powers include the power to sell, exchange, lease, mortgage or otherwise deal with the land - not for his own personal benefit but for the good of the settled estate as a whole.

70 Settled Land Act 1925, ss 16(1)(i), 107(1).
71 See In re Earl of Stamford and Warrington [1916] 1 Ch 404 at 420, where Younger J described the fiduciary powers of the tenant for life as a "highly interested trusteeship".
Inevitably these dealings may legitimately take into account of the needs of the tenant for life; he is after all one of the beneficiaries and is for that reason allowed to consider his own interests. In a very practical sense, however, it is impossible that the tenant for life should exercise his powers without promoting his self-interest where he occupies the land as his home.

The concern of both courts and legal commentators has centred on the problem that to invest the estoppel claimant with the statutory powers of a tenant for life is almost certainly in direct contravention of the intentions of both representor and representee.12

In Dodsworth v Dodsworth73 the Court of Appeal considered the relationship between estoppel-based rights of occupancy for life and the Settled Land Act 1925. The representees in Dodsworth had been invited to live with the representor, a close relative. The representees then spent over £700 improving the representor's bungalow in the belief that they could live there and make it their permanent home.

See also In re Boston's Will Trusts [1956] Ch 395 at 405, where Vaisey J stated that "the tenant for life may legitimately exercise his own powers with some, but not of course an exclusive regard for his own personal interest." See also Wade [1956] CLJ 174.

72See also Binions v Evans [1972] Ch 359 at 366. Megaw and Stephenson LJJ discussed this problem in a slightly different context but concluded that they were bound by Bannister v Bannister [1948] 2 All ER 133 and that therefore the defendant was a tenant for life even though this was contrary to the intentions of the parties. See also (1972) LQR 336; Oakley (1972) 35 MLR 551; (1972) 36 Conv (NS) 277; (1973) 117 Sol Jour 23.

73(1973) 228 EG 1115.
When they later claimed an 'inchoate equity' the county court rejected any question of continued joint occupation of the bungalow because the parties were at loggerheads. The representor died before the case reached the Court of Appeal and thus the main ground on which the case had been decided at first instance had disappeared. The Court of Appeal considered whether, in the changed circumstances, it would be appropriate to give the defendants a right to occupy the bungalow for life. However Russell LJ took the view that such a remedy would have activated the provisions of the Settled Land Act 1925.

In Dodsworth the Court of Appeal did not discuss the origins of the settlement which threatened to bring the defendants' claim within the Settled Land Act 1925. For the purposes of the Settled Land Act a settlement is a document. It is very generally accepted that a settlement cannot come into existence merely because the situation demands it. However, cases like Dodsworth indicate that the courts have not ruled out the theoretical possibility of a strict settlement in the present context even where there is grave uncertainty as to the precise way in which such a settlement is created. Megarry and Wade

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74Section 1(1) defines a settlement as "any deed, will, agreement for a settlement or other agreement, Act of Parliament, or other instrument, or any number of instruments." See the judgment of Goff LJ in Griffiths v Williams (1977) 248 EG 947 at 950.
refer to such decisions as 'borderline cases'. They maintain that the court's decision whether to hold that a case is caught by the Act depends on a consideration of the exact intention behind the transaction in any given case. 77 Where an intention can be found or inferred that the representee should have the powers of the tenant for life, the court will ensure that the remedy granted in satisfaction of the representee's expectations falls within the ambit of the Act. 78 If, however, the representee's expectations do not extend to any enjoyment of powers of management and disposition over the property, the court may hold either that the remedy of a licence for life is not caught by the Settled Land Act 1925 or that the appropriate remedy is that of mere financial compensation.

In Dodsworth v Dodsworth the Court of Appeal held that to award the representees a lifelong occupation right would result in their having "a greater and more extensive interest than was ever contemplated" by the parties. 79 The representees would otherwise have had power to sell the property, or quit and let it, thus receiving the income of the invested proceeds of sale for life.

The reasoning of the Court of Appeal can be criticised on two counts. First, the policy of the Settled

78 In such a situation, however, it is nowadays more likely that the court would grant a fee simple (see, e.g., Pascoe v Turner [1979] 1 WLR 437).
79 (1973) 228 EG 1115 at 1117.
Land Act 1925 is that, regardless of the intentions of the parties, the powers of the tenant for life must always be available to prevent the land from being sterilised. In Dodsworth this policy was simply ignored by the Court of Appeal. Second, even if the remedy claimed by the representees fell within the ambit of the Settled Land Act 1925, this remedy did not produce a result which in practical terms was more extensive than the expectations of the defendants. Third, the final order of the Court of Appeal in Dodsworth was that the representees were to be compensated for their original expenditure plus interest. This remedy was considerably less extensive than the original expectations of the representees, even after taking the benefits into account which the representees had already received in terms of several years of rent-free and rate-free occupancy. There had been rapid house inflation during the six years in which the representees lived in the

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80 See Megarry and Wade, The Law of Real Property, (5th Ed) at 349, 350. See also (1977) 93 LQR 561 at 562; (1973) 117 Sol Jour 23 at 24; In re Carne's Settled Estates [1899] 1 Ch 324 at 330 where North J took the view that "it may be the mansion house with land surrounding it could be sold, and the rest of the settled estate left, with this island the property of someone else in the middle of it. That this would be contrary to the intention of the settlor does not much matter. The question is what does the Act say?". Swinfen Eady J came to a similar conclusion in Re Baroness Llanover's Will [1902] 2 Ch 679 at 683.

81 In a slightly different context Oakley, (1973) 26 Current Leg Problems 17 at 23, has suggested that although the imposition of a constructive trust created a settlement within the Settled Land Act 1925 (see Bannister v Bannister [1948] 2 All ER 133) "such a result, despite its consequences, may well not be completely undesirable in view of the unconscionable conduct of the plaintiff." The same can surely be said in the context of proprietary estoppel. In Binions v Evans [1972] Ch 359 at 366 Lord Denning MR dissented on the point that the defendant was a tenant for life under the Settled Land Act 1925, since such a result would have been contrary to the intention of the parties.
bungalow. The representees were unlikely to be able to buy a new home, but the court thought that the factors weighing against a licence for life were greater than the problem which the representees would face in finding new housing.

In Griffiths v Williams some five years after Dodsworth, Goff LJ circumvented the problem whether the Settled Land Act 1925 can apply to occupational licences granted in satisfaction of the 'inchoate equity'. He suggested that the Dodsworth case might have been decided per incuriam because there had been no consideration of the instrument which constituted the settlement. Had the parties rejected his solution, he would have been prepared to decide this issue.

In the event the solution propounded by Goff LJ had the effect of averting any necessity to consider the implications of the Settled Land Act 1925. In his view the court ought to see, having regard to all the circumstances, "what is the best and fairest way to secure protection for the person who has been misled by the representation made to him and subsequently repudiated." The representee in Griffiths v Williams had taken care of her elderly mother in reliance on an encouragement that she would have a lifelong

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82 Cf the view of Goff LJ in Griffiths v Williams (1977) 248 EG 947, where he stated that the decision in Dodsworth went "too far the other way".
83 (1977) 248 EG 947 at 948. See also [1978] Conv 251.
84 See Section 1(1) of the Settled Land Act 1925.
85 Goff LJ also indicated that the order of the court satisfying the 'inchoate equity' might itself be the instrument of settlement.
86 Griffiths v Williams (1977) 248 EG 947 at 948.
occupation of her mother's property. Accordingly, Goff LJ thought that the fairest way of dealing with the matter was that the plaintiffs, the executors of the representor, should grant the representee a long lease (at a nominal rent) determinable upon her death. In this way the representee would have the right of occupation for life which she had been led to expect and yet would be outside the ambit of the Settled Land Act 1925. Goff LJ recognised that no rent obligation had been contemplated when the relevant encouragement was given but he accepted that "perfect equity is seldom possible".87

The risk to the plaintiffs of such an arrangement was that the representee might then assign her lease or remarry in which case a successor might claim her statutory tenancy.88 In order to avoid the first possibility, the representee was simply required to give an undertaking to the court not to assign her lease. To avoid the difficulties implicit in the second possibility, the rent payable was deliberately fixed at a low level which would not attract the operation of the Rent Act provisions for the devolution of tenancies.89 There was a marked reluctance on the part of Goff LJ to grant the representee anything other than a long-term occupation right. He pointed out

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87 Ibid. See also Hawkins (1966) 30 Conv (NS) 256 at 262; Martin (1972) 36 Conv (NS) 266 at 271; (1973) 177 Sol Jour 23 at 25; [1978] Conv 252.
88 See Rent Act 1977, Schedule 1, Part 1, para 2.
89 See Rent Act 1977, s 5, which provides that a tenancy in which the rent does not exceed two thirds of the rateable value of the property is not a protected tenancy within the Rent Act.
that it would be very difficult to quantify the representee's labour contributions in order to give her a financial remedy.

ii) War Service Homes Act 1918-1962 (Cth)

In *Pearce v Pearce* 90 the New South Wales Supreme Court found that the plaintiff, the *de facto* wife of the representor, had clearly expected to have a joint share in the representor's property. She had pooled her income with the representor and had cared for the four children of the relationship. This relationship had broken down and the representor was attempting to sell the family home. The representee placed a caveat on the title, claiming an interest in the family home. The property was, however, subject to the War Service Homes Act 1918-1962 (Cth). 91 Helsham CJ acknowledged that any transfer of the property to the representee would be in contravention of this act and therefore unlawful. In the circumstances, however, Helsham CJ was not prepared to accept that there was no remedy for the plaintiff. In the absence of transfer she would clearly have security of occupancy, because the representor could not have sold the property without the

91Now the Defence Service Homes Act 1918-1973 (Cth). Section 35(1) of the latter act provides "so long as any land or land and dwelling-house is subject to a contract of sale, mortgage or other security in accordance with this Act, a transfer (other than a transfer by or to the Director) of that land or land and dwelling-house or of any estate or interest therein shall not have any force or effect unless it...
c) is made with the consent in writing of the Director.
permission of the Director of the War Service Homes Division (who would be unlikely to give such permission). But the Chief Justice was anxious to grant a more positive remedy to the plaintiff in order to prevent any further litigation between the parties. The couple had clearly intended to "enjoy the fruits of their joint labours".92

The Chief Justice decided that the most appropriate way to satisfy the 'inchoate equity' was to grant to the representee a long-term right of occupancy in the property for as long as she required it as her home. Helsham CJ believed that this irrevocable licence in itself was not an interest which would be caught by Section 35 of the Defence Service Homes Act 1918-1973 (Cth). Helsham CJ suggested, however, that the plaintiff representee might be able to enter a caveat against the title in order to protect the interest which the court had awarded in satisfaction of her 'inchoate equity'. He commented on the paradoxical situation which would arise in these circumstances. If the irrevocable licence were caveatable, it would demonstrate that her licence was an equitable proprietary interest. Ironically, however, such caveatable status might ultimately render the plaintiff's occupation right less secure because this right could then be caught by Section 35 of the Defence Service Homes Act.

92[1977] 1 NSWLR 170 at 177.
iii) Fiji Native Land Trust Act 1955

In *Maharaj v Chand* the Privy Council held that the representer was estopped from denying that the representee had his permission to live permanently in his house. This defensive remedy was held to be a mere personal right which could not affect the interests of third parties. Any remedy involving a grant of a legal or equitable interest in the property would have granted the representee a right which would have fallen within the scope of Section 12 of the Fiji Native Land Trust Act. This Act prevents any dealings with land without the consent of the Native Land Trust Board, which would not have been forthcoming. Had the Privy Council satisfied the 'inchoate equity' by the grant of an alternative remedy the representee would have forfeited her right to live in the property.

iv) Land Subdivision in Counties Act 1946

In *Re Whitehead* the representee had expended labour and materials in order to build two cottages on the land belonging to his father, the representer. When the father died the son claimed that he had been led to expect that he would ultimately own one of the cottages. Sub-division of the land was not for legal reasons a viable possibility.

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4See post at 180 for a discussion of 'equities of estoppel' and third parties.

5[1948] NZLR 1066.

6The cottage was remote and had no road frontage and therefore no consent under the Land Subdivision Act 1946.
The court therefore satisfied the 'inchoate equity' by making an order for reimbursement of the value of the labour and materials which the representee had expended on the property.

G  Third party implications

Before deciding to grant a given remedy in satisfaction of the representee's expectation, the courts must take into account any third party claims to the disputed property. In Jones (AE) v Jones (FW), for example, the expectation of the representee was that his father had given him the property which provided his present family home. The representor, however bequeathed his property to his wife, the representee's stepmother. She had full knowledge of the representor's encouragement to the representee. The Court of Appeal held that the beneficiary was estopped from selling the property and the representee's occupancy was thus safeguarded. The case presented an obvious opportunity for the court to order a transfer of the fee simple to the representee. However, the Court of Appeal found itself constrained by the decision at first instance, which had awarded the representee a one-quarter share behind a trust for sale. Lord Denning MR cast some doubt on this decision but was nevertheless reluctant to disturb the

would have been forthcoming. Any agreement to dispose of the land without consent is an offence under the Land Act 1924, s 16.

ruling. In order to prevent the beneficiary of the
representor's will from selling the representee's home, the
court took the novel approach of using proprietary
estoppel to prevent sale which would have been the normal
consequence of a trust for sale. The decision in
Jones demonstrates that where the third party is a member of
the representee's family, the courts may be prepared to
reach a compromise between protecting the 'inchoate equity'
of the representee and protecting the proprietary interest
of the representor's beneficiary.

It is not infrequent in the 'familial cases' that the
disputed property is in the hands of the personal
representatives of a now deceased representor. In such
circumstances the court may have to consider the effect
which any possible remedy may have on the interests of the
various beneficiaries under the representor's estate. In
Cameron v Murdoch, for example, there was a significant
number of beneficiaries who would be affected by any remedy
granted to the representees. This did not deter the court
from awarding a transfer of the fee simple in return for a
monetary payment by the representees. The beneficiaries
had already been the recipients of substantial provision

98 Alder, (1978) 41 MLR 208 at 209 questioned why the case
came before the court at all since the plaintiff was the
sole legal owner and could have sold without a court order.
99 The beneficiary's interest is overreached on sale of the
property if the proceeds of sale are paid to two trustees.
The interest will be translated into a share in the proceeds
of sale. See City of London Building Society v Flegg
[1987] 2 WLR 1266 at 1288; Pritchard [1971] CLJ 44; Boyle
from the representor's estate and would in any event be further compensated for their loss of the disputed property by the monetary payment to be made by the representees.

H Conduct of the parties

From time to time the conduct of one or other of the parties in an estoppel claim is so irregular as to demand consideration by the court. Any remedy granted by the court in satisfaction of the 'inchoate equity' must clearly reflect exceptional conduct. Pascoe v Turner provides a good illustration of the type of conduct which will carry weight in the court's deliberations as to the appropriate remedy. Here the representor and the representee had previously occupied the disputed property as de facto husband and wife. When the representor departed to live with his new mistress, he explicitly assured her that the house was hers and she therefore had an expectation that the representor would transfer the property to her.

On these facts the Court of Appeal upheld a decision to award a transfer of the fee simple to the representee. The overriding reason for this decision lay in the conduct of

101 See also Matrimonial Causes Act 1973, s 25(2)(g) (as amended by Matrimonial and Family Proceedings Act 1984 s 3) which directs the court to take account of conduct in matrimonial proceedings.
102 [1979] 1 WLR 431.
103 Cf Cullen v Cullen [1962] IR 268 at 282, where Kenny J rejected the claim that there had been any representation by an alleged representor who had been under considerable duress as a result of the representee's behaviour (ante at 33).
the representor. For three years prior to the court hearing he had shown that he was "determined to pursue his purpose of evicting her from the house by any legal means at his disposal with a ruthless disregard of the obligations binding upon conscience." This appalling conduct prior to any court hearing led the court to infer that unless it satisfied the 'inchoate equity' by the grant of a fee simple in the property, the representor would later find some excuse to re-enter the property. Any lesser remedy than the award of a fee simple interest would have made the representee still vulnerable to the representor's oppressive behaviour.

In satisfying the 'inchoate equity' which arose in Thomas v Thomas, the New Zealand Supreme Court had occasion to take into account the blameless and exemplary conduct of the representee. The application had been brought by the representee under Section 19 of the New Zealand Married Women's Property Act 1952, which permits an order to be made by the court determining the title of the property. Gresson J expounded the view that in the matrimonial context the court should not be over-technical or too rigid in the application of the property principles governing the Act, "it may, provided there is a proper observance of legal principles, disregard niceties and make

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104 Pascoe v Turner [1979] 1 WLR 431 at 438. See also Sufrin, (1979) 42 MLR 574.
105 [1956] NZLR 785.
an authoritative declaration as to the respective beneficial interests of the parties."\textsuperscript{106}

During the marriage the wife had made a very real effort to help her alcoholic husband to play a responsible role within the family. To this end she had deliberately had the property vested in the joint names of herself and her husband even though she had paid the total purchase price herself. When the relationship between the parties broke down the husband orally abandoned his interest in the property to his wife. The Court awarded a transfer of the husband's interest in the property to the wife. The court, in satisfying the wife's 'inchoate equity', was evidently impressed by the wife's efforts during the marriage. By contrast the husband was attempting to free himself from his maintenance obligations to his wife and children. The husband was prepared to honour his agreement to transfer his interest to his wife in return for a release from his maintenance obligation. The court could not ignore such heinous conduct. The representor's maintenance obligations would of course continue to bind him even after the court-ordered transfer had been made.

In \textit{Greasley v Cooke}\textsuperscript{107} the representee had been assured of a long-term right of occupation in the family home. The representors subsequently attempted to evict her. The representors had behaved in a most devious way during the

\textsuperscript{106}Ibid at 792.
\textsuperscript{107}[1980] 1 WLR 1306.
first instance hearing. They had withdrawn their claim for possession in the county court at the eleventh hour and had not sought to contest the defendant's counterclaim. Their hope had clearly been was that the counterclaim would fail; they could then have brought a claim to evict the representee to which she had no answer, the issue then being res judicata. The Court of Appeal awarded a long-term right of occupancy to the representee. The conduct of the representors was taken into account by the Court of Appeal in deciding how to satisfy the 'inchoate equity'. Lord Denning MR thought that a long-term right of occupancy would protect the representee from any possibility of eviction by the representor.108

I Benefits gained by the representee from the parties' relationship

In the majority of the 'familial cases' the courts have been inclined to doubt whether an 'inchoate equity' exists at all, if the representee has gained substantial benefits from his relationship with the representor.109 In exceptional cases the courts have accepted that the representee has an 'inchoate equity' but even in these

109 See, e.g., E & L Berg Homes Ltd v Grey (1980) 253 EG 473; Fruin v Fruin (Unreported, Court of Appeal 15 November 1983); Stilwell v Simpson (Unreported, Queens Bench 21 June 1983); Warnes v Hedley (Unreported, Court of Appeal 31 January 1984).
circumstances have granted only some minimal form of remedy by way of satisfaction.\textsuperscript{110}

In the New Zealand case of \textit{J.N. Elliot & Co (Farms) Ltd v Murgatroyd}\textsuperscript{111} the representee had left her home at the time of the breakdown of her marriage and had returned to occupy a house owned by her father, the representor. The representee then spent some of her own money on furniture and materials for this property. The house was later modified in design and decorated and furnished for the most part at no cost to the representee. The expectations of the parties concerning the nature of the representee’s occupancy were uncertain.\textsuperscript{112}

The New Zealand Court of Appeal decided to give effect to the minimal common assumption which it felt able to impute to the parties. Accordingly the Court granted the plaintiff the somewhat meagre remedy of compensation for her expenditure on the property and otherwise upheld the representor’s right to serve on the representee reasonable notice to quit the premises.

In its satisfaction of the 'inchoate equity' claimed by the representee, the court took into account the fact that

\textsuperscript{110}Cf \textit{Hardwick v Johnson} [1978] 1 WLR 683 where the representee was granted an occupational licence which was irrevocable as long as the representee continued to pay £7 per week to the representor.

\textsuperscript{111}Unreported, New Zealand Court of Appeal 12 September 1984.

\textsuperscript{112}Some four years earlier the New Zealand High Court had granted the representee a permanent right of occupation. (Unreported, New Zealand High Court 15 October 1980).
the representee had clearly enjoyed eight years of rent-free occupancy of the disputed property. For five of these eight years the representee's occupancy had moreover been contrary to her father's expressed wishes. The benefit of this occupancy required to be balanced against the detriment which she had suffered, as was the fact that the representee had also been given a half-share in her father's farm.

J Social implications

There may be wider implications, particularly economic, for the community at large which the court will take into account in deciding how to satisfy an 'inchoate equity' raised by an estoppel claimant. In a very general sense the satisfaction of the 'inchoate equity' in any particular manner has implications not only for present and future litigants, but also for society at large. Information concerning the legal decisions will eventually become part of popular consciousness. The knowledge thus gained may affect future dealings with land. If the 'inchoate equity' in estoppel cases is satisfied by a remedy which is widely perceived as excessive, landowners in the future will be less likely to make informal arrangements concerning their property. If on the other hand the remedy awarded is perceived as insufficient, future recipients of informal grants of land may tend to use the property in a manner which leads to a diminution in the value of the land. Such

conduct would reflect the short-term interest of the recipients rather than the long-term good of the land.

In its satisfaction of the 'inchoate equity' the court may also take into account the more specific social consequences of any given remedy. In Crabb v Arun DC\textsuperscript{114} the Court of Appeal verbalised its concern that the representors' conduct had left the disputed property standing useless to the prejudice of the local people. Lawton LJ said "in an area where employment for the young is not always easy to find, we have the spectacle of this piece of land next door to a housing estate being rendered useless at a time when it could have been of value to the community. For that the defendants are solely to blame."\textsuperscript{115} Scarman LJ took a similar view of the representors' action. It amounted to "sterilization of an industrial estate for a very considerable period of time"\textsuperscript{116} and consequently any remedy awarded to satisfy the 'inchoate equity' must reflect this fact.\textsuperscript{117}

In Cameron v Murdoch,\textsuperscript{118} for example, any remedy other than the award of a transfer of the fee simple might have led to the diminution in value of substantial farm land. The representees would have been unlikely to care for the

\textsuperscript{114}[1976] Ch 179.
\textsuperscript{115}Ibid at 192.
\textsuperscript{116}Ibid at 199.
\textsuperscript{117}The Court of Appeal awarded the representee a right of access over the representors' land without making the payment, envisaged in the original agreement, to the representors.
\textsuperscript{118}[1983] WAR 321.
land with due regard to its long-term economic future potential had they been granted mere rights of occupation.

In Griffiths v Williams the representee had devoted herself to the long-term care of an elderly relative. To have denied the representee a right of occupancy could have been seen as a denigration of such valuable work. It is clear that alternative care facilities would have to be found for old people - at considerable social cost - if members of families did not readily undertake the task of caring for elderly relatives themselves.

VI CONCLUSION

The 'familial cases' considered in this chapter illustrate the range of remedies granted by the court in satisfaction of the 'inchoate equity'. The cases also demonstrate the great flexibility open to the court in deciding on the remedy appropriate in any given case. The advantages of such flexibility must of course be balanced against the accompanying disadvantages of uncertainty. The estoppel claimant risks being granted a remedy which he does not want, a remedy which may compensate him financially but which neither protects his right of occupancy nor permits him to purchase another home. The open-ended nature of the court's response to estoppel claims may perhaps explain why, in disputes concerning the family home,

120See Dewar (1986) 49 MLR 741 at 751.
there is often a stronger inclination to allege the existence of some trust of the property. Although a successful claim of trust may not always protect the occupation of the family home,\(^{121}\) this form of claim does at least give the claimant a conventional equitable proprietary right which permits him to share in the inflated sale value of the property. However, unless the claimant can prove the existence of a common intention to share the property there can of course be no trust.\(^{122}\)

Heavy criticism has been directed at the flexible approach of the courts in granting a remedy in estoppel cases even though this flexibility is frequently a response to the sheer complexity of the 'familial cases'. For the most part the criticism has centred on the nature of the 'equity of estoppel', an issue which is considered in the next chapter. Particular concern has been expressed about the potential duration of the 'equity of estoppel' and about its effect on third party purchasers. These matters are the subject of the next chapter.


\(^{122}\)See post at 257 ff
CHAPTER FIVE

THE NATURE OF THE EQUITY ARISING FROM PROPRIETARY ESTOPPEL

I INTRODUCTION

In property disputes between family members a successful claim to a beneficial interest behind a trust for sale has generally been viewed as more advantageous than a plea of proprietary estoppel. The fact-situations which give rise to both pleas tend to be remarkably similar. A litigant who obtains a beneficial interest behind a trust would normally be able also to plead proprietary estoppel successfully. The reverse, however, is rarely possible. In a significant number of claims litigants have pleaded both trust and estoppel in the alternative.

The principal advantage of a successful plea of a trust lies in the certainty of the remedy. A beneficial interest behind a trust is a conventional proprietary

1 See Anderson (1979) 42 MLR 203.
2 In Walker v Walker (Unreported, Court of Appeal, 12 April 1984), Browne-Wilkinson LJ accepted that the facts pleaded in a claim based on a resulting trust would quite likely give rise to a claim of proprietary estoppel. However no such claim was raised on the pleadings. See also Wallace and Grbich (1979) 3 UNSW Law Jour 175 at 199; Pettkus v Becker (1980) 117 DLR(3d) 257.
4 Members of families, conveyancers, vendors and purchasers all require certainty of remedy. Llewellyn maintained that “it is a significant degree of reckonability in the individual case which the bar demands and which the lay public expects as a condition of its confidence” (The Common Law Tradition - Deciding Appeals 1960 p 6). See also Crabb v Arun DC [1976] Ch 179 at 191 per Lawton LJ; Pascoe v Turner [1979] 1 WLR 431 at 438 per Cumming-Bruce LJ; In re Sharpe (A Bankrupt) [1980] 1 WLR 219 at 226 per Browne-Wilkinson J.
interest. In *Hoysted v The Federal Commissioner of Taxation* Isaacs J explained that

in equity, an identifiable contingent *cestui que trust* has an interest beyond a mere possibility in the execution of the trusts, and in that sense he has, in the eye of a court of equity, an interest in the trust estate, because as shown, in equity the trust is everything. But his interest in the trust estate at any given moment is measured by the relief which equity is then prepared to give him, that is, by the rights which the due execution of the trust as framed by the creator of the trust will at that moment give him.

The interest of the trust beneficiary has been so clearly recognised by equity that it is now considered to be almost as important as a legal proprietary interest. The right of the *cestui que trust* ranks at the head of the hierarchy of equitable rights. By contrast, the nature of the 'equity of estoppel' is far less certain. This uncertainty arises primarily from a failure to distinguish between the nature of the 'equity of estoppel' prior to its satisfaction by the court (i.e., the 'inchoate equity') and the nature of the equity after the court has granted a remedy (i.e., the satisfied equity).

5(1920) 27 CLR 400.
Even where a distinction has been made between the 'inchoate equity' and the 'satisfied equity', the courts have been unable to reach agreement on the nature of the respective equities. In the New South Wales case of Hamilton v Geraghty, for instance, Owen J maintained that the 'inchoate equity' "is not a personal right to sue which could not be assigned but an interest in the land itself." At other times, however, the 'inchoate equity' has been downgraded to the category of a mere equity "naked and alone...incapable of binding successors in title even with notice; it is personal to the parties." In Dewhirst v Edwards the New South Wales Supreme Court took the view that all modern formulations of the doctrine of 'proprietary estoppel' agree that "the remedy which the court will supply is whatever is most appropriate in the circumstances". The Court therefore declared that "it would seem that what the doctrine gives rise to is an equity - a right in personam - rather than an equitable estate or interest." In Fryer v Brook, Oliver LJ similarly suggested that the 'inchoate equity' was more of a personal interest than a proprietary interest, and was "akin to the personal right of occupation created by a statutory tenancy."
These apparently conflicting views greatly increase the uncertainty associated with claims of proprietary estoppel. Everton has suggested that if legal concepts could be represented pictorially, the concept of an equity should be depicted as "a grey and murky fog, consistent in depth of colour, the boundaries hazy and ill-defined." It is therefore readily understandable that the litigants in the 'familial cases' avoid a plea of proprietary estoppel if there is any possibility that an alternative trust claim may succeed. However, certainty is of particular importance where rights in the family home are concerned. Not only do members of the family need to know whether they possess an 'equity of estoppel' they also need to know whether the 'equity of estoppel' has all the attributes of an equitable property right.

The remainder of this chapter concentrates on the nature of equitable rights and more particularly on the nature of the 'equity of estoppel'.

II EQUITABLE INTERESTS: ATTRIBUTES AND LABELS

Attempts have been made to question whether the 'equity of estoppel' is a conventional equitable proprietary interest. If the 'equity of estoppel' is deemed to be a

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13 Everton, (1976) 40 Conv (NS) 209. Cf Von Jhering, In the Heaven of Legal Concepts in Law and Metaphysics p 687 where property is depicted as "squat, rough, with sturdy limbs, well fed and with a saturated expression on its face...you can see that it will not permit challenge by anybody and feels perfectly secure".
conventional equitable proprietary interest it will have all the attributes of such an interest; it will be indefeasible; it will be assignable and it will have the potential to bind purchasers of the representor's property.\textsuperscript{14} If, however, the 'equity of estoppel' is denied the label of an equitable proprietary interest, it will clearly have no proprietary attributes. It will be merely a right in \textit{personam}.\textsuperscript{15}

This rigid classification of equities into equitable proprietary interests and mere rights in \textit{personam} is somewhat simplistic. It implies that the courts permit the intervention of equity in relationships to protect established proprietary interests. In reality the courts may permit equity to play a more pragmatic role intervening in relationships because the courts recognise that the relationships require protection. In the Australian case of Burns Philip Trustee Co v Viney,\textsuperscript{16} Kearney J explained that

the administration of equity has always paid regard to the infinite variety of interests and has refrained from formulating or adhering to fixed universal and exhaustive criteria with which to deal with such varying situations.\textsuperscript{17}

\textsuperscript{14}See National Provincial Bank Ltd v Ainsworth [1965] AC 1175 at 1247 per Lord Wilberforce.
\textsuperscript{15}Lord Upjohn took this view in National Provincial Bank Ltd v Ainsworth [1965] AC 1175 at 1238.
\textsuperscript{16}[1981] 2 NSWLR 216.
\textsuperscript{17}Ibid at 223.
An illuminating and particularly interesting illustration of the flexible and pragmatic manner in which equity operates is the Australian case of Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq.).\(^\text{18}\) The High Court of Australia was called on to determine a question of priority as between an equity to have a transaction set aside for fraud and the interest subsequently taken over the disputed property by an equitable chargee. Menzies J relied heavily on the authority of Phillips v Phillips.\(^\text{19}\) The approach taken by Menzies J recognised that different policy considerations may operate in different contexts and that proprietary qualities may (or may not) be attributed to an equity according to the policy consideration deemed to be important in any given context.\(^\text{20}\)

Neave and Weinberg\(^\text{21}\) have suggested that resort to the concept of an equity may serve a useful purpose as a kind of 'holding operation' which allows the courts to refine details of the interest over a series of cases. In this way, argue Neave and Weinberg, questions as to the assignability of the interest and as to its enforceability against third parties "may be answered...the equity may graduate into the category of equitable interests."\(^\text{22}\)

\(^{18}\)(1965) 113 CLR 265.
\(^{19}\)(1861) 4 De G F & J 208, 42 ER 1164.
\(^{20}\)This approach had led Smith (1973) CLJ 123 to declare that "the law is what it ought to be."
\(^{22}\)Ibid.
Everton has likewise recognised the difficulties in categorising equitable interests and has accepted that these difficulties are a natural consequence of the role which equity plays. It is not easy to discover coherent patterns in a system which is designed to supplement the law. In an attempt to reduce equitable rights into systematic albeit fluid categories, Everton has distinguished two kinds of equitable interests. The first kind of equitable interest she designated as a 'patent' equitable interest which carries the traditional attributes of a proprietary right; it can be bought, sold and devised. Such an interest comes into existence by virtue of some act of the parties themselves. The interest may be enforceable only by a court order, but the court has no discretion as to the remedy it grants if the rules of equity are followed. 'Patent' equitable interests clearly include beneficial trust interests. By contrast the second type of equitable interest described by Everton, (the 'latent' equitable interest) is dependent for its very existence on some exercise of the court’s discretion. The 'latent' equitable interest becomes a 'patent' equitable interest only if and when the court, in exercise of its discretion, converts the 'latent' interest into some form of established equitable proprietary right.

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23Everton, (1976) 40 Conv (NS) 209.
24Ibid at 215.
25Ibid.
26According to Everton the category of 'mere equity' should be reserved for those rights, of an exclusively personal nature, to pursue an equitable remedy. Everton's category of latent equitable interests appear to be not dissimilar to Lord Upjohn's category of 'mere equities' not ancillary to land (National Provincial Bank Ltd v Ainsworth [1965] AC 1175 at 1238.)
Other commentators such as Wallace and Grbich have rejected any attempt to classify equitable rights as proprietary or non-proprietary. In their view such attempts are unhelpful in that they lead to a reification of legal reality. Wallace and Grbich argue that "property law has a long, involved history which tends to imbue it with an aura of certainty and stability, an image that is not entirely justified." To force the classification of equitable rights in situations which are on the frontier of established categories is thus to perpetuate that image. Artificial verbal manipulations do little more than classify remedies after the event. Wallace and Grbich argue that it would be more useful for judges overtly to analyse "objectives and competing priorities prior to deciding whether the relationship under consideration requires the

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28 Berger and Luckmann (The Social Construction of Reality, (Penguin 1971), p 106) have defined reification as "the apprehension of human phenomena as if they were things, that is, in non-human or possibly supra-human terms...Reification implies that man is capable of forgetting his own authorship of the human world, and further, that the dialectic between man the producer and his products is lost to consciousness."
29 (1979) 3 UNSW Law Jour 175.
30 Ibid at 179.
32 See Gray, Elements of Land Law, p 423. "It may, of course, be correctly concluded that it is not ultimately helpful to refer to anything as a 'property right', since at best this usage operates merely as an abbreviated reference to certain secondary characteristics which flow from the primary fact of enforcement through legitimated state power. When the arrogant nonsense of the 'property right' is finally stripped away, all that remains visible to the naked eye is the brute fact of enforcement. The only relevant question, in a congeries of situations involving a variety of parties, concerns who will win. True it may be that the answer is conventionally rationalised in terms of justice or conscience. But whether the 'equity' generated by proprietary estoppel is or is not a 'property right' is not in itself a particularly interesting question."
protection of proprietary right status. This approach does not detract from the requirement that legal rules should be predictable but leads to a different type of predictability which points to patterns based on "fact value complexes" \(^3\) and not on facts alone.

These different approaches, used to analyse the nature of equitable rights, are not, of course, mutually exclusive. It is undoubtedly true that Wallace and Grbich are correct in emphasising the necessity to seek out the value judgments implicit in judicial decisions. Gray has explained that whole areas of equitable jurisdiction can be understood only on the basis that an equitable right of property is protected not because it has first been characterised as 'property', but because equitable intervention is imperative in order to satisfy the demands of ethical dealing within a given social or commercial relationship. \(^4\)

It is, however, equally correct to examine the legal label which is ultimately attached to a right in order to identify the nature of the court's intervention if it intervenes regularly in similar fact-value circumstances. Once a legal label has been attached, legal consequences flow from that label. Any analysis of the nature of the 'equity of estoppel' must attempt to elucidate the value

judgments underlying the decision to grant or deny proprietary attributes to that 'equity'. It has thus become a particularly live question whether (and if so when) 'equities of estoppel' are indefeasible, assignable and binding on third parties. In such inquiries two distinct stages must be considered. Attention must be directed to the period prior to the point at which the court decides whether to satisfy the 'inchoate equity'. The analysis must then clearly distinguish a second period following the date of the court's decision, when the 'inchoate equity' now stands as a 'satisfied equity'.

III DEFEASIBILITY OF THE 'EQUITY OF ESTOPPEL'

A The 'inchoate equity'

In Grabb v Arun DC\(^{35}\) Scarman LJ suggested by implication that the 'inchoate equity' does not constitute any specific right but comprises merely a more general right to come before the court and to ask for such a remedy as the court deems to be appropriate in the circumstances of the case. At the time of the court hearing any unconscionable aspect of the parties' conduct must be examined. In Williams v Staite\(^{36}\) Cumming-Bruce LJ likewise expressed the view that

the true analysis is that, when the plaintiff comes to court to enforce his legal rights, the defendant is then entitled to submit that

\(^{35}\) [1976] Ch 179.

\(^{36}\) [1979] Ch 291 at 300.
in equity the plaintiff should not be allowed to enforce those rights and that the defendant, raising that equity, must then bring into play all the relevant maxims of equity so that the court is entitled then on the facts to look at all the circumstances and decide what order should be made, if any, to satisfy the equity.

The relevance thus accorded to the parties' conduct is well illustrated, for instance, in *J Willis & Son v Willis*. Here Parker LJ declined to satisfy an 'inchoate equity' on the ground that the representees had acted fraudulently. They had attempted to bolster their estoppel claim by the submission of fictitious accounts of expenditure on the property.

In some cases it may even be that the unconscionability which once existed has ceased to exist by the time the matter reaches the court. The English cases have taken the approach that if by this date the estoppel claimant has already been recompensed by the representor, there no longer remains any 'inchoate equity' which requires to be satisfied. Where such compensation has been provided, it may well have taken an indirect rather than a direct form. For example, the estoppel claimant may be deemed to have enjoyed sufficient use of the property already, with the

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result that the any detriment originally caused by his alteration of position has now been remedied.38

In Appleby v Cowley39 the representor had encouraged the representee to believe that he had an indefinite right of occupation of barristers' chambers. The representee had altered his position to his detriment in reliance on this representation. He was held to have received adequate compensation for this detrimental alteration of position in that he had paid a greatly reduced rent in respect of his occupation. The Vice-Chancellor, Sir Robert Megarry, quoted the phrase of Lord Hardwicke LC in Attorney General v Balliol College Oxford40 when he held that the representee had had "sufficient satisfaction" for his expenditure. Whether this meant that the 'inchoate equity' had ceased to exist when the case came before the court or whether the equity existed but no remedy should be granted, Sir Robert Megarry V-C regarded as a "nice academic point" which he was not prepared to debate. The claim simply failed.

In the sense outlined above 'inchoate equities' would in general seem to be defeasible prior to the court hearing.

There are nevertheless some cases in which a representation which can reasonably be understood as having created a perpetual right or at least a life-long right in the property. In such circumstances the courts have tended

38See, e.g., E & L Berg Homes Ltd v Grey (1980) 253 EG 473; Watts v Story (Unreported, Court of Appeal 14 July 1983); Warnes v Hedley (Unreported, Court of Appeal 31 January 1984).
40(1744) 9 Mod 407 at 512, 88 ER 538 at 541.
to regard the 'inchoate equity' as indefeasible prior to the court hearing. Implicit in such decisions is the view that if, when the case came before the court, the court would have been prepared to restrain the representor from disavowing his representation and would have granted an irrevocable right, it is then entirely reasonable to short-circuit the process and permit the right to pre-date the court equity.  

Thus, by indulging in a minor legal fiction, an unconscionable outcome is avoided. In *Plimmer v Mayor etc of Wellington* the Privy Council held that the 'equity of estoppel' was an interest in land prior to the court's satisfaction of the equity and even prior to the disavowal of the equity by the representor's successors in title. The Privy Council took the view that an equitable proprietary interest arose from the moment the representee spent money improving the representor's wharf in reliance on the representations made by the representor that the representee's occupation of the wharf would be perpetual.

Sir Arthur Hobhouse accepted that

there are perhaps purposes for which a licence would not be held to be an interest in land. But their Lordships are construing a statute which takes away private property for compensation, and in such statutes the

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41 See Bailey, Estoppel and Registration of Title, [1983] Conv 99.
42 (1884) 9 App Cas 699.
43 In *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 Dixon J had maintained that "so long as the representee's assumption continues to be regarded as true, the question of estoppel does not arise. It is only when the representor wishes to disavow the assumption contained in his representation that an estoppel arises."
44 Public Works Act 1882 (NZ).
expression 'estate or interest in, to or out of land' should receive a wide meaning. Indeed the statute itself directs that, in ascertaining the title of anybody to compensation, the court shall not be bound to regard strict legal rights only, but shall do what is reasonable and just.\textsuperscript{45}

Although the Privy Council made no distinction between the 'inchoate equity' and the 'satisfied equity', the court applied the maxim "equity looks on that as done which ought to be done".\textsuperscript{46}

In Hamilton v Geraghty\textsuperscript{47} the New South Wales court similarly viewed even an 'inchoate equity' as constituting an irrevocable interest in land prior to the court hearing. Here the defendant had permitted one, Connor, to have his house built on her land. She stood by silently with full knowledge of the fact that Connor believed the land to be his own. When Connor failed to pay his builder, the plaintiff who was the latter's administrator, sued and obtained judgment against Connor. The court later ordered the conveyance to the plaintiff of all Connor's estate, right, title and interest in the defendant's land. The Chief Justice in Equity had ruled at first instance that the defendant's acquiescence would by itself give Connor no right or interest in the land, though of course he might obtain such a right by a decree of the court giving him a

\textsuperscript{45}Plimmer v Mayor etc of Wellington (1884) 9 App Cas 699.
\textsuperscript{46}Banks v Sutton (1732) 2 P Wms 700 at 715, 24 ER 922 at 927.
\textsuperscript{47}(1901) 1 NSWR (Eq.) 81.
lien. The first instance court thus held that until Connor obtained a decree, "his right would be...a personal right to sue." The New South Wales Court of Appeal subsequently overruled this decision, although it was divided as to the precise extent of Connor's interest in the land held under his 'inchoate equity'.

B The 'satisfied equity'

Once the court has satisfied the 'inchoate equity', the nature of the remedy granted helps to determine whether the 'satisfied equity' is defeasible.

i) Legal or equitable proprietary interests

Where the representee is granted a legal or conventional equitable proprietary interest in satisfaction of the 'inchoate equity' this interest is clearly indefeasible.

ii) Grant of an occupation right

Where a remedy is granted in terms of an occupational right for life or an occupational right determinable on other grounds specified by the court it is uncertain whether the 'satisfied equity' can be defeated and, if so, under what circumstances (other, of course, than those specified by the court).

\[48\text{Ibid at 84.}\]
a) Defeasibility of the 'satisfied equity'

Whether and in what circumstances the 'satisfied equity' might be defeasible was discussed in Hardwick v Johnson. Here the representor, the mother and mother-in-law of the representees, had allowed them to live in the property as their family home. They had paid the representor £7 per week in reliance on their expectation that the property was to be their family home. When the representees' marriage broke up the wife remained in occupation of the property with their child. The court granted an occupation right to the wife. Lord Denning MR viewed the case as one of proprietary estoppel. He explained that the 'satisfied equity' was not revocable at will by the defendant. He said

it was certainly not revocable as against the daughter-in-law, who was still living in the house with her baby, deserted by the son. Looking simply at what is reasonable, it seems to me that the mother could not turn the daughter-in-law and child out, at all events when the daughter-in-law was ready to pay the £7 a week.

Both the social circumstances of the representee and her continuing detrimental alteration of position were considered as relevant to this view. Lord Denning MR's

49[1978] 1 WLR 638. See Anderson (1979) 42 MLR 203 at 204.
50Ibid at 689.
judgment contained moral overtones. He suggested that revocation might be possible if in the present case there had been no grandchild and the wife had formed an association with another man in the house, I should have thought that the mother could have revoked the licence. But there has not been a divorce, not even a judicial separation... Things may develop in the future. One cannot foresee when it may be possible to determine the licence, but it cannot be determined at this stage.\(^1\)

This approach to defeasibility appears to transpose the principles governing maintenance on matrimonial breakdown into the context of breakdown of wider familial relationships.\(^2\) Lord Denning MR took the unusual view that members of the extended family, if they are also representors, must maintain an abandoned wife and child by housing her, unless and until a new de jure or de facto spouse takes over that responsibility.

In J Willis & Son v Willis\(^3\) Parker LJ suggested that even if misconduct could permit the cancellation of a 'satisfied equity', the degree of misconduct necessary must

\(^{1}\)Ibid.


\(^{3}\)[1986] 1 EGLR 62 at 63.
be greater than the degree of misconduct which would rule out the satisfaction of the 'inchoate equity'.

In *Williams v Staite* the Court of Appeal considered the defeasibility of a 'satisfied equity' of estoppel. Unfortunately, however, the judgments here were confusing and somewhat inconclusive. Some six years previously the defendants had been granted an occupational right by the County Court in satisfaction of an 'inchoate equity'. The County Court specified that the defendants could remain in the property for so long as they required it as their family home. The plaintiff, who later purchased the property with full knowledge of the defendants' 'satisfied equity', moved into the adjoining property. The defendants had always used the paddock behind the properties but the plaintiff claimed that the defendants' occupational right in their cottage did not extend to this land. He sent a letter of complaint to the defendants requesting them to cease using the paddock. The defendants' response was to build a stable and to culvert the stream in the paddock which they claimed was an integral part of their 'satisfied equity'. The defendants proceeded to threaten the plaintiff with 'bloody trouble' and blocked the entrance to the paddock in order to inconvenience the plaintiff's move into his property. The plaintiff finally brought an action for possession of the paddock and the defendants' cottage. He maintained that the defendants' conduct was so deplorable that they should forfeit their 'satisfied equity'.

[^5][1979] Ch 291.
In the Court of Appeal Lord Denning MR took the view that the 'satisfied equity' could be revoked but not in these circumstances. The defendants' conduct, "however reprehensible, was not such as to justify revocation of their licence to occupy the cottage as their home." In an exceptional case Lord Denning MR thought that an estoppel licence could be revoked but the defendants' conduct would have to be bad in the extreme before they could be turned out of their own home. They have nowhere else to go. The overwhelming concern of Lord Denning MR was to protect the occupation of the defendants' family home.

b) **Indefeasibility of the 'satisfied equity'**

Goff LJ, another member of the Court of Appeal, was prepared to accept that events supervening between the moment the 'inchoate equity' arose and the court hearing could ultimately affect the remedy granted. However, in the view of Goff LJ, once the remedy was granted "excessive user or bad behaviour towards the legal owner cannot bring the [satisfied] equity to an end or forfeit it."

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55 Ibid at 298.
56 Ibid.
57 Ibid at 299. See also Crabb v Arun DC [1976] Ch 179 at 199.
is brought before it whether there is any equity to restrain
the legal owner from exercising his legal right. He
suggested that where there had been impropriety in relation
to the property by the party possessing the 'equity of
estoppel', the court has to consider whether he comes with
clean hands to be allowed to plead his 'equity of estoppel'
as a defence.

Goff LJ declined to decide whether this argument was
correct but obiter thought that the argument was correct in
principle and indeed Cumming-Bruce LJ concurred on this
point. Counsel's argument was somewhat ambiguous. Counsel
did not specify whether he was referring to the 'inchoate
equity' or the 'satisfied equity'. In the context of
Williams v Staite it seems likely that he was referring to
the 'satisfied equity', an inference which is, if anything,
strengthened by Goff LJ's reference to a 'novel point'.
If counsel was suggesting that the recipient of a 'satisfied
equity' could effectively disentitle himself to that right,
Goff LJ's categorical denial that misconduct towards the
legal owner can never terminate a 'satisfied equity' may
require modification.

Counsel's 'novel point' merits careful analysis. The
legal owner who is precluded by the doctrine of proprietary
estoppel from exercising his legal rights cannot normally
return to court to reassert those rights once the court has
satisfied the 'inchoate equity'. The principle of res
judicata applies. He can return to court only if the
holder of the 'satisfied equity' begins to deal with the
property in a way which is contrary to the terms of the
court order. The mere existence of a court-ordered remedy
will be no defence to this allegation of infringement of the
legal owner's rights. In such circumstances there could be
no question of equitable relief for the estoppel claimant.
The court would have no need to decide whether the holder of
the 'satisfied equity' came before it with "clean hands". The
court would be able simply to grant an injunction
protecting the rights of the legal owner from further
infringement, thus leaving the representee's existing
'satisfied equity' intact.

It may be that in the Williams v Staite context the
rights of both the legal owner and the recipient of the
'satisfied equity' are so intertwined that the latter may be
able to plead his 'satisfied equity' as a partial defence to
any allegation that he has infringed the legal owner's
rights. In these circumstances the court may have
jurisdiction to decide whether the conduct of the recipient
of the 'satisfied equity' has disentitled him to equitable
relief. Even in these circumstances, however, it is
arguable that the recipient of the 'satisfied equity' should
only be disentitled to equitable relief if the legal owner's
rights cannot be protected in any other way. In this
limited situation, therefore, it appears possible that
misconduct towards the legal owner may bring a 'satisfied
equity' to an end.

58 Meagher, Gummow and Lehane, Equity Doctrines and Remedies,
d) Problems associated with defeasibility

If 'satisfied equities' can be extinguished albeit in an indirect manner, it may encourage litigation by legal owners in an effort to regain their lost rights. Purchasers of the property would have to "investigate not merely the circumstances creating the estoppel but also the relative nastiness of the parties since then - and that without knowing how nasty the [representees] would have to have been to justify termination of the licence."\(^5\)

Defeasibility of 'satisfied equities' intensifies the demand that the fee simple should be transferred in satisfaction of the 'inchoate equity'. However, provided that a long-term occupation licence is indefeasible, it may often be a more suitable remedy in the family context than an order for transfer of the fee simple. Such a remedy does justice between the parties. The representor (and his assignees) do not lose their legal rights completely\(^6\) whilst the representee is securely housed as indeed he has been led to expect.

Defeasibility of the 'satisfied equity' is an important issue in the familial context. It may be possible for

\(^5\)Anderson, (1979) 42 MLR 203 at 204. Anderson is critical of the decision in Williams v Staite on the ground that "since it is commonly thought that an estoppel creates a property interest...it seems to make no more sense to talk of its revocation than to imagine a trustee being able, in the absence of express power, to deprive a beneficiary of his interest on the ground that the beneficiary has been unpleasant to him." See also Bowie (1981) 11 VUWLR 63 at 78.

\(^6\)Unless the occupational right becomes a right by limitation, see Chapter 6.
those who occupy property as their family home to accept that, prior to the court hearing, their occupational security is at risk. However, once a remedy has been granted giving them life-long occupational rights, it may be less readily understood that these rights can be taken away.

IV ASSIGNABILITY OF THE 'EQUITY OF ESTOPPEL'

A The 'inchoate equity'

Although the consensus of legal opinion has been that 'inchoate equities' are not assignable, this conventional view has been disturbed in a number of cases. In Plimmer's case it was explicitly accepted by the Privy Council that the equity was assignable. The appellants in this case were Plimmer and his assignees. The latter were held to have acquired an assignable interest in the land prior to any court hearing. Sir Arthur Hobhouse held that

John Plimmer acquired and transferred to Jacob Joseph a perpetual right to occupy and use the land in question for the purposes of a jetty or wharf, ...the interest which the appellants had in the land on the 1st of September, 1880, was the term which then remained to them under the lease granted to them by Jacob Joseph.\(^{61}\)

\[^{61}\text{Plimmer v Mayor etc of Wellington (1884) 9 App Cas 699.}\]
The plaintiff in *Hamilton v Geraghty*\(^6\) similarly obtained judgment in his favour prior to any decision by any court as to what remedy should be granted to satisfy the 'inchoate equity'.

In *Proprietors of Hauhungaroa 2C Block v A-G*\(^6\) the New Zealand Court of Appeal held that in circumstances where the nature of the representation had led to a belief that the licence granted by the representor was to be permanently irrevocable, the representor lost his proprietary rights prior to any decision of the court. The licence granted by the representor was deemed to have derogated sufficiently from his proprietary rights to bring him within the statutory definition of a person who had suffered 'an alienation of land'.\(^6\) If the representor has suffered such an alienation, it must be arguable that the representee has gained an assignable proprietary interest.

In *Brikom Investments Ltd v Carr*\(^6\) Lord Denning MR suggested that the 'inchoate equity' was assignable.\(^6\) Lord Denning MR cited Coke on Littleton to the effect that, "every estoppel ought to be reciprocal...privies in estate, as the feoffee, lessee etc...shall be bound and take advantage of estoppel."\(^6\) The key question to be asked in considering assignability according to Lord Denning MR was

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\(^6\) (1901) 1 NSWSR (Eq.) 81.
\(^6\) [1973] 1 NZLR 389.
\(^6\) Maori Affairs Act 1953, s.2(1).
\(^6\) [1979] QB 467.
\(^6\) The Brikom case was argued *inter alia* on the basis of promissory estoppel although for the purposes of the present discussion this is not relevant.
\(^6\) Co Litt 352a cited in *Brikom Investments Ltd v Carr* [1979] QB 467 at 484; Pople, (1980) 130 NLJ 373 was critical of this interpretation of Lord Coke's statement.
whether in all the circumstances of the case it would be unjust and inequitable to allow the landlords to recover against the assignees when they could not have recovered against their original representees. Lord Denning MR held that because any of the assignees of the landlord’s reversionary interest would be bound by the equity, so should representees be able to assign of the benefit of the equity. The Master of the Rolls found, on the facts of the case, that it was plain that the landlords intended their representation to be for the benefit of all those from time to time holding the leases, realising that each in turn would tell his successor that the landlords were going to repair the roof at their own expense.

In the Australian case of Cameron v Murdoch68 the representees’ children were claiming the benefit of the ‘inchoate equity’. After the death of one of the representees, his children, as devisees under his will, maintained that their father had been led to believe that he would have the use of, occupation of, and ultimate ownership of, farmland owned by his brothers, the representors. The representees succeeded.69 The decision suggested that the ‘inchoate equity’ was a right to come before the court to ask for satisfaction of the equity rather than any particular substantive equitable proprietary interest. Nevertheless it was held to be an assignable interest which could be devised by will.70

68[1983] WAR 321 (affirmed by the Privy Council (1985-86) 63 ALR 575).
69Cf Jones (AE) v Jones (FW) [1977] 1 WLR 438.
70Cf Brickwood v Young (1905) 2 CLR 387 at 395, 399.
In all the cases where the courts have accepted the assignability of the 'inchoate equity', the representation has been overwhelmingly clear that a long-term, if not indeed perpetual, right was intended. In each case, moreover, substantial detrimental reliance had been undertaken by the representee. Furthermore, in most of the cases the land had not passed into the hands of an assignee of the representor. Unconscionability still fell to be judged, primarily as against the original representor rather than any third party.

B  The 'satisfied equity'

i) Legal or equitable proprietary interests

Once the court has granted a remedy in satisfaction of the 'inchoate equity', assignability will depend on the nature of that remedy. The grant of a legal interest in the land or a conventional equitable proprietary right will allow the representee to assign his satisfied equity.

ii) Grant of an occupation right

Occupational licences which are for life or are determinable upon the occurrence of a specified event are

72There remains little doubt that the rights of way granted in E R Ives Investment Ltd v High [1967] 2 QB 379, Ward v Kirkland [1967] 1 Ch 194 and Crabb v Arun DC [1976] Ch 179 could have been assigned together with the representee's interest in his own land. Lord Denning MR was explicit in E R Ives Investment Ltd v High [1967] 2 QB 379 at 394 that Mr High's right of way across the representor's land would benefit Mr High's successors in title.
generally accepted as being non-transferable equitable rights. In Jones v Jones Roskill LJ implied that Frederick Jones' right to remain undisturbed in his family home could not be assigned. Had the right been assignable, it could have protected his wife and family. Roskill LJ denied that the right could extend to these people. In the Australian case of Pearce v Pearce, however, suggest that an irrevocable occupational licence might be registrable as a caveat claiming an equitable proprietary interest. If such a licence is caveatable it may constitute a conventional proprietary interest in so far as only conventional proprietary interests are caveatable. Such interests would, in general, be regarded as assignable.

Professor Maudsley attempted to distinguish between positive and negative remedies in the context of occupational licences which are based on proprietary estoppel. He put forward the view that negative remedies simply prevent the legal owner from exercising his proprietary rights: in these circumstances the representee has nothing to assign. Maudsley thus claimed that the defendant in Inwards v Baker could not sell his occupational right; if he were to leave the premises, it

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74Ibid at 443; cf dicta of Lord Denning MR at 442.
75[1977] 1 NSWLR 170 at 173 (ante at 138 ).
76Pearce v Pearce was exceptional in that the circumstances clearly indicated that a beneficial trust interest had been intended by the parties but statute prevented such a claim. See also Majaraj v Chand [1986] 3 All ER 107.
would terminate. The estoppel claimant owns nothing new: he merely acquires a status of irremovability. 79

The English courts have not distinguished between positive and negative remedies in the context of occupational licences. Whether the satisfaction of an 'inchoate equity' takes a positive or a negative form, the 'satisfied equity' is not assignable.

The decision in Dodsworth v Dodsworth illustrates the reluctance of the Court of Appeal to grant any remedy which even resembles an assignable right. Russell LJ, giving the judgment of the court, declined to grant a remedy which might be caught by the provisions of the Settled Land Act 1925. 80 Although the tenant for life cannot assign his life interest he may sell the property or lease it. On the basis that the 1925 Act applied, the holder of the 'satisfied equity' would then be entitled to the income of the proceeds of sale or to the rents obtained from the lease. 81

In Griffiths v Williams 82 Goff LJ likewise propounded a solution which would not attract the provisions of the Settled Land Act 1925. He was equally concerned to grant a remedy which would avoid the provisions of the Rent Acts. 83

79 (1965) 81 LQR 183 at 184. Alder categorically asserts that the equity, whether satisfied in a negative or positive manner, is not assignable. See (1978) 41 MLR 208 at 209.

80 Dodsworth v Dodsworth (1973) 228 EG 1115 at 1117.

81 Ibid.

82 (1978) 248 EG 947.

83 Ibid at 950.
The latter permit what is effectively a form of limited statutory devolution to members of a deceased family.84

In *Pascoe v Turner*85 the defendant had expended money in reliance on a representation that the property would be transferred to her. Cumming-Bruce LJ gave the defendant a remedy of a fee simple interest in the representor’s property partly because he accepted that an occupational licence for life was not assignable. The latter form of remedy, he believed, would have been distinctly disadvantageous to the defendant because if she had to carry out further and more expensive repairs in the future "she may only be able to finance them by a loan but as a licensee she cannot charge the house."86

The family home has increasingly become the main source of financing of both business and family projects. Families retain their occupational rights. To deny assignability to the holders of the 'satisfied equity' where the 'satisfied equity' is in the form of a long-term occupational licence excludes them from a valuable source of income and prevents geographical mobility.

85 [1979] 1 WLR 431.
86 Ibid at 439. See also Vitoria, (1976) 126 NLJ 772, "the licensee may have gained but a pyrrhic victory if he cannot afterwards assign his interest."
V CAN THE 'EQUITY OF ESTOPPEL' BIND THIRD PARTIES

A Alienability of land

The central concern of land law since the end of the seventeenth century has been to ensure that land is freely alienable. In a free market economy where land is a marketable commodity, a constant tension has arisen between the necessity to protect purchasers from obtaining an encumbered title and the need to protect pre-existing rights from being defeated by a purchaser. An encumbered title impairs the marketability of land. Yet to deny a legal

87 Holdsworth in Historical Introduction to the Land Law, (1927), p 108, has explained that, "the common law came to regard the principle of freedom of alienation as a fundamental principle based upon public policy. We can find statements of this principle in Bracton in the thirteenth century, in Littleton in the fifteenth century and in Coke in the sixteenth century. No doubt the grounds which these three authorities assigned for this principle differed. Bracton would have said that they were contrary to the conception of dominium, and would also have emphasized the importance of breaking up the solidarity of the feudal group. Littleton would have emphasized the importance of maintaining the freedom of alienation because it was a principle of the common law. Coke would have had in view the attempt of the landowners to create perpetuities; and he emphasized the commercial advantage of a free circulation of property." 88 Lord Simon of Glaisdale has referred to the "dual nature of the matrimonial home. On the one hand, it is the seat of a family and as such its integrity is of great social importance. On the other hand, it is a capital asset which should be capable on requirement of being dealt with commercially with speed, economy and safety." Hansard, House of Lords Vol 437, (Session 1982-83) Col 640. The speeches in Williams and Glyns Bank v Boland [1981] AC 487 illustrate this tension. The Law Commission attempted to resolve the conflict of interests between conveyancers and holders of equitable rights in the family home (see Cmnd 8636, para 70). According to the Law Commission, "for over 150 years the policy of the law has been both to simplify conveyancing and to maintain the security of property interests on the one hand and the marketability of land on the other," Cmnd 8636 para 70. See also Royal Commission on Legal Services, (1979) Cmnd 7648 para 21.21. See also Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd [1949] 1 KB 322, 336-7 per Denning LJ; Law Com Working Paper No 37 (1971), para 7.
owner the ability to create rights which are transferable with the land on sale, may equally affect the marketability of land. This latter right of a legal owner may be as much a part of the exchange value of land as is alienability of the legal title itself. Any intervention by equity must take account of the tension between the interests of purchasers who require an unencumbered title and the interests of those who possess 'equities of estoppel'.

B The 'equity of estoppel' and third parties in unregistered land - The doctrine of notice

i) The 'inchoate equity'

If a third party has acquired the legal title to the representor's property, the doctrine of notice in unregistered land in the absence of any possible registration under the Land Charges Act 1972, governs the question of priorities.

Where an equitable interest in the property has been assigned by the representor, the maxim qui prior est tempore potior est jure has been held to govern the question of priority between the assignee and the holder of the 'inchoate equity'. The Vice-Chancellor in Rice v Rice 99

99It may be that equity will refuse to intervene in certain situations because equity tends towards the view that any act which makes land inalienable is in some sense unconscionable. Lord Upjohn in National Provincial Bank v Ainsworth [1965] AC 1175 at 1233 emphasised the importance of alienability of land in deciding that the deserted wife's equity was not binding on a third party purchaser. See also Hayton [1986] CLJ 394 at 398.
98(1854) 2 Drew 73, 61 ER 646.
explained that this statement was an over-simplification. In particular, he stated that "as between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity." He also stated, however, that priority in time is a residual ground of preference last resorted to and he listed the following points to which the court must direct its attention.

the nature and condition of their respective equitable interests, the circumstances and manner of their acquisition and the whole conduct of each party with respect thereto. And in examining into these points it must apply the test not of any technical rule or any rule of partial application but the same broad principle of right and justice which a court of equity applies universally in deciding upon contested rights.\(^1\)

Three categories of cases may be discerned in which the court has held that an 'inchoate equity' can bind the representor's assignees prior to satisfaction by a court-ordered remedy. The categories are not entirely unconnected but categorisation may help to predict the circumstances in which the estoppel claimant will be granted protection.

\(^1\)Ibid at 648.
(a) Where the representee believes that he has acquired permanent rights

The first category consists of situations where the representation and the nature of the detrimental reliance can only be understood as giving rise to permanent rights which bear a close resemblance to accepted proprietary rights. The third party in these cases has always been a stranger to the representee. He may also have purchased either expressly or impliedly subject to the rights of the representee. At present there are no 'familial cases' in this category. One must therefore turn to the non-familial cases for guidance as to the approach which the court might take in the familial context.

This category of case is well illustrated in Duke of Beaufort v Patrick.\textsuperscript{92} Here the representee had constructed a canal through the representor's land. Sir John Romilly MR held that the assignee of the representor had "bought with the knowledge, and subject to the implied condition that the canal was to remain, and was to be used for the benefit of the public for ever thereafter."\textsuperscript{93} Neither the assignee nor anyone else obtaining title through him could extinguish the representee's 'inchoate equity'.

In similar circumstances in E R Ives Investment Ltd v High\textsuperscript{94} it was held that a permanent proprietary right had been created in favour of the representee. The

\textsuperscript{92}(1853) 17 Beav 60, 51 ER 954.
\textsuperscript{93}(1853) 17 Beav 60 at 79, 51 ER 954 at 961.
\textsuperscript{94}[1967] 2 QB 379.
representors included details of the right in the particulars of sale of their property. The rights supposedly created appeared to be akin to an easement permitting the representee to pass over the representor's yard with or without vehicles. Lord Denning MR held that the 'inchoate equity' bound the successors in title of the representor. In these circumstances the 'inchoate equity' can perhaps be analysed as suspending the legal owner's rights until the court hearing. Whatever the court decrees determines retrospectively what rights the assignee has acquired. Such an approach can only be justified when the representation itself implies that a permanent right is intended and the third party has the clearest knowledge that this was so.

In Ward v Kirkland Ungoed-Thomas J held that where expenditure by the representee on the insertion of drains had been made with the full knowledge of the representor that there was no time limitation, permanent rights accrued which were potentially binding on third parties. The case illustrates how the 'inchoate equity' can have proprietary qualities for one purpose but not for another. The representor's assignee had urged the court that if the 'inchoate equity' was to be binding on third parties, the representor, as rector of the local church, had required the necessary consents of his diocese in accordance with statute, before making the relevant representations. Ungoed-Thomas J rejected the argument by explaining that

95See Bailey, Estoppel and Registration of Title, [1983] Conv 99 at 100.
97Ecclesiastical Leasing Act 1858; Glebe Lands Act 1888.
such an equity may, in effect, take effect as an interest in property, but that is merely the consequence of the court's action in recognizing an equity arising by reason of it being unconscionable in the circumstances to do otherwise.98

Thus although the 'inchoate equity' had no proprietary qualities for the purposes of a disposition by the representor until after the court recognised it, for the purposes of binding third parties purchasers from the representor the 'inchoate equity' appeared to have assumed proprietary qualities even prior to the court hearing.

The third party assignee in Ward v Kirkland99 had the clearest possible notice of the representor's action as she had been the tenant of the representor's property prior to purchasing the legal interest from him. Furthermore the third party would suffer no damage if the 'inchoate equity' held by the representee were allowed to prevail.100

(b) The 'greater hardship' principle

In the second category of cases where the representor's assignee has been held bound by the 'inchoate equity', the

100 In Ward v Kirkland the court considered that the representee's further activities on the land were not covered by the representation and therefore constituted a trespass. However, an injunction was refused and merely minimal damages were awarded against the representee.
courts appear to have weighed up the relative burden which would fall on either party as a result of the decision. These cases seem to be governed by a 'greater hardship' principle applies rather than by any strict application of the doctrine of notice.

In Re Sharpe (A Bankrupt)101 Browne-Wilkinson J alluded to the difficulties facing the court in circumstances where the representor's property had been assigned. Here the trustee in bankruptcy had acquired the representor's property with the result that he took the property subject to all the equitable rights affecting it. He had then contracted to sell the property to a third party. Browne-Wilkinson J expressed his concern for the third party when he said that

as an antidote to the over-indulgence of sympathy which everyone must feel for [the representee], I put on record that the purchaser's plight is little better. He apparently had no reason to suspect that there was any flaw in the trustee's right to sell with vacant possession. As a result of the trustee's inability to complete the sale he cannot open the business he intended and he and his wife and two children are being forced to live in a small motorized caravan parked in various places on or near Hampstead Heath.102

102Ibid at 224.
The purchaser was not a party to the action, and it is therefore a matter of mere speculation whether he would ultimately have been bound by the representee's interest. Browne-Wilkinson J complicated the decision by holding that the representee had an interest behind a constructive trust which by its very nature pre-dated the court hearing. It is unlikely that the purchaser had actual notice of the representee's interest as neither the trustee in bankruptcy nor the representee knew the nature of the right claimed. Browne-Wilkinson J implied that only actual notice could bind a third party in these circumstances.\(^\text{103}\)

Until recently it was accepted that constructive notice was sufficient to bind third party assignees.\(^\text{104}\) Thus a purchaser is expected to inspect the land and if any person other than the vendor is in occupation make inquiry of that person as to his rights. Whether the court imposes actual or constructive notice on a third party is in reality a form of the 'greater hardship' principle.\(^\text{105}\)

\(^{103}\)Ibid.

\(^{104}\)See, e.g., Jones v Smith (1841) 1 Hare 43 at 55, 66 ER 943; West v Reid (1843) 2 Hare 249 at 257, 67 ER 104 at 107; Hodgson v Marks [1971] Ch 892 at 914 (decision on registered land but the doctrine of notice in unregistered land was explained).

\(^{105}\)See, e.g., Hunt v Luck [1901] 1 Ch 45 per Farwell J at 48. "This doctrine of constructive notice imputing as it does knowledge which the person affected does not actually possess is one which the courts of late years have been unwilling to extend. I am not referring to cases where a man wilfully shuts his eyes so as to avoid notice, but to cases like the present where honest men are affected by knowledge which everyone admits they did not in fact possess...even assuming both parties to the action to be equally innocent, the man who has been swindled by too great confidence in his own agent has surely less claim to the assistance of a court of equity than a purchaser for value who gets the legal estate and pays his money without notice. Granted that the vendor has every reason to believe his
Recently a subtle reversal of the doctrine of notice has been used to give effect to the 'greater hardship' principle. Where the holder of an 'inchoate equity' who is in actual occupation of the property has remained silent about the existence of his right, he has been deemed to have postponed his 'inchoate equity' to that of any purchaser. At first instance in *Bristol & West Building Society v Henning* it was held that an 'inchoate equity' which had arisen because the representor had encouraged his *de facto* wife to believe that she had an interest in the property took priority over the representor's subsequent mortgage of the property to the building society. The Court of Appeal allowed the building society's appeal but did not overturn that part of the judgment which ruled that the 'inchoate equity' gave rise to a proprietary interest prior to its satisfaction. Browne-Wilkinson LJ explicitly refrained from deciding that point. He held that the *de facto* wife who had notice of the mortgage had, by her silence, represented to the building society that its charge took priority over any equitable proprietary interest she might have. The building society was, therefore, exempted from enquiring into the nature of the defendant's rights. Browne-Wilkinson LJ's main concern was that the defendant should not obtain an uncovenanted benefit at the expense of the building society. To permit otherwise could lead to a refusal by lending institutions to finance the purchase of

agent an honest man, still if he is mistaken and trusts a rogue, he rather than the purchaser for value without notice, who is misled by his having so trusted ought to bear the burden."

family homes. Once again the alienability of land was of
crucial importance to the decision - more important than the
preservation of the family home.¹⁰⁷

In the New Zealand case of Andrews v Colonial Mutual
Life Assurance Society¹⁰⁸ the representor made an assignment
of the legal title to a third party prior to the
satisfaction of the 'inchoate equity' by the court. Although the dispute arose between the original representor
and representee, Barker J alluded to the situation of the
third party purchaser, who was not a party to the action.
Barker J suggested that the third party might confront the
representor with a claim in damages for remaining silent
about the representee's 'inchoate equity', but refused to
allow this possibility to influence his decision to satisfy
the 'inchoate equity' with the grant of a lease.¹⁰⁹ The
implication of this statement was that the plaintiff's
'inchoate equity' (which had retrospectively been given the
status of a legal proprietary right) would have bound third
parties even prior to the court hearing. To hold that the
'inchoate equity' was binding on third parties in the
Andrews case would have done little harm to the
representor's assignee; he would simply receive the rent

¹⁰⁷ See also the view of Robert Reid QC, the Legal
Implications of Williams & Glyns Bank Ltd v Boland p 61 in
Gauer, Report of Conference in Problems of Conflict of
Interest in the Matrimonial Home, (1981). See also Frank
Kraus' comments in the same report p 47. See also
Paddington Building Society v Mendelsohn (1985) 50 P & CR
244; (1985) 49 Conv (NS) 55. The High Court of Northern
Ireland has accepted that this approach is correct in Ulster
Bank Ltd v Shanks [1982] NI 143 at 150. See also Abigail v
Lepin [1934] AC 491; Midland Bank Ltd v Farmpride
Hatcheries Ltd (1981) EG 493; Winkworth v Edward Baron
¹⁰⁸[1982] 2 NZLR 556.
¹⁰⁹ Ibid at 570.
due under the lease. Davies\textsuperscript{110} has suggested that "it is not a question of making an ascertained right bind a third party automatically but of measuring the degree of unconscionability afresh" when considering whether third parties should be bound.

(c) \textit{Where the representor’s assignee is an agent of the representor}

The third category of cases where an 'inchoate equity' has been held to bind third parties arises where the assignee has acquired the interest of the representor primarily in some capacity as agent or nominee of the representor. Where, for instance, the assignee is a personal representative of the representor he can of course be in no better position than the representor himself. The assignee here may also be entitled to a share under the representor’s estate.

The 'familial cases' fall mainly into this third category. In the majority of these situations the assignee is related in some way to the representee. In \textit{Inwards v Baker},\textsuperscript{111} for example, the plaintiffs were held bound by an 'inchoate equity'. The plaintiffs were the trustees of the now deceased representor and beneficiaries under his will. To permit them to oust the representee (their step-brother)
in circumstances where the testator could not have done so would have been grossly unconscionable.\textsuperscript{112}

In the 'familial cases' the question of what constitutes notice to the third party may be less stringent than in a non-familial situation. In the Australian case of \textit{Cameron v Murdoch}\textsuperscript{113} Brinsden J took a robust approach to the question of whether the assignees knew of the representations which had been made by their assignors and were thus fixed with knowledge of the 'inchoate equity'. The assignees were eight members of a large extended family with a somewhat hazy knowledge of the representations. Although one of the assignees was a personal representative as well as a beneficiary the other assignees were not personal representatives. Notice should therefore have been a relevant issue but the court did not question the extent of their knowledge of the 'inchoate equity'. They admitted that they had no specific knowledge of the 'inchoate equity' but had heard rumours.\textsuperscript{114} This was nevertheless deemed to be sufficient notice of the 'inchoate equity' raised on the facts of the case.

\textit{ii) The 'satisfied equity'}

Once the 'inchoate equity' has been satisfied by the award of a court-ordered remedy, the normal rules in unregistered land apply in determining priority between a third party who acquires title and the holder of the 'satisfied equity'. Legal rights will clearly bind any

\textsuperscript{112}Ibid at 217.
\textsuperscript{113}[1983] \textit{WAR} 321.
\textsuperscript{114}Ibid at 355.
future purchasers of the property. Where equitable proprietary rights or long-term occupation rights have been granted, there appears to be a general acceptance on the basis of *Inwards v Baker*\(^ {115}\) that the 'satisfied equity' will bind third parties who have actual or constructive notice.\(^ {116}\)

Where a more idiosyncratic remedy has been granted, the courts may not necessarily hold third parties with notice to be bound. In *Vinden v Vinden*\(^ {117}\) the plaintiff was awarded an occupational right for so long as he continued to pay the agreed outgoings on his father's property. Such an open-ended remedy may not necessarily bind third party purchasers; it has the appearance of a personal rather than a proprietary right. It may be that in circumstances similar to *Vinden v Vinden* the courts would hold that a particularly stringent form of notice should be required in order to bind a third party.

In *Maharaj v Chand*\(^ {118}\) the Judicial Committee of the Privy Council ruled, in a situation where no third party was involved, that a 'satisfied equity' in the form of a long-term occupational licence was a purely personal right not binding on third parties.\(^ {119}\) Sir Robin Cooke held therefore that this long-term occupational licence was not a dealing with land for the purposes of Section 12a of the

\(^{115}\)[1965] 2 QB 29.
\(^{116}\)Ibid at 37.
\(^{117}\)[1982] 1 NSWLR 618.
\(^{118}\)[1986] 3 All ER 107.
\(^{119}\)Ibid at 110.
Fiji Native Land Trust Act.\textsuperscript{120} The Privy Council acknowledged that the plaintiff had a duty to house the defendant and their three children even though he had since married and created a new family. Had the licence been held to be binding on third parties it would have been an illegal dealing under Section 12a of the Fiji Native Land Trust Act.\textsuperscript{121} The defendant would have been left homeless and the plaintiff would have received the benefit of a property improved by the defendant.

iii) Registration under the Land Charges Act 1972

The doctrine of notice was considerably modified by the English property legislation of 1925, which confirmed a principle of registration for certain equitable proprietary interests in land. Professor Wade has explained that the policy of the 1925 legislation embraced

a shift from a moral to an a-moral basis. Its justification was that the doctrines of constructive and imputed notice had been over-refined, to such an extent that it had become dangerous to employ in a purchase, a solicitor of good practice and reputation.\textsuperscript{122}

\textsuperscript{120}The Act makes illegal any dealing with native land vested in the Native Land Trust Board without the Board's consent.
\textsuperscript{121}See also Kulamma v Manadon [1968] AC 1062.
\textsuperscript{122}[1956] CLJ 216 at 227.
a) The 'inchoate equity'

1) Section 2 of the Land Charges Act 1972

Section 2 of the Land Charges Act 1972 lists those interests which may be registered as land charges in unregistered land. Section 198 (1) of the Law of Property Act 1925 states that registration of any land charge "shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected." In spite of this change in policy after 1925 Thompson has suggested that "throughout the period when registration statutes have been in force...a tension has existed between literal compliance with them on the one hand, and seeking to read into them general equitable principles on the other."123 This tension continues to attract the attention of the judiciary. In the light of the House of Lords' ruling in Midland Bank Trust Co Ltd v Green124 it is most unlikely that any gloss can be put upon section 199(1) of the Law of Property Act 1925 which renders any registrable interest, under what is now the Land Charges Act 1972, void for non-registration against certain categories of purchaser. In giving judgment in Midland Bank Trust Co Ltd v Green125 Lord Wilberforce rejected the introduction of the requirement of good faith on the part of any purchaser as it "would bring with it the necessity of inquiring into the purchaser's motives and state of mind". A purchaser may take advantage of a situation, which the law has provided

125 Ibid.
and the addition of a profit motive cannot create an absence of good faith. Any advantage gained by a purchaser seems necessarily to involve a disadvantage for another however to make the validity of the purchase depend upon which aspect of the transaction was prevalent in the purchaser's mind seems to create distinctions equally difficult to analyse in law as in fact: avarice and malice may be distinct sins, but in human conduct they are liable to be intertwined.126

This approach must be contrasted with that of Lord Hardwicke in the Le Neve v Le Neve127 who viewed earlier registration Acts as enactments designed to prevent the mischief of secret conveyances. Where the transaction was evident to a subsequent purchaser he stated that "the taking of a legal estate after notice of a prior right makes a person a mala fide purchaser...this is a species of fraud, and dolus malus itself."128 It is thus quite clear that such registration Acts were not intended to protect fraudulent transactions.

There is substantial authority for the view that the 'inchoate equity' is not registrable under the Land Charges Act 1972. The question whether the 'inchoate equity' is registrable arose, for instance, in the Court of Appeal hearing in National Provincial Bank Ltd v Hastings Car Mart

126Ibid at 530.
127(1748) 3 Atk 646, 26 ER 1172 at 1174 ff.
128Ibid.
In this case Lord Denning MR, referring to the 'inchoate equity' of estoppel, maintained that it was incapable of registration under the Land Charges Act precisely because it was not a proprietary right. Lord Denning's view was not, however, without its difficulties and must always be considered in the context of the case in question. The deserted wife in *National Provincial Bank Ltd v Hastings Car Mart Ltd* had an 'equity' to live in her husband's house. This 'equity' was clearly not a proprietary right. In order to bring it within Section 70(1)(g), Lord Denning MR had to find some way of demonstrating that the section includes equities of a non-proprietary nature. If the 'inchoate equity' of proprietary estoppel were held to be a non-proprietary right which nevertheless bound a purchaser of unregistered land who had notice, then, by analogy the deserted wife's 'equity' might be held to bind a similar purchaser of unregistered land and moreover to be an overriding interest in registered land. The House of Lords overruled the decision in the Court of Appeal and held that the deserted wife's equity was a mere personal right and could not therefore bind third parties. In *Inwards v Baker* Lord Denning MR was bound by the decision of the House of Lords in *National Provincial Bank Ltd v Ainsworth*. If the 'inchoate equity' of estoppel in *Inwards v Baker* was to be capable of binding third parties it could not be held to be a mere personal equity. Lord Denning MR therefore suggested that an 'inchoate equity' had at least some

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131[1965] AC 1175.
proprietary quality and could therefore bind third parties. Registration was not a relevant issue here.

In E R Ives Investment Ltd v High\textsuperscript{133} the Court of Appeal gave further consideration to whether an 'inchoate equity' of estoppel could be registered under the Land Charges Act. Here the defendant had expended money in the belief that he had been granted an easement over the land of the plaintiff's predecessor in title. In return the defendant had agreed to allow the foundations of the plaintiff's property to encroach on to his land. Lord Denning MR rejected counsel's submission that the defendant's 'inchoate equity' constituted any form of estate contract.\textsuperscript{134} On the instant facts he held that there was no contract to convey a legal estate. Furthermore, the right was not registrable as an 'equitable easement'.

Lord Denning MR maintained that an 'equitable easement' is a category of proprietary interest in land such as would have existed before 1926 but which would not have been registrable under the Land Charges Act 1925, s 10(1) (now the Land Charges Act 1972 s 2).

\textsuperscript{133} [1967] 2 QB 379.

\textsuperscript{134} See the Land Charges Act, 1925, s 10(1) (now the Land Charges Act 1972 s 2).
bind successors, but takes effect in equity without registration.\(^{135}\)

To find that the representee's 'inchoate equity' was capable of registration but unregistered would have enabled the owners of the property to "perpetrate the grossest injustice" for this reason Lord Denning MR was not prepared to make that finding. Any other view would have inhibited the equitable jurisdiction to prevent unconscionable dealings.

In *E R Ives Investment Ltd v High*\(^{136}\) Danckwerts LJ held that a binding oral contract had been concluded between the defendant and the plaintiff's predecessor in title. According to what is now section 4(6) of the Land Charges Act 1972, failure to register a class C (iv) or a class D (iii) land charge makes the relevant interest void as against a purchaser for money or moneys worth of a legal estate in the land charged with it. However, the defendant's 'inchoate equity' was additional to his equitable rights under the oral contract. Danckwerts LJ held that the 'inchoate equity' was not a registrable charge, and section 199 of the Law of Property Act, 1925, therefore had no application.\(^{137}\)

\(^{135}\) *E R Ives Investment Ltd v High* [1967] 2 QB 379 at 394. See Davidge, (1937) 53 LQR 259. Compare the decision reached in registered land in *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204 at 220 per Scott J.

\(^{136}\) *Winn LJ* ([1967] 2 QB 379 at 405) shared this view. He said "the statute has no impact upon an estoppel, nor do I think that an estoppel could be registrable under its provisions." See also Wilkinson (1967) 30 MLR 580; Todd, [1981] Conv 347.
An obvious policy factor may have led the courts to hold that the 'inchoate equity' is not capable of registration. The 'inchoate equity' normally arises from informal arrangements by people who are generally unaccustomed to seeking legal advice. To hold 'inchoate equities' to be capable of registration would militate harshly against vulnerable and uninformed persons. However, the exclusion of the 'inchoate equity' from the registration system undoubtedly leaves 'inchoate equities' at risk of being defeated by the bona fide purchaser for value without notice. Such a risk will be heavily accentuated where the owner of the 'inchoate equity' is not himself in actual occupation.

ii) Registration of a lis pendens

Section 5(1) of the Land Charges Act 1972 provides for the registration of a *lis pendens* (or pending land action). If the 'inchoate equity' is indeed capable of registration, as a *lis pendens*, such a registration places on record that the representee is seeking to have his 'inchoate equity' satisfied by remedy of the court. Registration of a *lis pendens* will fix any purchaser with...

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139 More recently the Court of Appeal implied in *Bristol and West Building Society v Henning* [1985] 1 WLR 778 that an estoppel interest is not registrable under the Land Charges Act 1972. The judge at first instance had ruled that the interest was unregistrable and the Court of Appeal left that part of the decision intact. See also Todd, [1985] 49 Conv 361.


140 Section 17(1) of the Act defines a pending land action, as "any action or proceeding pending in court relating to land or any interest in or charge on land."
notice of the representee's action to have his 'inchoate

equity' satisfied. According to section 5(7) of the Land

Charges Act 1972 a purchaser with express notice of the

pending action will be bound even if the pending land action

is not registered; constructive notice is not sufficient.

There are no reported cases concerning the

registrability of an 'inchoate equity' as a lis pendens and

it remains an open question whether registration is

possible. It may, however, be difficult to bring a claim

to satisfaction of an 'inchoate equity' within the
definition of "any action relating to land or any interest

or charge on land." In Re Barned's Banking Co Ltd

Cairns LJ defined the lis pendens as a technical expression

which always implies a claim of right, or a claim to charge

some specific property.\textsuperscript{142}

In Whittingham v Whittingham\textsuperscript{143} Stamp LJ suggested that

there was no general rule for determining what actions fall

within the definition of a lis pendens. Stamp LJ thought

that each case must be looked at in terms of the definition

"some assistance in answering the question will no doubt be

obtained by considering whether in the absence of

registration a purchaser or mortgagee might obtain a title

to the land as a bona fide purchaser without notice of, and

so defeat, the plaintiff's claim."\textsuperscript{144}

\textsuperscript{141}(1867) 2 Ch App 171.

\textsuperscript{142}Ibid at 178; See also Heywood v BDC Properties Ltd (No

2) [1964] 1 All ER 180; Taylor v Taylor [1968] 1 All ER

843.

\textsuperscript{143}[1978] 3 All ER 805.

\textsuperscript{144}Ibid at 815.
Where the holder of the 'inchoate equity' claims some form of proprietary interest in the property as a remedy, the 'inchoate equity' is likely to be held to be registrable as a *lis pendens*. Where the claimant demands an occupation right or compensation for expenditure, it is somewhat less certain that his 'inchoate equity' will be held to be capable of registration as a *lis pendens*. Because the courts may satisfy the 'inchoate equity' in a totally flexible manner, it may not, however, be entirely logical to differentiate in this way between claims involving proprietary rights and claims involving mere occupational rights or compensation for expenditure.

b) The 'satisfied equity'

There is no evidence to suggest that the satisfied equity is in general registrable under the Land Charges Act 1972. Something obviously depends on the precise form of the court-ordered remedy. For instance, the English courts have been fairly reluctant to order a lien when granting financial remedies in satisfaction of a claimant's 'inchoate equity'. However, if a lien were ordered by the court, it is possible that the lien is registrable under section 2(4) of the Land Charges Act 1972. It has been

144 Cf Hamilton v Geraghty (1901) 1 NSWSR (Eq) 81; *In re Whitehead* [1948] NZLR 1066; *Pearce v Pearce* [1977] 1 NSWLR 170; *Morris v Morris* [1982] 1 NSWLR 61 (ante at ).

145 Section 2(4) of the Act defines the Class C (iii) land charge as "a general equitable charge is any equitable charge which —

a) is not secured by a deposit of documents relating to the legal estate affected; and

b) does not arise or affect an interest arising under a trust for sale or a settlement; and

c) is not included in any class of land charge."
suggested that there is considerable uncertainty as to what the category of general equitable charge includes. According to Wade a lien is probably included in the category but he has argued that "this penumbra of uncertainty should have no place in the system and occasional equities would be better left to the tenderer mercies of the doctrine of notice, which is at least a principle of equity in the ethical as well as in the technical sense."  

An equitable lien imposes a charge upon the representor's property until such time as the representee has been compensated. The charge is ultimately enforceable by a court order for sale unless when the remedy is granted the court decrees that the lien may only be enforced when the representor chooses to sell or dies.

The main advantage obtained by registration of a representee's lien would be that the representee could thereby ensure priority for his charge over any later charge of the same property.

\[147\] Wade, [1956] CLJ 216.
\[148\] Ibid at 225. The Lord Chancellor's Committee on Land Charges under Mr Justice Roxburgh (Cmd 9825 July 1956 para 13) recommended the abolition of the class C (iii) general equitable charge.
C Registered land

i) The policy behind the Land Registration Act 1925

The policy behind the Land Registration Act 1925 was to simplify and cheapen conveyancing. More particularly, the purpose of the new system was to free the purchaser from the hazards of notice - real or constructive which arise in unregistered land. It was the original intention that, with limited exceptions, only those equitable rights entered on the register would be binding on purchasers.152

There was no intention in the 1925 legislation that equitable rights should receive protection only in the context of unregistered land and not in registered land. The means of protection were simply said to be different.153 It is inevitable that decisions concerning the protection of an equitable right in unregistered land have often considered whether the equitable right has also been granted protection in registered land.154 Increasingly, however, very real differences concerning the protection of equitable rights are becoming apparent as between registered and unregistered land.155

152 Williams & Glyn's Bank Ltd v Boland [1981] AC 487 at 503, 504.
153 Lord Wilberforce stressed this point in National Provincial Bank Ltd v Ainsworth [1965] AC 1175 at 1261. See Ruoff and Roper, Registered Conveyancing, p 100. See also Williams & Glyns Bank Ltd v Boland [1981] AC 487 at 504
Per Lord Wilberforce.
154 See Poster v Slough Estates Ltd [1968] 1 Ch 495 at 507
Per Cross J.
155 The Law Commission has considered these discrepancies between registered and unregistered land (see Cmnd 8636 para 18, 19 p 10). See now Law Com No 158, Property Law Third Report on Land Registration (31 March 1987), para 2.5.
ii) Registration of the 'inchoate equity'

a) Entry of a caution

The Land Registration Act 1925 provides for minor interests in land to be registered in order to ensure their protection. According to a former Chief Land Registrar, 'inchoate equities' may be entered on the register by way of a caution under section 53 or section 54 of the Act. The former section is concerned with land liable to be registered whilst the latter refers to land already registered. Both sections permit a claimant of an equitable right to make a statutory declaration supporting his claim. The land certificate or the permission of the legal title holder is not required for the lodging of a caution. For this reason the entry of a caution in respect of 'inchoate equities' may be regarded as a hostile act towards the representor and may deter familial members from registering any 'inchoate equity' which they might have. It is not intended as more than a temporary holding device, and in that sense lodging a caution would seem to be a particularly appropriate procedure for protecting the 'inchoate equity'. A cautioner does not have to establish his rights as proprietary rights at the date of entry of the caution. The entry simply permits his case to be examined before the registrar before any transfer of title by the registered proprietor is allowed.

156 See Ruoff and Roper, Registered Conveyancing, (1972 3rd Ed) p 768.
If a person enters a caution without reasonable cause, an action in damages may be brought against him by any person who suffers loss as a result of the caution. If the claim to have the 'inchoate equity' satisfied is subsequently rejected by the court, the cautioner may be at risk of such an action being brought against himself. Furthermore, the legal proprietor may seek a remedy by way of motion to have the caution vacated. In The Rawlplug Co Ltd v Kamvale Properties Ltd Megarry J favoured the robust approach that "if there is a fair, arguable case in support of the registration the matter must stand over until the trial. But if though not cloudless, the sky had in it no more than a cloud the size of a man's hand, [he] would clear the register." This means that the equitable claimant could be prejudiced in any later hearing to determine the satisfaction of his 'inchoate equity' if his caution were removed from the register. Between the clearing of the register and the court hearing the registered proprietor would be able to dispose of the land. Whether a caution which has been removed from the register can give rise to an overriding interest is uncertain. The question is discussed later in the chapter.

It has been suggested by certain commentators that the 'inchoate equity' cannot be entered as a caution because only those rights which are registrable as land charges in unregistered land come into the category of a cautionable

159 (1968) 20 P & C R 32.
160 Ibid at 40
161 See post at 214
However, the more conventional view is that the 'inchoate equity' is still protectible by the entry of a caution even though it is not registrable as a land charge in the analogous context in unregistered land. In *Poster v Slough Estates Ltd* Cross J drew the attention of the Law Commission to the consequences of accepting that certain rights are not capable of registration in registered land. He explained that in unregistered land the doctrine of notice could be called into play to determine a fair result in any particular case of an unregistrable equitable right. The general principle of the Land Registration Act is however that a purchaser of registered interests takes free from any unprotected rights which are not 'overriding interests'. Equitable rights may not always be overriding interests, therefore if a right is not capable of registration there is no way of making it bind a purchaser.

The Law Commission responded with the recommendation that protection of equitable rights in registered land should be effected by entering a caution or notice. Pending the registration of rights by a person who under the Law Commission's proposals was entitled to apply for registration, such rights should, according to the Commission, remain enforceable in accordance with the principles laid down in *E R Ives Investment Ltd v High*.  

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162 See Vitoria, (1976) 126 NLJ 772.  
164 [1968] 1 Ch 495.  
165 Ibid at 507.  
The Commission accepted that its proposal would bring about a limited exception to the general principle of the 1925 property legislation, which required notice to be derived exclusively from the register, but justified this on the grounds that the existence of such equitable rights had probably not been considered by Parliament in 1925.

The Law Commission's concern in this respect was primarily with the type of equitable easements outlined in *Poster v Slough Estates Ltd.* The obiter dicta of Cross J in that case will not generally apply to equitable rights arising from proprietary estoppel. At least in the 'familial cases', claimants of these rights will normally be in actual occupation and may be able to claim an overriding interest. However, if the representee is not in actual occupation of the property, he will not be able to claim an overriding interest.

b) Entry of notice

Where a more permanent protection is desired, entry of a 'notice' may be possible. Section 49(1)(f) of the Land Registration Act 1925 provides for the entry of a 'notice' in respect of "creditor's notices and any other right, interest, or claim which it may be deemed expedient to protect by notice instead of by caution, inhibition or restriction." The wording seems wide enough to cover

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169 Ibid.
170 [1968] 1 Ch 495.
'inchoate equities'. One obstacle which may prevent the entry of a 'notice' is that the entry of a 'notice' requires the assistance of the registered proprietor, the Land Certificate must be produced. If the certificate is already in the Land Registry the registered proprietor must be given the opportunity to object.171

c) Overriding interests

Failure to register the equity under the provisions of the Land Registration Act 1925 does not necessarily defeat it, if the property is transferred by the representor. Even if unprotected the right may still receive protection if they can be brought within the provisions of section 70(1)(g) of the Land Registration Act 1925.172

Parliament never intended in 1925 that all rights relating to land should be capable of registration.173 It

172See Williams & Glyn's Bank Ltd v Boland [1981] AC 487 at 508, 511, 512. The section provides that "All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may for the time being subsisting in reference thereto". Section 3 (xvi) of the Land Registration Act 1925 defines overriding interests as "all the incumbrances, interest, rights and powers not entered on the register but subject to which registered dispositions are by this [Land Registration] Act to take effect, and in regard to land registered at the commencement of this Act include the matters which are by enactment repealed by this Act declared not to be incumbrances.
173Para 63 of the Royal Commission report in 1857 on registration of land stated that "The register will be a substitute for the documentary or parchment title. But the registered ownership...will remain subject, as the fee simple now is...to such other rights as are not usually included in the abstract of title...These rights which are commonly evidenced by known usage or continued enjoyment or may be ascertained on the spot by inspection or inquiry; and the title to them is generally so independent of the
is a late twentieth-century obsession which demands an all-embracing system of registration. The existence of a limited number of overriding interests was considered to be essential. Without this certain rights and interests would be deprived of recognition although if the title to the same land was not registered, their existence would be undoubted. This difference would cause hardship as well as confusion and would not be tolerated by the public which the registration system is intended to serve.

It remained not entirely clear until the decision in Williams & Glyn's Bank Ltd v Boland whether it had been the intention of the legislators to permit rights capable of registration but unregistered in registered land to rank as overriding interests. The House of Lords in that case documentary title to the property that they will necessarily form a partial exception to that which will constitute the registered ownership." See also Ruoff and Roper, Registered Conveyancing, (1972 3rd Ed) pp 100 ff. See inter alia Hansard Vol 460 (Session 1985-86) Col 1273 per Lord Hailsham; Law Commission draft report on Land Registration 8 November 1984, Introduction para 5; Celsteel Ltd v Alton House Ltd [1985] 1 WLR 204; Hayton, Registered Land, (1981 3rd Ed) p 77. Even these ardent supporters of registration of equitable interests admit that a few limited exceptions to registration which remain. Ruoff and Roper, Registered Conveyancing, (1972 3rd Ed), pp 100, 101. [1981] AC 487. Although not decided, the point was implicit in such decisions as London & Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd [1971] 1 All ER 766 that unregistered but registrable minor interests can take effect as overriding interests. See also Strand Securities Ltd v Caswell [1965] Ch 959; Webb v Pollmount Ltd [1966] Ch 584; Grace Rymer Investments Ltd v Waite [1958] Ch 831; Hodgson v Marks [1971] Ch 892.
confirmed the dual status of minor interests and overriding interests. Lord Scarman explained that a right of occupation if unaccompanied by actual occupation, is clearly within the definition of minor interests: in section 3 (xv) of the 1925 Act. It is not itself an overriding interest, but once it is associated with actual occupation "the association is an overriding interest."177

The decision in Williams & Glyn's Bank Ltd v Boland is of crucial importance in the familial context. Members of families are highly unlikely to register their 'inchoate equities' prior to any court hearing, even if they do so after such a hearing. Section 70(1)(g) of the Land Registration Act 1925 gives claimants of equitable rights, in effect, a second chance to protect their rights if they have failed to register them. The overriding interests in section 70(1)(g) comprise

the rights of every person in actual occupation of the land or in respect of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.

According to Lord Upjohn in National Provincial Bank Ltd v Ainsworth,178 the rights which are protected under section 70(1)(g) are "rights in reference to land which have the quality of enduring through different ownerships of

177 Williams & Glyn's Bank Ltd v Boland [1981] AC 487 at 511, 512.
178 [1965] AC 1175 at 1237.
the land according to normal conception of title to real property". In the same case Lord Wilberforce explained that to find what 'rights' come within the section, one must look outside the Land Registration Act 1925 in order to determine the rights which are binding on purchasers under the general law. Personal rights do not become proprietary by virtue of the section per se.\textsuperscript{179}

Some commentators have doubted that estoppel rights can be brought within section 70(1)(g) of the Land Registration Act. Bailey,\textsuperscript{180} for instance, has maintained that the 'inchoate equity' does not fit the description of section 70(1)(g) rights. He was led to this view inter alia by the fact that one group of inchoate rights, i.e., those in the course of acquisition under the Limitation Acts, forms a separate category of overriding interests under section 70(1)(f) of the Land Registration Act 1925.

In \textit{London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd}\textsuperscript{181} Brightman J held that the relevant date for adjudging the existence of an overriding interest is at the moment when the land title is registered at the Land Registry.\textsuperscript{182} It is therefore the rights of those in

\textsuperscript{179}Ibid at 1261.
\textsuperscript{180}Bailey, Estoppel and Registration of Title, [1983] Conv 99 at 106 suggested that even if a proprietary estoppel equity were not registered it might be enforceable under the principle that "equity will not allow a statute to be used as an instrument of fraud". Bailey viewed the circumstances of mutual benefit and burden as one of the situations in which equity would intervene to prevent fraud. See also Hayton (1986) 45 CLJ 394 at 398.
\textsuperscript{182}See Law Com 158 Property Law Third Report on Land Registration para 2.76, 2.77.
actual occupation at that date which bind the representor's assignee. Even if they cease to remain in occupation after that date their rights remain protected.\textsuperscript{183} Brightman J could see nothing in the Act which could cause an overriding interest under section 70(1)(g) to be extinguished solely because the owner of the right in question subsequently ceases to occupy the property after the relevant disposition.\textsuperscript{184} If the overriding interest were to be extinguished when the owner of the equitable interest went out of occupation, this would result in an unreasonable windfall for the new proprietor.

The requirement that the purchaser must enquire of every person in actual occupation of the land is an important safeguard for claimants of equitable rights. Reliance upon "the untrue ipse dixit of the vendor" is not sufficient, as Russell LJ remarked in Hodgson v Marks.\textsuperscript{185} This onus of enquiry has been strongly criticised in that the purchaser may not necessarily know who is in occupation.\textsuperscript{186} The property may be occupied by persons whose presence is not discoverable by the purchaser or who move into residence between the time of the purchaser's enquiries and the registration of the new title. In Kling

\textsuperscript{183}Unless of course the property is sold again in which case the conditions of section 70(1)(g) must be satisfied at the date of registration of this transfer unless the overriding interest has been noted on the charges register after the original hearing (see Land Registration Act 1925, s 70(3)).
\textsuperscript{184}London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd [1971] 1 All ER 766. See also In re Chowood’s Registered Land [1933] Ch 574.
\textsuperscript{185}[1971] Ch 892 at 932.
\textsuperscript{186}See National Provincial Bank Ltd v Hastings Car Mart Ltd [1964] 1 All ER at 700, 701. In unregistered land the purchaser is only bound by the rights of occupiers of whom he has notice.
Veston Properties v Vinelott J acknowledged this tension between the interests of purchasers and the interests of holders of equitable rights. He found it disquieting that a purchaser could be prejudiced by rights notwithstanding that there is no person other than the vendor in apparent occupation of the property and that careful inspection and enquiry has failed to reveal anything which might give the purchaser any reason to suspect that someone other than the vendor had any interest in or rights over the property.\(^\text{188}\)

The presence of members of families who are estoppel claimants is likely to be only too evident to purchasers except in cases of temporary absence from the property. The problem remains that even if a purchaser makes enquiry of holders of 'inchoate equities', the latter will be generally unable to verbalise their rights with any precision. There is no procedure, as there is in the case of a caution, by which the purchaser can clarify the nature of the right prior to a transfer of title to him.

If an 'inchoate equity' is accepted by the court as an overriding interest, the Registrar may note it on the Charges Register of the burdened land.\(^\text{189}\) The estoppel claimant thereby obtains more certain protection for his rights.

\(^{187}\)(1983) 49 P & CR 212.

\(^{188}\)Ibid at 220.

\(^{189}\)Land Registration Act 1925, s 70(3).
The overlap between overriding interests and minor interests may thus give protection to claimants of proprietary estoppel. However it remains uncertain whether a right can be revived as an overriding interest if it has been registered as a caution and the registrar has subsequently cleared the register of the caution. Section 3(xvi) of the Land Registration Act 1925 appears to be wide enough to include such a right in the category of overriding interests in so far as it is no longer "entered on the register". Section 55(1) of the Act provides that if a caution is vacated the registered land may be dealt with in the same manner as if no caution had been lodged. However, if the 'inchoate equity' has been cleared as a caution from the register because it is deemed not to be a proprietary right, it may be that it will be rejected as an overriding interest for precisely the same reason. If it has been cleared from the register for any other reason, there seems to be no logical reason for excluding it from the category of overriding interests. 190

d) The decline of overriding interests

Since Williams & Glyn's Bank Ltd v Boland 191 attempts have been made to reduce the impact of section 70 of the Land Registration Act 1925. Concern has been expressed repeatedly about the problem of the third party

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190 Cf Crane, (1958) 22 Conv (NS) 17-18.
A recent decision of the Court of Appeal has subtly eroded the protection of equitable rights as overriding interests. The pendulum has been judged to have swung too far in the direction of protecting equitable claimants, and it is now considered high time by Chancery lawyers for third party purchasers to be protected. In

Paddington Building Society v Mendelsohn a son purchased property and charged it to the plaintiff building society. His mother had contributed money towards the purchase and later claimed that her beneficial interest took priority. Browne-Wilkinson LJ held that where the owner of an 'inchoate equity' remained silent about her right with full knowledge that the property was being charged by way of a mortgage she could not claim that her 'inchoate equity' plus her occupation was, as an overriding interest, binding on the mortgagee. Browne-Wilkinson LJ explained that

the mother knew and intended that the mortgage was to be granted to the society and that without the mortgage the flat in which she claims a beneficial interest could not have been acquired, the only possible intention to impute to the parties is an intention that the mother's rights were to be subject to the rights of the society.


Ibid at 249.
There could therefore be no remaining rights to permit the operation of section 70(1)(g). The decision is in keeping with a similar trend in unregistered land.\textsuperscript{195}

In 1987 the Law Commission considered the future of overriding interests in its report on Land Registration.\textsuperscript{196} It recommended the retention of a narrower class of rights as overriding interests including the rights of persons in actual occupation of the land.\textsuperscript{197} Whether inchoate rights fall into this category remains uncertain. The Law Commission preferred to leave such a determination to be made in accordance with the general principles of land law.\textsuperscript{198} The Law Commission also expressed concern about the problem of the 'Registration Gap'. It proposed that purchasers should take subject only to the rights of those in occupation at the date of the relevant disposition rather than of those in occupation at the date of registration of the transfer instrument at the land registry.\textsuperscript{199}

e) Existing provisions for rectification of the Land Register and the payment of an indemnity

At present rectification of the Register may be possible in favour of a claimant of an 'inchoate equity'. Section 82(1) of the Land Registration Act 1925 provides for

\textsuperscript{195}See Welstead [1985] CLJ 354; Bristol and West Building Society v Henning [1985] 1 WLR 778.
\textsuperscript{196}Law Com 158 Property Law Third Report on Land Registration.
\textsuperscript{197}Ibid paras 2.54-2.74. This recommendation modifies s 70(1)(g) Land Registration Act 1925 by excluding persons in receipt of rent and profits.
\textsuperscript{198}Ibid at para 2.56.
\textsuperscript{199}Ibid at para 2.106(ii).
rectification of the Register in a wide range of circumstances. The circumstances outlined are sufficiently broad to permit rectification in favour of the holder of an 'inchoate equity'.

Section 82(3) states that the register may not be rectified, except for the purpose of giving effect to overriding interests, so as to affect the title of a proprietor in possession unless he is in some way at fault or it would be unjust not to rectify the register against him.

In order to complement the powers of rectification section 83(1), (2) of the Land Registration Act 1925 provides...

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Section 82(1) provides for rectification of the register
a) ...where a court...has decided that any person is entitled to any estate right on interest in or to any registered land or charge and as a consequence of such decision such court is of opinion that a rectification of the register is required...;
b) ...where the court, on the application in the prescribed manner of any person who is aggrieved by any entry made in, or by the omission of any entry from, the register...

c) ...In any other case where, by reason of any error or omission in the register, or by reason of any entry made under a mistake it may be deemed just to rectify the register.

'Possession' in section 82(3) is defined in section 3 (xviii) to include "the receipt of rents and profits or the right to receive the same, if any". Section 82(3)(a) states that rectification is not possible where the registered proprietor is in possession except for the purpose of giving effect to overriding interests "unless the proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care" (added by the Administration of Justice Act 1977 s 24); In Re_139 High Street Deptford [1951] 1 Ch 884 at 891 Wynn-Parry J made clear that innocent mistakes of the registered proprietor were sufficient to permit rectification against him. Whether the new section 82(3)(a) would be interpreted in this way remains to be seen. See also In re Chowood's Registered Land [1933] Ch 574; Epps v Esso Petroleum Co Ltd [1973] 1 WLR 1071; Hayton, [1976] CLJ 211 at 214; Law Com No 158, para 3.12.
for the payment of indemnity where rectification of the register is ordered or where an error or omission is accepted but rectification is not allowed.  

The existing rectification provisions seem particularly relevant to the issue of priority in cases of proprietary estoppel. Section 82(1)(h) of the Land Registration Act 1925 confers a broad judicial discretion to rectify even where rectification may affect third party rights which have been registered. A broad judicial discretion to rectify the register enables justice to be done. Rectification according to the Law Commission is "a crack in the mirror principle" which underlies all land registration schemes. The Law Commission compared the crack in the mirror principle resulting from rectification with that resulting from the recognition of overriding interests. It found with reference to rectification that the crack is "wider in that it can be used to alter any aspect of registration...it

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202 If the claim for rectification is made by pleading an overriding interest based on proprietary estoppel, an indemnity is not payable to the registered proprietor. If rectification is ordered against him, he is deemed to have suffered no loss. See In Re Chowood’s Registered Land [1933] Ch 571. Compare, however, Law Com No 158 Property Law Third Report on Land Registration paras 2.11 ff.

203 In Re 139 High Street Deptford [1951] Ch 886 at 890 Wynn-Parry J saw no reason "to limit the word 'mistake' in that section to any particular kind of mistake. The court must determine in every case whether there has been a mistake in the registration of the title, and if so, whether justice requires that the register should be rectified." A broad approach to rectification was also taken in Orakpo v Manson Investments Ltd [1977] 1 WLR 347 at 360 per Buckley LJ. See also Crane, (1977) 41 Conv (NS) 210.

204 In Freer v Unwins Ltd [1976] Ch 288 at 296 it was implied that rectification cannot be retrospective, but section 82(2) suggests that such a narrow interpretation is not necessary. The Law Commission was critical of the decision, see Law Com 158 Property Law Third Report on Land Registration, para 3.8. Cf Hayton, [1976] CLJ 21. See Argyle Building Society v Hammond (1985) 49 P & CR 148.
is shallower in that it is a discretionary matter."\textsuperscript{205} It is thus a particularly appropriate means of protecting the 'inchoate equity' as it reflects the flexibility of the judicial process in satisfying this equity. The courts have total flexibility as to the remedy granted and in exercising their discretion may alter completely the proprietary nature of the representor's rights.\textsuperscript{206} Permitting or denying rectification or indemnity will in reality depend upon whose conscience the court decided to place the blame.\textsuperscript{207} Where both parties are equally innocent the court may have to decide upon whose shoulder to place the burden.

f) Registration of a lis pendens

Once litigation has commenced, a claimant of an 'inchoate equity' may be able to register a lis pendens. In registered land a lis pendens can only be protected by a caution under section 59(1) of the Land Registration Act 1925. In \textit{Calgary and Edmonton Land Co Ltd v Dobinson}\textsuperscript{206} Megarry J explained that

even as regards registered land, the essential question is that of the meaning of 'pending land action' for Section 59(1) of the Land Registration Act 1925 provides that a 'pending action' registrable under the Land

\textsuperscript{205}Law Com No 158, Property Law, Third Report on Land Registration para 2.10.
\textsuperscript{206}See ante at 108
\textsuperscript{207}See, e.g., Peffer \textit{v} Rigg [1977] 1 WLR 285.
\textsuperscript{208}[1974] Ch 702.
Charges Act 1925 is to be protected, where registered land is affected, by a caution against dealings with the land and the effect of Section 18(6) of the Land Charges Act 1972 seems to be to apply this to any 'pending land action' registrable under the Land Charges Act 1972.\textsuperscript{209}

Megarry J proceeded to consider what restriction should be placed on the broad language of the statute. He interpreted it narrowly. As the rights under the Land Charges Act 1972 are for the most part substantive rights in land, he thought that section 59(1) of the Land Registration Act should also be restricted to substantive rights adverse to the owner.

In Allen v Greenhi Builders Ltd\textsuperscript{210}, Browne-Wilkinson J took a broader view. He thought that the decision in Calgary and Edmonton Land Co v Dobinson\textsuperscript{211} was not comprehensive and had to be read in context. He then confirmed the view of Stamp LJ in Whittingham v Whittingham\textsuperscript{212} that whether a right is registrable as a \textit{lis pendens} depends on whether in the absence of registration of a \textit{lis pendens}, a third party \textit{bona fide} purchaser without notice might obtain title and defeat the claimant’s interest. As in unregistered land, the important question appears to be the nature of the relief claimed in any

\textsuperscript{209}Ibid at 105.
\textsuperscript{210}[1978] 3 All ER 1163.
\textsuperscript{211}[1974] Ch 102.
\textsuperscript{212}[1978] 3 All ER 484.
pending action based on proprietary estoppel.\textsuperscript{213} It therefore remains uncertain whether a \textit{lis pendens} can be registered by a holder of an 'inchoate equity'.

\textbf{iii) Registration of the 'satisfied equity'}

In the familial context once the court has satisfied the 'inchoate equity' by granting the claimant an order for transfer of the fee simple, this right will be clearly registrable in the Land Register. Where the 'satisfied equity' comprises some form of conventional equitable interest which is subject to registration but has not been registered, the interest may take effect as an overriding interest.\textsuperscript{214} There remains a possibility that a mere right of occupancy granted in satisfaction of the 'inchoate equity' is capable of registration and if not registered may take effect as an overriding interest.

The preceding discussion relating to rectification and indemnity in registered land\textsuperscript{215} applies equally to the 'satisfied equity'.

\textbf{D CONCLUSION}

The nature of the 'equity of estoppel' remains uncertain. The 'inchoate equity' has rarely been granted any of the attributes of a conventional proprietary

\begin{footnotesize}
\textsuperscript{213}See ante at 199 ff
\textsuperscript{214}See \textit{London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd} [1971] Ch 499; \textit{Lee-Parker v Izzet} [1971] 1 WLR 1088.
\textsuperscript{215}See ante at 216
\end{footnotesize}
interest. In most cases the courts have accepted that the 'inchoate equity' is liable to defeasance, cannot be assigned, and has the potential to bind third parties only in a strictly limited number of situations. Where the courts have satisfied the 'inchoate equity' with some form of conventional proprietary right, the 'satisfied equity' clearly has proprietary status. If, however, the 'inchoate equity' is satisfied by any alternative remedy, this 'satisfied equity' may be defeasible and it cannot be assigned. The 'satisfied equity' in these circumstances does, however, appear to have one proprietary attribute; it is normally regarded as potentially binding on third parties.
CHAPTER SIX

PROPRIETARY ESTOPPEL AND ACQUISITION UNDER THE LIMITATION ACT

I. INTRODUCTION

The estoppel claimant may be in a very vulnerable position unless his 'inchoate equity' is satisfied by a legal or conventional equitable proprietary interest. The alternative remedy of a right of occupancy exposes him to a number of risks. The representor may attempt to regain his property by returning to court to claim wrongful user of the property by the representee.1 If the representee should ever go out of personal occupation himself, his family's occupation will not normally be protected.2 He cannot assign his right in order to obtain finance to assist with the purchase of an alternative property or to improve his home.3

These disadvantages would be largely removed if the representee were able to acquire a possessory title under the Limitation Act4 on the basis of a long-standing 'equity of estoppel'. In the Irish case of Cullen v Cullen,5 for instance, Kenny J refused to grant the legal owner of the disputed property an injunction which would have evicted the representee.6 Kenny J suggested that as a result of his decision neither the legal owner nor any person claiming through him would now be able successfully to assert a

1See Williams v Staite [1979] Ch 291, (ante at 168 ff).
2See Jones (A.E.) v Jones (F.W.) [1977] 1 WLR 438 at 443.
3(See ante at 176).
4The current English statute is the Limitation Act 1980.
5[1962] IR 268, (ante at 37).
title to the disputed property. Thus, at the end of a twelve year period from the date of origin of the 'inchoate equity' the estoppel claimant would be able to bring a successful application under Section 52 of the Local Registration of Title Act 1891 that he himself be registered as owner.6

Maudsley also suggested that a representee might be able to enlarge his 'satisfied equity' into a possessory title. Referring to the decision in Inwards v Baker,9 Maudsley maintained that the representee who has been granted the right to remain in the property for as long as he desired it to be his home "cannot of course, sell his privilege; if he leaves the premises, it terminates. He owns nothing new, but his status becomes one of irremovability. A nice question arises if he remains there for thirteen years."10

7Ibid. Kenny J suggested that the 'inchoate equity' arose at the date of detrimental reliance by the representee. The more conventional view is that the 'inchoate equity' does not arise until the representor attempts to resile from his representation.

8Section 52 of Local Registration of Title (Ireland) Act 1891 provided that the person in adverse possession could apply to the court for an order declaring the title to the land he would have acquired, had it been unregistered land, and for an order for rectification of the register. See now Registration of Title Act, 1964 S 49 (RI). See also Brady, (1970) I Jur (NS) 239.


10(1965) 81 LQR 183. See also Wallace and Grbich (1979) 3 UNSW Law Jour 174 at 191, who question whether occupancy of property based on an 'equity of estoppel' could be of such a nature as to constitute adverse possession. See also Wylie, Irish Land Law, (1980) pp 808, 809 for further consideration of the possibility that representees may acquire rights under the Limitation Act after acquiring estoppel rights.
This chapter considers whether an 'equity of estoppel' can lead to the acquisition of rights by the representee under the Limitation Act.

II THE LIMITATION ACT 1980

Section 15(1) of the Limitation Act 1980 provides that no action may be brought by any person to recover any land after the expiration of twelve years from the date when the right of action first accrued to him. In order that a right of action should accrue, the land must be in the possession of some person in whose favour the period of limitation can run. This possession is referred to as 'adverse possession'. Thus the period of limitation begins to run against the legal owner once his property is in the hands of an adverse possessor.

III ADVERSE POSSESSION

There are two elements to possession of land for the purposes of the Limitation Acts. First, there must be exclusive physical control of the land and, secondly, there must be an intention to possess (or animus possidendi).

12The concept of adverse possession has changed over time, see eg Hughes v Griffin [1969] 1 All ER 460 at 463.
A **Exclusive physical control of the land**

In *Treloar v Nute*, Sir John Pennycuik maintained that a person claiming adverse possession must show either "discontinuance by the paper owner followed by possession, or, dispossession (or as it is sometimes called 'ouster') of the paper owner." Possession concurrent with the paper owner is therefore insufficient to constitute adverse possession.

Thus there can be no question of adverse possession in those cases of proprietary estoppel where the representee shares possession with another member of his family who is the legal owner.

1) **Occupation referable to a licence is not adverse possession**

If the legal owner clearly permits a temporary occupation of the land until he requires it for an alternative purpose, such temporary occupation of the land is enjoyed merely by licence of the legal owner. Adverse possession cannot be said to have started where occupation is referable to a licence granted by the legal owner. In

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14 *Treloar v Nute* [1976] 1 WLR 1295; See also Smith (1978) 41 MLR 204.
15 *Treloar v Nute* [1976] 1 WLR 1295 at 1300.
Hughes v Griffin,¹⁷ for instance, Harman J held that the defendant who was the wife and personal representative of the testator, had failed to demonstrate that the testator had been in adverse occupation of the plaintiff’s property for more than twelve years prior to his death. Harman J found that the testator's interest was "what indeed it was intended by both parties to be - a permissive licence throughout. The testator never thought that he was acquiring any right; and the plaintiff has the same idea - that he could safely let the testator stay in the house for the rest of his declining years, and that that should produce a position where the personal representative of the testator can claim a statutory title seems to be an untenable proposition."¹⁶ The decision in Hughes v Griffin¹⁹ may be of considerable relevance to a claimant of an 'equity of estoppel'. A representee remains a licensee of the legal owner until the latter attempts to resile from the representation he has made. There can clearly be no question of adverse possession on the part of the representee until resiliation takes place.²⁰

¹⁷[1969] 1 All ER 460. See also Cobb v Lane [1952] 1 All ER 1199 (that a licensee cannot be in possession was implicit in this case); Moses v Lovegrove [1952] 2 QB 533; Mann v Jollye (1959) 174 EG 781; Hyde v Pearce [1982] 1 All ER 1029; Tunley v James (Unreported, Court of Appeal 7 April 1982); Murphy v Murphy [1980] IR 183 at 195; Harris (1969) 32 MLR 567.
¹⁸Hughes v Griffin [1969] 1 All ER 460 at 464. See also Moses v Lovegrove [1952] 2 QB 533; Paradise Beach and Transportation Company Ltd v Price Robinson [1968] 1 All ER 530; Culley v Doe D Taylorson (1840) 11 Ad & El 1008 at 1015, 113 ER 697; E P Properties Ltd v Buckler (1987) The Times 13 August.
¹⁹[1969] 1 All ER 460.
ii) Occupation referable to a lawful right cannot be adverse possession.

An arrangement which at the outset constituted a mere licence may cease to be so by reason of the acts of both parties to the arrangement.\(^2\) If the legal owner requests or permits the licensee to act to his detriment, the licence may often give way to an 'inchoate equity'.

a) Occupation referable to the 'inchoate equity'

It is uncertain whether a right of action accrues to the legal owner because his former licensee is in adverse possession from the moment his licence becomes an 'inchoate equity'. In *Bridges v Mees*,\(^2\) Harman J confirmed that "possession can only be adverse if it be not referable to a lawful right."\(^3\) The 'inchoate equity' merely permits the claimant to come before the court and request a remedy. An equity of this nature has not always been recognised as a lawful right in the sense required here. Where the representee’s pre-existing licence has been replaced by an 'inchoate equity', the representee’s occupation may be seen as referable to that 'inchoate equity' and not to a lawful right. If occupation by the representee continues for more

\(^{21}\)See *Bellew v Bellew* [1982] IR 447 at 464 per Griffin J; *Bell v Bell* (1957) 9 DLR(2d) 767; *Lyell v Kennedy* (1889) 14 App Cas 437; *Harris* (1969) 32 MLR 567.

\(^{22}\)[1957] 1 Ch 475.

\(^{23}\)Ibid at 484. See also *Smick v Lyndale Developments Ltd* [1974] Ch 317; *Thomas v Thomas* (1855) 2 K & J 79, ER 69 701 at 703; *Corea v Appuhamy* [1912] AC 230 at 236; *Warren v Murray* (1894) 2 QB 648; *Hyde v Pearce* [1982] 1 All ER 1029 at 1037; *Moses v Lovegrove* [1952] 2 QB 533 at 540; *Preston & Newsom’s Limitations of Actions* (2nd Ed) p 71; Goodma, (1976) 39 MLR 281.
than twelve years prior to any intervention by the representer, this occupation may well be accepted as adverse possession.

The courts have considered whether possession is referable to a lawful right in other contexts involving inchoate equitable interests. In *Hyde v Pearce*,\(^{24}\) for instance, Templeman LJ, giving the main judgment of the Court of Appeal, accepted that the plaintiff’s equitable interest in the property arising from an uncompleted contract of sale was not sufficient to defeat his claim to be in adverse possession of the property. Templeman LJ took the view that the plaintiff’s position was equivocal: he was neither a trespasser nor was his possession referable to any lawful right. His equitable interest was not one which entitled him to specific performance of the contract. Templeman LJ distinguished *Warren v Murray*\(^{25}\) from the present case. In the former case the lessee was entitled as of right to a decree of specific performance. His possession was not adverse because it was referable to a lawful right.\(^{26}\) Templeman LJ pointed out that by contrast in *Hyde v Pearce*\(^{27}\) the purchase price remained to be ascertained and paid.

These *dicta* suggest that where an inchoate equitable right exists and possession is referable to that right there is uncertainty about the nature of the claimant’s

\(^{24}\)[1982] 1 All ER 1029 at 1037.
\(^{25}\)[1894] 2 QB 648. See also *Bridges v Mees* [1957] Ch 475 at 484, per Harman J.
\(^{26}\)*Hyde v Pearce* [1982] 1 All ER 1029 at 1037.
\(^{27}\)*Ibid.*
possess. It is, therefore, possible that where a licence has been terminated and replaced by an 'inchoate equity', the equitable claimant's occupation of property may be viewed as not being referable to a lawful right, with the result that adverse possession can commence. Such a view conduces towards the anomalous situation that an 'inchoate equity' may ultimately give rise to a more valuable property right - a possessory title - than an equitable proprietary interest of a somewhat more certain nature.

The circumstances of the case and the outcome which is judicially deemed to do justice between the parties may ultimately determine whether a person is held to be in occupation adverse to the legal owner, or, whether his occupation is held to be referable to a lawful right, because he has an 'inchoate equity'. The case of Helm v Facey provides an interesting illustration, albeit in a different context, of the judicial decision-making process concerning the nature of a person's occupation. Sir Robert Megarry V-C held that a beneficiary who was equally entitled to possession with other beneficiaries could indeed be a tenant in common in Corea v Appuhamy [1912] AC 230. See also [1982] Conv 382 at 383; Dockray (1983) 46 MLR 89 at 90, 91.

Cf the position of a tenant in common in Corea v Appuhamy [1912] AC 230. See also [1982] Conv 382 at 383; Dockray (1983) 46 MLR 89 at 90, 91.

Unreported, Chancery 2 October 1980. See also Re Strong and Colby (1978) 87 DLR(3d) 589, Re Piggott and Salvation Army (1982) 128 DLR(3d) 371, Re Appleby and MacLeod (1983) 140 DLR(3d) 562 in which it was held that a co-owner can be in adverse possession to his fellow co-owner where his possession of the co-owned land is exclusive. Cf Cooper v Charles (Unreported, Privy Council 26 July 1982) where there are dicta to the effect that a tenant in common cannot be in adverse possession if he is also a trustee for sale under the statutory trusts imposed by the Law of Property Act 1925. See also Corea v Appuhamy [1912] AC 230.

In Helm v Facey (Unreported, Chancery 2 October 1980), the issue was whether a beneficiary could be a trespasser as against the trustee of the property and so entitle the trustee to an injunction.
trespasser if he went into possession against the trustee's wishes. He explained that he took such a view because any other result "would indeed be remarkable. If land held on trust is vacant, any beneficiary has the right to take possession of it, and the trustees cannot evict him as a trespasser." Sir Robert Megarry V-C held that the beneficiary was in "adverse possession" to the trustee, but declined to grant the trustee an order for the vacation of the property. The trust property clearly required the beneficiary's presence for the protection of its profitability. Furthermore, even if the beneficiary had remained in possession for more than twelve years, he could never have claimed a possessory title. Such a claim was expressly prevented by section 7(5) of the Limitation Act 1939.

Sir Robert Megarry V-C pointed out that this was a most unusual case and made it clear that he did not intend to give any encouragement to the idea that "if trespassers occupy land and the legal owner seeks an injunction to restrain the trespass, the courts are likely to send him away empty handed. This decision is no trespasser's charter of immunity. In all ordinary cases the court will in all probability grant an injunction. In all ordinary cases the trespass will be harmful and unjustifiable, and it will be right and proper for the legal owner to seek the aid of the court in restraining it...there will nevertheless be a few exceptional cases where the trespass, although in law a trespass, is nevertheless beneficial in its effect, and the purpose of the legal owner in seeking to restrain it wanting in equity or defective in merit; and in those exceptional cases the courts may well exercise their discretion by refusing to grant an interlocutory injunction. Equity has long been accustomed to looking at the realities of a case, and to looking beneath the surface of labels such as 'trespasser' and 'legal owner' however accurately they are used; and here I have to deal with an unusual case of a trespass on trust property which in effect is beneficial to it."

The current legislation is to be found in Limitation Act 1980, Schedule 1, para 8(9), which provides "Where any settled land or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale (not being a person solely or absolutely entitled to the land or the proceeds), no right of action to recover the land shall be treated for
b) **Occupation referable to 'the satisfied equity'**

In the majority of cases where a representor has attempted to revoke his representation, he will take early legal action against any representee who remains in possession of the disputed property. This attempt to assert the representor's rights may well terminate any adverse possession claimed by the representee. If the representor is granted an order for possession, either because the court finds that no equity exists, or, because any equity is deemed to have been adequately satisfied already, the adverse possession which may have existed clearly comes to an end. If the representee is granted a positive remedy such as a right to occupy the property for life or for so long as he requires it to be his home, his occupation is thereafter referable to the court order. It is difficult to see how the representee's possession can be adverse unless the concept of judicially imposed adverse possession is accepted.

c) **The distinction between positive and defensive claims**

In *Cullen v Cullen* the Irish High Court satisfied the defendant's 'inchoate equity' by barring the plaintiff's right to possession. Kenny J implied that the plaintiff's claim for an injunction preventing trespass to his land did not stop time running for the purpose of adverse possession.

The purposes of this Act as accruing during that possession to any person in whom the land is vested as tenant for life, statutory owner entitled to a beneficial interest in the land or the proceeds of sale." See also *Moses v Lovegrove* [1952] 2 QB 533 at 540.

*33[1962] IR 268.*
Such a claim neither terminated the defendant's possession nor gave the defendant any new right. According to Cullen there appears to be a distinction between those cases where the representee's 'inchoate equity' is satisfied by a positive remedy and those in which his 'inchoate equity' is held merely to bar the representor's right to immediate possession. In the latter category of case Kenny J suggested that the court simply confirms the representee's status of irremovability which was activated by his 'inchoate equity'.

In many of the 'familial cases' of the past the court has satisfied the representee's 'inchoate equity' by granting a defined occupational right rather than merely by barring the representor from exercising his own legal rights. To differentiate between cases on the basis of whether a representor is barred from regaining his property or whether the representee is granted a positive remedy is to make a spurious distinction. If the barring of the representor's right gives the representee the opportunity to obtain a possessory title, the representee would receive a more valuable remedy than the court intended after it has already considered all the circumstances of the case. Even if adverse possession is a possibility, from the time of revocation of the representation, the continuance or discontinuance of such possession cannot depend on whether the court bars the representor's action or satisfies the 'inchoate equity' by the grant of a positive remedy. Either adverse possession commences from the time of the court's decision because it is in effect judicially imposed
or adverse possession ceases because it is referable to the order of the court.

iii) Adverse possession where the legal owner has no right of action

There is a further obstacle to the view that an estoppel claimant may still be in adverse possession after his 'inchoate equity' has been satisfied. After the court hearing the legal owner cannot bring a successful action to regain possession unless the argument is accepted that subsequent misconduct by the representee can deprive him of his 'satisfied equity'. In the absence of misconduct the representor has no right of action. Can there be adverse possession if the legal owner has no right of action? In Moses v Lovegrove Evershed MR held that adverse possession by the defendant continued even though the plaintiff had no automatic right to recover possession because of the Rent Restriction Act 1939. This legislation restricted the plaintiff's right to possession by substituting a discretion in the court to grant possession. In Moses v Lovegrove, however, the adverse possession had commenced prior to the enactment of the legislation which restricted the legal owner's rights. Evershed MR declined to accept that adverse possession rested on the premise of an unqualified right to recover possession. He preferred to view adverse possession simply as "possession adverse to,

36 Evershed MR found nothing in Section 10(1) of the 1939 Act to justify such a conclusion.
that is to say, inconsistent with, and, in denial of the right of the landlord to the premises." The occupation of the tenant without payment of rent and without acknowledgement was a relevant possession even though the right of the landlord to recover possession of his premises was indeed restricted by legislation.

Similarly in Bridges v Mees Harman J rejected the argument that a purchaser, in whom the whole beneficial interest resided, could not be in adverse possession merely because the bare trustee of the legal title who could not bring an effective action to recover possession of land occupied by the purchaser.

Both Moses v Lovegrove and Bridges v Mees referred to situations in which adverse possession had commenced prior to the rights of the legal owner becoming circumscribed by one means or another. If the 'inchoate equity' of estoppel does give rise to adverse possession and that adverse possession is disturbed by the court hearing resulting in a remedy to the representee, a new situation has arisen. These circumstances may be distinguishable from a situation where adverse possession has existed without interference by the legal owner and his right to intervene subsequently becomes qualified. The court hearing in cases of

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37 Moses v Lovegrove [1952] 2 QB 533 at 538.
38 [1957] Ch 475.
39 See also In re Cussons [1904] 73 LJ Ch 296 at 298 where Kekewich J stated "A person who is a bare trustee without duties may lose his trust estate at the end of twelve years if he does not interfere...One can see cases where a trustee might keep alive the right by bringing an action of ejectment but if he allows the cestui que trust to remain in possession, the statute must run against him, and by virtue of the Act of 1874 and the earlier Act the title is gone".
proprietary estoppel would seem to prevent a new period of adverse possession from commencing at all (unless the concept of judicially imposed adverse possession is accepted). In Moses v Lovegrove Evershed MR acknowledged the distinction outlined above. Here the legal owner had no right to enter the property because the court would have immediately ordered a decree of specific performance. As there was no right of entry at all, adverse possession could not even commence. In cases of proprietary estoppel once the Court has remedied the 'inchoate equity' it is likely that any preceding adverse possession will have been brought to an end. Such adverse possession cannot be revived since there is no right of action accruing to the legal owner: the court has effectively removed it.

B Intention to possess the land

Even if a representee is able to overcome the difficulties of establishing that he is factually in exclusive possession of the land, he must also prove the existence of the necessary element of intention to possess the land. The Limitation Acts have given no explicit guidance as to the intention required to be proved. and the authorities on the meaning of animus possidendi are at variance. It remains unclear whether the possessor must show an intention merely to possess the property concerned or whether he must also show an intention to exclude the legal owner. The Privy Council has held that only the

\[1952\] 2 QB 533.
\[1982\] Conv 256 at 258.
former simple intention is essential,\(^\text{42}\) whilst the Court of Appeal has held that the latter element of intention is necessary.\(^\text{43}\) Following the Court of Appeal line of decisions, Slade J explained in Powell v McFarlane\(^\text{44}\) that "animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title."\(^\text{45}\) According to Slade J the courts require clear evidence that the trespasser had not only the requisite intention to possess but made that intention clear to the world. If the trespasser's acts did not make it perfectly clear to the world at large that he intended to exclude the owner as best he could, the courts will treat him as not having had the requisite animus possidendi.

1) The 'inchoate equity' and animus possidendi

A claimant of an 'inchoate equity' clearly intends to occupy the land to the exclusion of almost everyone. He may


\(^{44}\)(1977) 38 P & CR 452.

\(^{45}\)Ibid at 471. See also (1980) 96 LQR 333.
not, however, have had any intention to exclude the legal owner. If the representee has been encouraged to believe that the land is his, he has probably given no consideration at all to excluding the legal owner. It has been suggested by one commentator that possession taken "bona fide and with a justa causa" may well not be adverse possession. In Preble v Met Cent Ry an American court declined to find in favour of a claimant who occupied land for the requisite period of time under the Limitation Acts because he thought it was his own land.

In the majority of the 'familial cases' the representee does not undergo a detrimental alteration of position with any certainty that the land is his. The representor's encouragement may have led him to believe that he has been granted a right for his lifetime or for some shorter period of time. If fortuitously either of these periods lasts for longer than twelve years, the representee would certainly seem to have animus possidendi, in the sense required by the Privy Council, i.e., an intention to exercise control and to exclude strangers. He is unlikely to have the more complex intention required in the line of Court of Appeal cases. He may well have an intention to exclude the legal owner for the period agreed, but this is not inconsistent with an acknowledgement of the permanent nature of the legal owner's dormant title during that period.

46 Goodman, (1970) 33 MLR 281 at 284. Goodman at 287 argues that a unilateral mistaken belief should give rise to adverse possession because a plea of proprietary estoppel is not available in such circumstances. Cf the position in Roman Law where only bona fide occupation with good cause can give rise to a squatter's title (see Inst II:6).
47 (1893) Me 260.
48 Ibid.
ii) The 'satisfied equity' and animus possidendi

After the court hearing the representee remains in occupation of the property with full knowledge of the extent of his 'satisfied equity'. Where his occupancy is merely temporary, he cannot be said to have any real intention to exclude the legal owner permanently, although he may have the intention to exclude everyone other than the legal owner.

IV CONCLUSION

It remains to be seen whether occupation by an estoppel claimant can be regarded as constituting factual adverse possession coupled with the requisite animus possidendi in a sense sufficient to bar the legal owner's rights under the Limitation Act. The only argument in favour of upholding the representee's occupation as adverse possession is the policy which urges that, where there is long-term occupation by someone other than the legal owner, it may be advantageous that factual possession of the land and legal title should ultimately become synonymous.49 Succession by members of the claimant's family and assignment of the land would then be possible.

49Holmes (1897) 10 Harv LR 457 at 477 observed that "a thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came about it". See also Goodman, (1970) 33 MLR 281 at 282.
It would seem unlikely that the courts will accept that occupation based on 'equities of estoppel' will lead to the acquisition of possessory title under the Limitation Act. The acquisition of possessory rights and of 'equities of estoppel' may arise from similar fact-situations but the doctrines are distinctive. Under the Limitation Act the knowledge of the legal owner is irrelevant; no detrimental alteration of position in reliance on a belief engendered by the encouragement of the legal title holder is required but a long period of occupation and an intention to possess are necessary. Throughout the relevant limitation period the claimant remains at risk. The legal owner may assert his right to possession at any time. If he does not do so, the reward for the claimant is substantial - the acquisition of a possessory title. Under the doctrine of proprietary estoppel detrimental alteration of position in reliance on a representation is essential but there is no requirement of long-term occupation or of any intention to possess. Nevertheless the estoppel claimant risks the possibility that the court exercise its flexible discretion

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56 In J. F. Perrott & Company Ltd v Cohen [1951] I KB 705 at 708 Somervell LJ explained that "the principle underlying the cases on encroachment is not, perhaps, strictly an estoppel, but it is akin to it. If a tenant takes possession of adjoining property and by his conduct represents that he is holding it under the demise, then, if the landlord acts on that representation by allowing the tenant to remain in possession the tenant cannot afterwards assert that he is holding it on any other footing." In Tunley v James (Unreported, Court of Appeal 7 April 1982) the Court of Appeal rejected the claim under the Limitation Act maintaining that occupation was referable to a licence. Had proprietary estoppel been pleaded the court could have reached the decision that the representation and detrimental reliance by the plaintiff had superceded the licence. Of the dicta of Oliver LJ in Savva v Costa & Harymode Investments Ltd (Unreported, Court of Appeal 9 October 1980).

in the direction of satisfying the 'inchoate equity' through the grant of a short-term right, although even here his reward is an immediate remedy. Once the court has satisfied the 'inchoate equity' by granting a remedy, it would make a nonsense of that satisfaction to give the representee a second chance of obtaining a more valuable remedy of a possessory right, after twelve years of occupation. One of the main aims of the Limitation Act is to end long dormant claims and ensure that persons with good causes of actions should pursue them with reasonable diligence. It would seem to defeat this aim to allow the Act to be used as an additional remedy by those whose 'inchoate equity' has already been satisfied under the doctrine of proprietary estoppel.

52In R B Policies at Lloyds v Butler [1950] 1 KB at 81. Streatfield J remarked that, "It is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the courts recovering their property, but another, and I think, equal policy behind these Acts, is that there shall be an end of litigation". In A'Court v Cross (1825) 3 Bing 329 at 332, 130 ER 540 Best CJ commented that a Statute of Limitation is "an act of peace. Long dormant claims have often more of cruelty than of justice in them". See also Dundee Harbour Trustees v Dougall (1852) 1 Macq 317 at 321 per Lord St Leonards; Dockray, [1985] Conv 272.
CHAPTER SEVEN

THE RELATIONSHIP BETWEEN PROPRIETARY ESTOPPEL AND

CONSTRUCTIVE TRUST

1 INTRODUCTION

Throughout the commonwealth jurisdictions it has been acknowledged that the resolution of familial property disputes may be found in any of a number of legal approaches. The concepts of proprietary estoppel and constructive trusts have both regularly been pleaded as alternatives in claims relating to the family home. A more recent trend is the attempt to merge these two concepts and thereby end the necessity to plead them in the alternative.

This tendency towards assimilation may perhaps be seen as having its roots in the judgment of Lord Diplock in Gissing v Gissing. The language used there to define a constructive trust is not unlike the terms adopted by Lord Kingsdown in his classic exposition of estoppel doctrine in Ramsden v Dyson. Lord Diplock defined a constructive trust as one created by a transaction between the trustee and the cestui que trust in connection with

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4 (1866) LR 1 HL 129 at 170.
the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.\(^5\)

In a series of recent decisions the present Vice-Chancellor, Sir Nicolas Browne-Wilkinson, has drawn attention to the affinity between the doctrines of proprietary estoppel and constructive trusts. In *Re Sharpe (A Bankrupt)*,\(^6\) he accepted that irrevocable licences arising from informal family arrangements might confer some equity or equitable interest under a constructive trust. According to Browne-Wilkinson J, the principle behind these cases was "akin to or an extension of proprietary estoppel"\(^7\) stemming from Lord Kingsdown's speech in *Ramsden v Dyson*.\(^6\) The constructive trust has been accepted as a possible remedy for the purpose of satisfying the 'inchoate equity' of proprietary estoppel, but it has not yet been explicitly employed in this context.\(^9\) This remedial

\(^7\)Ibid at 225.
\(^8\)(1866) LR 1 HL 129 at 170.
\(^9\)See, e.g., *Pearce v Pearce* [1977] 1 NSWLR 170. Cf *Warnes v Hedley* (Unreported, Court of Appeal 31 Jan 1984), where Slade LJ suggested that the constructive trust in *Hussey v Palmer* [1972] 1 WLR 1286 was based on proprietary estoppel.
approach to the use of the constructive trust was specifically rejected by Browne-Wilkinson J in Re Sharpe (A Bankrupt).\textsuperscript{10} The constructive trust in this decision was a substantive constructive trust pre-dating the court order. The decision in Re Sharpe (A Bankrupt), although somewhat ambiguous, suggests that if the elements of proprietary estoppel are pleaded they will give rise either to an 'inchoate equity', which then requires to be satisfied as the court thinks fit, or a declaration that a substantive constructive trust exists. Nowhere does the judgment explain how the court is to decide which of these alternatives should prevail. The plea of constructive trust may be accepted in such a situation according to some unspoken policy of the court in question.\textsuperscript{11}

It has been compellingly argued that the true basis of Re Sharpe (A Bankrupt) is the doctrine of proprietary estoppel.\textsuperscript{12} Martin has maintained that the doctrine of constructive trusts is a totally separate doctrine from that of proprietary estoppel and that prior to Re Sharpe (A Bankrupt) it had never been thought necessary to introduce the constructive trust into cases of proprietary estoppel. Martin has argued that to do so only confuses the issue. According to her view

\textsuperscript{10}In re Stanley Palmer (Unreported, Court of Appeal 5 July 1984) per Oliver J; Holiday Inns Inc v Broadhead (1974) 232 EG 951 at 1086; In re Basham (decd) [1986] 1 WLR 1498 at 1504.

\textsuperscript{11}In re Sharpe (A Bankrupt) [1980] 1 WLR 219 at 225.

\textsuperscript{12}See also Potter v Gyles (Unreported, Court of Appeal 10 October 1986); Dewar (1984) 47 MLR 735 at 740.

\textsuperscript{11}Martin [1980] Conv 207.
proprietary estoppel confers an equitable interest (as determined by the court) on the party who has acted to his detriment. A constructive trust is simply another variety of equitable interest. The one can exist without the other.13

In Walker v Walker14 Browne-Wilkinson LJ also implied that a constructive trust can arise out of "a kind of proprietary estoppel"15 and that a plea of a constructive trust (but not a resulting trust) can embrace a plea of a "lesser right"16 based on proprietary estoppel. Browne-Wilkinson LJ suggested that the real difference between the two doctrines lies in the nature of the representation which underlies the application of either doctrine. Constructive trusts, he suggested, require - with limited exceptions - a common intention to grant a conventional equitable proprietary interest.17 By contrast proprietary estoppel requires merely a belief on the part of the representee, encouraged by the legal title holder, that he will obtain some right in or over the representor's property. The representee's expectation may relate to a conventional proprietary interest or merely to an occupational privilege of some kind.

14Unreported, Court of Appeal 12 April 1984.
15Ibid.
16The remedy granted in Pascoe v Turner [1979] 1 WLR 431 suggests that the 'equity of estoppel' may in certain circumstances be a more valuable right than a constructive trust. See Potter v Gyles (Unreported, Court of Appeal 10 October 1986).
More recently, in Grant v Edwards,\(^1\) Sir Nicolas Browne-Wilkinson V-C has suggested that in cases where constructive trusts are pleaded in the context of the family home, "useful guidance may in future be obtained from the principles of proprietary estoppel which...are closely akin to those laid down in Gissing v Gissing."\(^2\) According to Sir Nicolas Browne-Wilkinson V-C, to ground either plea the claimant must, to the knowledge of the legal owner, have acted in the belief that he has obtained or will obtain an interest in the property. The claimant must have acted to his or her detriment in reliance on such belief. Under both pleas "equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them; but they rest on the same foundation and have on all other matters reached the same conclusions."\(^3\)

The law is in some state of confusion about the relationship between proprietary estoppel and constructive trusts. The English courts appear to be moving towards a merger of the principles yet there has been little discussion as to how this has been achieved. More particularly, no attention has been given to the specific requirements underlying the doctrines of constructive trust and proprietary estoppel and to the nature of the equitable interests arising from either kind of claim.

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\(^1\)[1986] 2 All ER 426 at 439.
\(^2\)Ibid.
\(^3\)Ibid.
The Australian courts have been most reluctant to apply the substantive constructive trust in the context of the familial home unless certain stringent requirements concerning intention can be met. Although proprietary estoppel has often been viewed as a more appropriate form of claim, an alternative type of constructive trust has recently been introduced as a means of satisfying estoppel claims. It will be seen later in this chapter that the nature of this constructive trust is most uncertain. It appears to date only from the time of the court hearing and is, therefore, a truly remedial constructive trust.\(^1\)

The Canadian jurisdictions have formulated the concept of the constructive trust in a way which is radically different from the approach of the English and Australian courts. In Canada the concept of proprietary estoppel is not used in the familial context, but on closer examination the Canadian constructive trust bears a distinct resemblance to the English concept of proprietary estoppel.\(^2\)

The New Zealand courts have invoked the concepts of both constructive trust and proprietary estoppel but in the field of constructive trusts have shown an as yet unfulfilled desire to follow the Canadian pattern.\(^3\)

\(^1\)See post at 328 ff
\(^2\)See post at 305
\(^3\)See \textit{Hayward v Giordani} [1983] NZLR 140.
This chapter analyses the conceptual requirements of constructive trust and proprietary estoppel in order to determine whether these requirements are the same and whether the two concepts have thus been merged into a single doctrine.

II DEFINITION OF THE CONSTRUCTIVE TRUST

A The elusive task of definition

The task of defining a constructive trust has proved to be an elusive one. According to Snell, "no satisfactory definition of a constructive trust has yet been enunciated, and perhaps none ever will be; for the concept is still uncertain and the boundaries obscure."24 In similar vein, Maudsley has claimed that "there are few areas of law which are as fertile and as vague as that of constructive trusts."25 In the context of the family home the problem of defining the constructive trust has been exacerbated by a general judicial refusal to differentiate between the resulting and the constructive trust.

The somewhat confusing dictum of Lord Diplock in Gissing v Gissing26 that "it is unnecessary for present purposes"27 to distinguish between resulting, implied and constructive trusts, has been misused. This dictum has often
led to the erroneous conclusion that there is no significant
difference between the various categories of non-express
trusts.28 There are indeed some circumstances where it is
totally irrelevant whether a resulting or constructive
trust is found. For instance, neither of these forms of
trust requires the writing demanded by Section 53(1)(b),(c)
of the Law of Property Act 1925.29 However, there are many
situations in which it becomes essential to differentiate
between these two types of implied trust.30

B  The resulting trust

In the context of the family home, a resulting trust
normally arises where property is acquired in the name of A
but B provides all or part of the purchase price. In the
absence of evidence to the contrary, equity presumes a
resulting trust in B's favour.31 B's beneficial interest
in A's property will be directly proportionate to his
contribution. In a strict sense this category of resulting
trust does not require intention at all; it arises by
operation of law.32 The principle upon which the purchase

28See, e.g., Hussey v Palmer [1972] 1 WLR 1268 at 1289; Harpum (1982) Ox Jour Leg Stud 277 at 278; Burns v Burns
Rev 578; Bloch v Bloch (1981) 55 ALJR 700; McCamus & Taman (1978) 16 (3) Osgoode Hall Law Jour. 741 at 753;
Hayward v Giordani [1983] 1 NZLR 140 at 144.
29See Law of Property Act 1925, s. 53(2).
30See Walker v Walker (Unreported, Court of Appeal 12 April 1986); Allen v Snyder [1977] 2 NSWLR 685 at 698;
31See Waters (1970) 16 (2) McGill Law Jour 188.
The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether jointly or successive, results to the man who advances the purchase money.\(^{34}\)

This resulting trust arises out of equity's presumption that bargains rather than gifts are intended in such circumstances.\(^{35}\) The person advancing the purchase money is presumed to have intended that the legal title holder should hold the beneficial title on trust for him.

The purchase money resulting trust has been extended to post-acquisition payments providing that such payments are referable to the property.\(^{36}\) In Gissing v Gissing,\(^{37}\) Lord

\(^{34}\) (1788) 2 Cox Eq cas 92, 30 ER 42.
\(^{35}\) (1965) 3 NSWLR 531 at 534 ff where Hope JA criticised the presumption of resulting trust, as a primary presumption, he maintained that it was completely anachronistic.


Diplock recognised that it would be unreasonably legalistic to restrict the purchase money resulting trust to contributions made at the time of the acquisition of the property. He accepted that later financial contributions referable to the property could also lead to a resulting trust. A retrospective inference could be made from these financial contributions that the parties had intended to share the beneficial interest from the time of acquisition. Professor Waters has argued that the courts' discovery of an implied common intention from financial contributions has frequently provided a means of giving wives a just and equitable share in disputed matrimonial assets. This retrospective inference is, in fact "a constructive trust approach masquerading as a resulting trust approach."

Waters has stressed the absence of a common intention, in the majority of cases, at the time the property was acquired.

It is clear of course that there can be no question of resulting trust where the relationship between the parties developed only some time after the acquisition of the property. In no sense can the later contributions be retrospectively referable to an intention to share the beneficial interest at the moment of acquisition.

Inevitably attempts have been made to extend the resulting trust in order to include within its boundaries fact-situations involving a labour contribution or a

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contribution to general household expenditure. The courts have shown a marked reluctance to accept that such contributions can lead to an inference of a resulting trust. Where, however, there was at the moment of acquisition a separate agreement by the parties that they should share the beneficial interest in the property, the courts have been prepared to accept that labour contributions or contributions to general household expenditure can give rise to a trust. In Gissing v Gissing Lord Diplock accepted that in circumstances of express oral agreements it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased or to make some other material sacrifice by way of contribution to or economy in the general family expenditure.

Lord Diplock did not specify the nature of such a trust but it would seem to be closer to a constructive than a resulting trust.


Ibid at 905. See also Harpum (1982) Ox Jour Leg Stud 277 at 278.

It has been suggested that a resulting trust can also arise out of an oral agreement based on evidence of the parties' intentions as to how their respective contributions should be treated in giving them a share in the property. But it is arguable that in such circumstances there is both a resulting and a constructive trust. The resulting trust arises out of the initial contribution. The constructive trust arises out of the supervening agreement to vary the original beneficial interest, based on the pre-existing resulting trust providing detrimental reliance can be shown.

C Necessity to distinguish between resulting and constructive trusts

Where a third party makes a claim to disputed property, it may be crucial for any original contributor to the purchase price to be able to show that a resulting trust exists. Such a trust, if proved, exists from the moment of purchase of the property. By contrast, unless the agreement to vary the beneficial interest giving rise to a constructive trust was simultaneous with the financial contribution to the purchase price, a constructive trust

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44 See Malsbury v Malsbury [1982] 1 NSWLR 226. In Re Densham (A Bankrupt) [1975] 1 WLR 1519, the property was purchased by the plaintiff using the monies of the defendant. The consequent resulting trust in the defendant’s favour was subsequently altered by an agreement to grant the plaintiff a fifty per cent share. This agreement gave rise to a constructive trust. See also Cowcher v Cowcher [1972] 1 WLR 425; Harpum (1982) Ox Jour Leg Stud 277 at 279.
will date only from the moment of agreement. The trust may then be subsequent in time to a third party's claim.45

A further situation in which the distinction between resulting and constructive trusts becomes important arises where a resulting trust is pleaded and the claimant's contribution is held to have been a gift or a loan. In such circumstances the plea of resulting trust must fail,46 but this does not necessarily preclude a plea of constructive trust. However, unless a constructive trust is pleaded separately, the claimant of a beneficial interest will be left without any proprietary remedy. In Walker v Walker,47 for instance, the plaintiff had urged that the plea of a resulting trust was wide enough to cover a constructive trust arising from some kind of proprietary estoppel. Browne-Wilkinson LJ rejected this submission, explaining that

in many contexts there are crucial distinctions as to the circumstances which give rise to the existence of such trusts. Where a constructive trust is alleged to arise from a kind of proprietary estoppel, the crucial factor is not the payment of the money by itself but the representation made by the defendant as to

45See post at 331
47Unreported, Court of Appeal 12 April 1984.
his future conduct and the reliance by the 
plaintiff on such representation.46

D  Principle behind the constructive trust

The principle behind all constructive trusts has been 
ated somewhat nebulously in Beatty v Guggenheim 
Explanation Co.49 Here Cardozo J maintained that "when 
roperty has been acquired in such circumstances that the 
older of the legal title may not in good conscience retain 
the interest, equity converts him into a trustee."50

In the context of the family home the issue of 
unconscionability has been widely debated. The broad 
approach of Lord Denning MR permitted the court to impose a 
structive trust whenever it judged the conduct of the 
legal owner to be inequitable51 whilst the strict approach 
of Mahoney JA in Allen v Snyder52 appeared to require an 
tention to create a trust as the basis for the imposition 
of a constructive trust. Mahoney JA in Allen v Snyder53 
maintained that the time had come to circumscribe the use of 
the constructive trust. He observed that

48Walker v Walker (Unreported, Court of Appeal 12 April 
1984).
49225 NY 380 (1919).
50Ibid at 386. See also Binions v Evans [1972] ch 359 at 
368. See also Oakley, Constructive Trusts (2nd Ed) 1987 p 
36 ff.
51See Fribance v Fribance (No 2) [1957] 1 WLR 384; Ulrich 
v Ulrich and Felton [1968] 1 WLR 180; Chapman v Chapman 
ussey v Palmer [1972] 1 WLR 1286; Re Spears and Levy et 
gl 52 DLR (1974) (3d) 146; McMahon v McMahon [1979] VR 
239; Rathwell v Rathwell (1978) 83 DLR (3d) 289 at 297 per 
Dickson J.
53Ibid.
not all cases in which in the popular sense, there is a sense of unfairness or injustice, will be appropriate for this remedy. There are in matrimonial and analogous relationships, inequities, in the popular sense of the term, which are incidental to the relationships.\textsuperscript{54}

According to Mahoney J these inequities were not to be smoothed over by the random use of the constructive trust as a general remedy for unconscionability.

Lord Diplock's definition of a constructive trusts in Gissing v Gissing\textsuperscript{55} has now been accepted, either implicitly or explicitly, as the foundation of the family home constructive trust. From this definition two requirements have been distilled in order to found a constructive trust: common intention and detrimental reliance.\textsuperscript{56} These two requirements will now be considered and compared with their counterparts of encouragement and detrimental reliance in proprietary estoppel.

\textsuperscript{54}Ibid at 706.
\textsuperscript{55}[1971] AC 886 at 905, see ante at 242 ff
\textsuperscript{56}See Muschinski v Dodds (1985) 62 ALR 429.
not all cases in which in the popular sense, there is a sense of unfairness or injustice, will be appropriate for this remedy. There are in matrimonial and analogous relationships, inequities, in the popular sense of the term, which are incidental to the relationships.\textsuperscript{54}

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\textsuperscript{54}Ibid at 706.  
\textsuperscript{55}[1971] AC 886 at 905, see ante at 242 ff  
\textsuperscript{56}See Muschinski v Dodds (1985) 62 ALR 429.
Judicial statements have reiterated that the constructive trust is imposed regardless of intention. In *Allen v Snyder* Glass JA explained that constructive trusts arise where it would be a fraud for the legal owner to assert a beneficial interest. Unlike express and implied (resulting) trusts, which reflect actual intentions, they are imposed without regard to the intentions of the parties, in order to satisfy the demands of justice and good conscience.

Glass JA, in somewhat contradictory *dicta* then stated that when it is called a constructive trust, it should not be forgotten that the courts are giving effect to an arrangement based upon the actual intentions of the parties as to how they should share the beneficial interest.

In the 'familial context' the constructive trust does appear to require a common intention or conduct which leads the claimant to believe that there is an agreement between himself and the legal owner, as to how the beneficial interest should be shared. This role of agreement in the

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57[1977] 2 NSWLR 685.
58Ibid at 690.
59Ibid at 693.
creation of constructive trusts of the family home was stressed by Lord Diplock in Gissing v Gissing.\textsuperscript{60} He observed that previous familial cases concerning beneficial interests in the home had passed over the role of agreement in creating equitable interests in property. According to Lord Diplock, the trust which the courts have construed arises

from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for by the agreement the beneficial interests in the matrimonial home shall be held as they have agreed.\textsuperscript{61}

The decision of the New South Wales Court of Appeal in Allen v Snyder\textsuperscript{62} has been interpreted in subsequent decisions in the Australian Courts as holding that the common intention of the parties (whether overt or inferred) must be that a trust of the property was intended.\textsuperscript{63}

The necessity to prove a common intention or agreement has been acknowledged as giving rise to difficulties where constructive trusts are pleaded in the familial context. Lord Pearson once expressed the view that

\textsuperscript{61}[1971] AC 886 at 905.
\textsuperscript{62}[1977] NSWLR 685 at 692. The Australian and New Zealand Courts have not always specified the category of trust being referred to in the intention-based family home cases but it is clearly a constructive trust (see, e.g., Hayward v Giordani [1983] NZLR 140 at 144).
\textsuperscript{63}See Morris v Morris [1982] 1 NSWLR 61; Feeney v Feeney (Unreported, New South Wales Court of Appeal 3 May 1979); Baumgartner v Baumgartner [1985] 2 NSWLR 401.
it must often be artificial to search for an agreement made between husband and wife as to their respective ownership rights in property used by both of them while they are living together. In most cases they are unlikely to enter into negotiations or conclude contracts or even make agreements. The arrangements which they make are likely to be lacking in the precision and finality which an agreement would be expected to have.  

In spite of this acknowledgement, the common intention requirement prevails throughout the commonwealth except perhaps in Canada. The onus of proof of a common intention is on the claimant of the constructive trust.

IV OVERT COMMON INTENTION

A In the context of constructive trusts

Prior to the decision in Grant v Edwards there had been a tendency to distort the principles enunciated by Lord

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64 Gissing v Gissing [1971] AC 886 at 900. See also Wade (1979) 6 (2) Univ Tas Law Rev 97; Baumgartner v Baumgartner [1985] 2 NSWLR 4 17.

65 See also the requirement in French law of a common intention "to put into hotch potch all the fruits of their activity and to share their profits and losses" to give rise to a de facto marital partnership having legal consequences, (S v D [1983] Dalloz Jur 607 (CA Montpelier 8 June 1982) cited in (1984) XII European Law Digest pt 4.)


67 [1986] 2 All ER 426.
The courts had generally assumed that to find a common intention they had to find substantial financial expenditure referable to the disputed property. The Court of Appeal in Grant v Edwards, in the most lucid of decisions, attempted to end this distortion. Nourse LJ pointed out that there is a rarer class of case, of which the present may be one, where although there has been no writing, the parties have orally declared themselves in such a way as to make their common intention plain. Here the court does not have to look for conduct from which the intention can be inferred, but only for conduct which amounts to an acting on it by the claimant. And, although that conduct can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so.

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[AC 1986 at 905 ff.]

[2 All ER 426.]

[Albid at 432. See also Re Spears and Levy (1974) 52 DLR (3d) 146 at 153 where the Nova Scotia Supreme Court accepted the marriage vow as evidence of a common intention.

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69[1986] 2 All ER 426.
70Ibid at 432. See also Re Spears and Levy (1974) 52 DLR (3d) 146 at 153 where the Nova Scotia Supreme Court accepted the marriage vow as evidence of a common intention.
additionally required. There must simply be conduct which amounts to reliance on that overt intention.71

i) Written agreements

Written documentation of an agreement between the parties is indubitable evidence of a common intention. Such a situation is, however, rare in the familial context. In Gough v Fraser72 the New Zealand Court of Appeal held that written evidence of an agreement to vary a resulting trust would give rise to a constructive trust of the property if the agreement had been subsequently acted upon.

ii) Verbal agreements

Although the courts, in principle, have declared themselves prepared to hold that a common intention can be proved from verbal assurances alone,73 monetary contributions, conduct benefiting the legal title holder and gross conduct by the legal title holder have all tended to reinforce the courts' view, in the context of constructive trusts, that there is direct evidence of an agreement or common expectation. There is no reason why there should be such a close relationship between these factors and the finding of express verbal agreements.

73In Midland Bank PLC v Dobson [1986] 1 FLR 171 at 174 Fox LJ expressed the view that "assertions made by a husband and wife as to common intention formed thirty years ago regarding joint ownership of which there is no contemporary evidence and which happens to accommodate their current need to defeat the claims of a creditor must be received by the courts with caution." See also Baumgartner v Baumgartner (1985) 2 NSWLR 406.
Where there is a direct financial contribution towards the property

In the New South Wales case of *Maurice v Lyons* the plaintiff claimed that his father, the deceased, had suggested to him that they should enter a land ballot and, if either of them was successful, he would build a house for both of them using the plaintiff's money. The deceased won the ballot and agreed that he would leave the property, which he had built, to the plaintiff in his will. He subsequently changed his mind and left it to his widow and daughter. Helsham J held that a constructive trust had arisen from the verbal agreement. The plaintiff and his wife had not only financed the purchase of the property but for the nine years prior to the deceased's death had lived in the property paying all the outgoings.

In *Malsbury v Malsbury*, the plaintiff had sold his home in England and had handed over the proceeds of sale to his son in Australia. He claimed that his son had told him that he would be looked after in his old age, in a house purchased by the son with the plaintiff's money. The detriment suffered by the plaintiff was considerable. There was uncertainty about the precise nature of the parties' agreement. The defendant, the son, maintained that the plaintiff had merely loaned him the money. The New South Wales court held that the evidence gave rise to

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74(1968) 13 FLR 475.  
75Ibid.  
76[1982] 1 NSWLR 226.
the inference that there had been an intention to create an express trust: the plaintiff was to be cared for in his son's property in return for his monetary contribution. The failure of this express trust gave rise to a constructive trust. Any alternative inference would have permitted the son to retain the benefit of property purchased with the plaintiff's money without giving anything in return. 7

In Butler v Craine76 the Supreme Court of Victoria found that a constructive trust could arise from a de facto wife's express representation to her male cohabitant that "If you do the home, the home will be yours". Marks J was influenced by the fact that the claimant had for sixteen years provided the deceased with money to pay off the mortgage, lived with her as a husband, paid the taxes, rates and insurance on the home, took the deceased on holidays, provided food and maintenance for the deceased, and did cooking and housekeeping well above the usual for a male spouse, de facto or de iure. When they went on holidays the deceased wore rings and adopted the name of the claimant.

The claimant's financial expenditure was extensive. Indeed the expenditure would have been sufficient to permit the inference of a common intention to share the beneficial interest had the common intention not been present.

77See also Hussey v Palmer [1972] 1 WLR 1206.
78[1986] VR 274.
b) Where the legal title holder receives a benefit

A limited number of cases demonstrate that the courts have accepted evidence of an agreement even where there has been minimal financial contribution by the claimant. In Ogilvie v Ryan\textsuperscript{79} the court may have been influenced to accept that an express agreement was present by the fact that a substantial contribution of a non-financial nature by the claimant which benefited the legal title holder had been made. In Ogilvie v Ryan a de facto husband had promised the plaintiff that he would leave their quasi-matrimonial home to her in his will.\textsuperscript{80} When he died, his will did not contain the agreed bequest. A constructive trust was nevertheless held to exist on the basis of the express agreement. The plaintiff had dutifully cared for the deceased for several years prior to his death.\textsuperscript{81}

c) Effect of legal title holder's conduct

In the Australian case of Hohol v Hohol\textsuperscript{82} the Supreme Court of Victoria accepted evidence given by a de facto wife of some twenty five years that her husband had said, referring to the disputed property, "It's for all of us, it's for you and me."\textsuperscript{83} The plaintiff had left behind a comfortable and secure home and had come to live in a

\textsuperscript{79}[1976] 2 NSWLR 504.
\textsuperscript{80}The decision in Ogilvie v Ryan has survived Allen v Snyder [1977] 2 NSWLR 685. See also Heydon, Annual Survey of Law 1977 (Australia) p 69.
\textsuperscript{81}Cf Thwaites v Ryan [1984] VR 65; Dale v Haggerty [1979] Qd R 83.
\textsuperscript{82}[1980] 1 VR 221 at 222.
\textsuperscript{83}Ibid. See also Baumgartner v Baumgartner [1985] 2 NSWLR 406 in which there was evidence of a similar agreement but the New South Wales Court of Appeal preferred to infer an intention from financial contribution.
primitive garage on the property with four young children. O'Bryan J upheld a constructive trust on the basis of an overt common intention. He distinguished *Eves v Eves*.84 The words of assurance in *Hohol* were deemed by O'Bryan J to be a more certain indication that a trust of the property had been intended than the unfulfilled promise of the legal title holder in *Eves v Eves*. The conduct of the defendant in *Hohol* was a significant factor in the court's ruling that the familial declaration, was sufficient to create a trust of the property. O'Bryan J remarked that

the defendant has an autocratic and authoritarian personality. I am satisfied that he ruled his family, and particularly his wife, like a despot when they lived together. No doubt he had to struggle hard to succeed in his adopted country, but in doing so he required his family and particularly the plaintiff to adopt a very menial position in the household and rewarded her from his earnings with little more than she needed for her basic household requirements such as food and clothing.85

84[1975] 1 WLR 1338.
85*Hohol v Hohol* [1980] 1 VR 221 at 222. See also *Riley v Osborne* [1986] VR 193.
d) Overt common intention - covert unilateral intention

In *Eves v Eves* a de facto husband told his wife that the house was to be a home for themselves and their children as she was under twenty one, it could not be in their joint names and had to be in his name alone; and that but for her age, it would have been purchased in joint names.  

As the husband later admitted, this was a deception on his part, and a constructive trust was held to have been raised on the facts. The husband had represented to his de facto wife that he wished her to have a share in the property; this was the overt common intention. The fact that the husband had a covert unilateral intention did not detract from the force of the overt common intention.  

The claimant had made a significant contribution in labour to the acquisition of the property.

More recently the Court of Appeal has confirmed that a representation by the defendant that the plaintiff's name would have been put on the title deeds but for the risk of affecting her impending divorce proceedings was evidence of an agreement sufficient to give rise to a constructive trust. In *Grant v Edwards* Mustill LJ accepted that strictly speaking there had never been any common intention. The defendant never intended the plaintiff to have a share in the disputed property. He had simply given her an

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85[1975] 1 WLR 1338. See also *Cooke v Head* [1972] 1 WLR 518 at 521.
87*Eves v Eves* [1975] 1 WLR 1338. See also *Hodgson v Marks* [1970] 1 WLR 956.
88[1986] 2 All ER 426.
untruthful excuse for not putting her name on the title deeds. This did not, however, defeat the plaintiff's claim, Mustill LJ explaining that "whatever the defendant's actual intention, the nature of the excuse which he gave must have led the plaintiff to believe that she would in future have her name on the title, and this in turn would justify her in concluding that she had from the outset some kind of right to the house." The language used here is that of proprietary estoppel. The plaintiff was encouraged to believe that she had or that she would obtain a right in the property.

e) Conditional agreements

Where an agreement is conditional on some subsequent event such as marriage, the agreement will lapse if the condition is not fulfilled. In such circumstances there will be no constructive trust. In Muschinski v Dodds the claimant maintained that she had been induced to place the property in joint names by the respondent's promise to expend a substantial sum on the property. The court declined to find an express or implied condition that they would hold the property on constructive trust in shares relating to their respective contributions if the parties' relationship did not work out or if the respondent did not fulfil his promise. Gibbs CJ held that the appellant had never believed that she was acquiring more than a one-half beneficial interest in the property. The respondent had

90 Ibid at 436.
91 See, e.g., Jackson v Crosby (No 2) (1979) 21 SASR 280.
93 Muschinski v Dodds (1986) 62 ALR 429 at 435.
made it plain to the appellant that he would not assist her as promised \(^9^4\) unless he was given an absolute interest in the property. The parties had consulted a solicitor and had had adequate opportunity to formalise the claimed condition, if that was their intention. In *Muschinski v Dodds* the High Court of Australia eventually awarded an alternative remedy to that of constructive trust. It held that the parties held their respective legal interests upon trust to repay to each his or her respective money contribution and then to hold the residue in equal shares. Gibbs CJ declined to discuss the nature of the right from which the remedy stemmed. \(^9^5\) Mason J \(^9^6\) and Deane J \(^9^7\) referred to the right as existing under a constructive trust albeit a different type of constructive trust to the agreement based family home constructive trust. It appears to be a constructive trust based on a breach of fiduciary duty and dates only from the time of the court hearing. \(^9^8\)

**B In the estoppel context**

The overt agreement necessary to found a constructive trust is akin to the common expectation in those cases of proprietary estoppel where the court has found an undeniable concordance between the representee's belief and the representor's active explicit encouragement. \(^9^9\) Monetary contributions and substantial labour are also important.

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\(^9^4\) Ibid at 431.
\(^9^5\) Ibid at 438.
\(^9^6\) Ibid at 439.
\(^9^7\) Ibid at 458.
\(^9^8\) Ibid.
\(^9^9\) See ante at 39 ff
corroborations of an explicit encouragement in the context of proprietary estoppel.100

The major difference between the common intention required in the constructive trust and the common expectation which provides the basis of proprietary estoppel is that the latter embraces a wider category of equitable rights.101 The expectation satisfied in the law of estoppel may relate to either a conventional proprietary interest or a long-term occupation right. The precise nature of the interest concerned need not be specified.102 The court's flexible approach to the satisfaction of the 'inchoate equity' in proprietary estoppel permits the recognition of less certain agreements, the remedy being can be tailored by the court to that uncertainty. Proprietary estoppel is a less blunt judicial instrument. In the context of the constructive trust the courts may be forced either to grant no remedy at all or to manipulate the facts of a situation into the shape of some artificial common intention where circumstances clearly demand a remedy.

100See also In re Basham (decd) [1986] 1 WLR 1498; Maharaj v Jai Chand [1986] 3 All ER 440.


102In Vinden v Vinden [1982] 1 NSWLR 618 the defendant was found to have a successful estoppel claim. His father had encouraged him to believe that he had a long-term occupational right by the words "No son, I do not want you to leave home. I would like you to stay and give me a hand to look after young Lynette. She hasn't a mother and her sisters are all married and there is no one to look after her and as you are not the marrying kind I would like you to stop and look after her." See also J N Elliot & Co (Farms) Ltd v Murgatroyd (Unreported, New Zealand Court of Appeal 12 September 1984); Plimmer v Mayor etc of Wellington (1884) 9 App Cas 699 at 713.
Where the parties to the dispute have no overt common intention, the court must infer their intention from their conduct. In Gissing v Gissing¹⁰³ Lord Diplock explained that

the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inference as to the intention which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what these inferences are.

¹⁰³[1971] AC 886 at 906.
A) **Imputing of intention**

i) **Constructive trust**

The possibility of imputing an intention to the parties where neither party had addressed their minds to the question of ownership of the beneficial interest has been considered by the courts. Lord Denning MR was the leading advocate of the theory that intention may be imputed.\(^{104}\) However, his approach to the question of what the parties would have intended had they given consideration to the matter of ownership of the property was often not to impute at all but simply to ask "What is reasonable and fair in the circumstances as they have developed, seeing that they are circumstances which no one contemplated before?"\(^{105}\)

In **Pettitt v Pettitt**\(^{106}\) Lord Reid thought that

where there was in fact no agreement, we can ask what the spouses or reasonable people in their shoes would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse.\(^{107}\)

\(^{104}\)See Heseltine v Heseltine [1971] 1 WLR 342 at 345. See also Valent v Salamon (Unreported, Equity Division (New South Wales) 8 December 1986); Nemeth v Nemeth (1977-1978) 17 ALR 500.

\(^{105}\)Appleton v Appleton [1965] 1 WLR 25. See also Oakley (1973) 26 Current Leg Problems 17.


\(^{107}\)Ibid at 795. See also Hayward v Giordani [1983] NZLR 140 at 151.
In the same case Lord Diplock accepted that most parties normally give no consideration to the beneficial ownership of their family home. He maintained that

unless it is possible to infer from the conduct of the spouses at the time of their concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts upon the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses.\(^{108}\)

The other judges in the House of Lords in Pettitt rejected the possibility of imputing an intention where the parties to the dispute had given no consideration to ownership of the beneficial interest. Although Lord Upjohn\(^{109}\) was not as explicit as Lords Hodson\(^{110}\) and Morris,\(^{111}\) Lord Diplock later accepted in Gissing v Gissing\(^{112}\) that a majority of the House of Lords in Pettitt had rejected the imputing of intention in the context of


\(^{109}\) Ibid at 806.

\(^{111}\) Ibid at 797.

constructive trusts. Any confusion caused by the decision in Pettitt\(^ {113}\) arose once again from a failure to distinguish conceptually between resulting and constructive trusts.

The case law suggests that the courts are not very precise in terminology; inferring and imputing have been used interchangeably even when it is absolutely clear that inferring is the concept being used.\(^ {114}\)

In Hayward \(v\) Giordani\(^ {115}\) the New Zealand Court of Appeal, leaned strongly towards the imputing of intention in family home cases. The Court of Appeal nevertheless found it unnecessary to decide the issue, since sufficient evidence was already present from which an agreement could be inferred.

In Burns \(v\) Burns\(^ {116}\) Waller LJ once more raised the question of whether the courts could impute an intention to the parties where there had been no agreement between them. He cited Lord Reid's judgment in Pettitt \(v\) Pettitt,\(^ {117}\) which suggested that

> there is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the

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\(^{113}\)Pettitt \(v\) Pettitt [1970] AC 777.

\(^{114}\)See, e.g., Pettitt \(v\) Pettitt [1970] AC 777 at 791 per Lord Morris.

\(^{115}\)[1983] NZLR 140 at 153. Here the court accepted that it was not bound by the precedent of the House of Lords. See, however, the criticism of Hayward \(v\) Giordani in Muschinski \(v\) Dodds (1986) ALR 429 at 436.


acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other?...The improvement is made for the common enjoyment of both spouses during the marriage.116

Waller LJ nevertheless rejected the possibility of imputing intentions and concurred with the judgments of Fox LJ and May LJ to that effect.

In spite of the clear contrary authority provided by the House of Lords in Gissing v Gissing119 the Court of Appeal in Bristol and West Building Society v Henning120 appeared to accept that it was permissible to impute intention. Browne-Wilkinson LJ held that the only way in which the defendant could establish either a constructive trust or "some lesser right"121 based on proprietary estoppel, "would be to show, inter alia, that as between her and Mr Henning there was an express or imputed intention or assumption that she should have such a right."122 Browne-Wilkinson LJ was most concerned "that the common sense answer in this case may get lost in the many different technicalities which can arise."123 The legal title holder in Henning had granted a mortgage to the Building Society

121[1985] 1 WLR 778 at 782.
122Ibid at 782.
123Ibid.
with the full knowledge and approval of the defendant, his de facto wife. They had both undertaken the joint project of buying a family home with the assistance of a mortgage loan. Without this loan the home could never have been bought. When the legal title holder left the defendant, she alleged that she had a right of occupation in the property which enjoyed priority over the rights of the Building Society which had provided the bulk of the purchase money. The defendant had unsuccessfully tried to find some way of paying the instalments under the mortgage. Browne-Wilkinson LJ was not prepared, however, to accept that the defendant was entitled to stay in possession indefinitely without making any payment. The defendant had claimed in evidence that she would have realised that the Building Society expected her beneficial interest (or other right) to be postponed in its favour but she said, "I never really thought about it...if somebody had explained it to me as you have now I would have appreciated it."\(^\text{124}\) Browne-Wilkinson LJ explicitly stated that although Mrs Henning had no relevant intention, "it would be wrong to impute to the parties any intention other than that the Society was to have a charge in priority to the parties' beneficial interests."\(^\text{125}\) The decision was clearly made on the ground of preventing what was seen as an injustice to the Building

\(^\text{124}\) Ibid.

\(^\text{125}\) Ibid at 782. See Thompson (1986) 49 MLR 245; Thompson [1986] Conv. 57; M Welstead [1985] CLJ 354; Martin (1986) 16 Fam Law 315. See also Heavey v Heavey (1977) 117 ILTR 2. In a private interview (22 October 1986) Sir Nicolas Browne-Wilkinson appeared to see very little difference between the imputing and the inferring of intention, and rejected any suggestion that he was not following Gissing in his decision in Bristol and West Building Society v Henning.
Society. To have decided otherwise would have permitted the defendant to retain an uncovenanted benefit.

The distinction between imputing and inferring of intention is a fine one.\textsuperscript{126} It will be seen that a constructive trust will almost always be imposed where there is a substantial financial contribution to the legal title holder. In such circumstances the imposition of the trust is based on little more than an imputed intention.

\subsection*{ii) Estoppel}

In cases of proprietary estoppel the courts have not clearly distinguished between inferring and imputing the nature of the representee's expectation. They appear to have used both techniques in determining whether conduct can be viewed as encouragement of the claimant's expectation. In the New South Wales case of \textit{Morris v Morris}\textsuperscript{127} the plaintiff had made a substantial contribution from the proceeds of sale towards the extension of the defendant's property. McClelland J arrived at what he described as the essential features of the arrangement in spite of the fact that there was no discussion relating to

the duration of the proposed living arrangements, or as to what was to happen if

\textsuperscript{126}See Helsham CJ (1979) 8 (3) Sydney Law Review 571 at 576; Kardynal v Dodek (Unreported, Supreme Court of Victoria, 12 December 1977); M Neave (1978) 11 Mel Univ Law Rev. 580.

\textsuperscript{127}[1982] 1 NSWLR 61. See also Broughall v Hunt (Unreported, Chancery Division February 1983); Bristoland West Building Society v Henning [1985] 1 WLR 778 at 782.
the heretofore harmonious relationship between the parties broke down, or what was to happen if the defendants wanted to sell the house.

On the basis of proprietary estoppel the plaintiff received reimbursement of his expenditure.

B INFERRING INTENTION FROM FINANCIAL EXPENDITURE

i) Substantial direct financial expenditure referable to the property

a) Intention normally inferred

During the period between the decision in Gissing v Gissing126 and the decision in Grant v Edwards129 the courts tended to accept substantial direct financial expenditure referable to the property as evidencing a common intention sufficient to found a constructive trust. There was little discussion as to whether, in any given case, a common intention could actually be inferred from the substantial financial expenditure referable to the property. In Grant v Edwards130 for instance, the Court of Appeal stressed that such expenditure merely provided evidence from which the parties' intentions could be inferred.131 According to the decision in Grant v Edwards the relevant expenditure could occur either at the time of acquisition of the

130[1986] 2 All ER 426.
131See also Winkworth v Edward Baron Development Co Ltd (1985) 52 P & CR 67; K v K 1980 114 ILTR XXV.
property or at a later stage. In either case, however, the expenditure concerned must be significantly greater than the expenditure which is required for the purpose of proving detrimental reliance on an overt agreement.\textsuperscript{132} No court has yet been prepared to define with precision the nature of the substantial financial expenditure which will be sufficient to permit an inference of a common intention. The Court of Appeal in Grant v Edwards\textsuperscript{133} declined to articulate such a definition, since there was in this case direct evidence of a common intention.

b) Intention not inferred

In the context of constructive trusts the courts have not discussed at any length the question whether the state of knowledge of the legal title holder concerning the nature of the financial payments is a relevant factor in inferring the necessary common intention. The legal title holder's knowledge of the intention of the claimant may be a relevant factor in the overall inquiry in constructive trusts in inferring the common intention of the parties. If the legal title holder believes that the financial contributions are being made to him as part of some bargain which does not have proprietary consequences, some objective judgment will require to be made as to the reality of that belief.\textsuperscript{134}

\textsuperscript{132}Grant v Edwards [1986] 2 All ER 426 at 434.
\textsuperscript{133}Ibid.
\textsuperscript{134}See Grant v Edwards [1986] 2 All ER 426 at 439 per Sir Nicolas Browne-Wilkinson V-C.
contribution, although both substantial and referable to the property, was such as to lead to the inference of a common intention. The cases have tended to concern disputes other than those between parties involved in a familial dispute.

In his dissenting judgment in the Court of Appeal Winkworth v Edward Baron Development Co Ltd, Kerr LJ explained that the description of some payment being referable to the acquisition of some beneficial interest in property was only a convenient form of shorthand. He suggested that where the payment could be related to some other form of agreement, the inference that the payment was referable to the home would be negated. Kerr LJ's view prevailed in the later appeal by the respondent to the House of Lords. Here it was held that the payments must manifest an intention by both payer and payee that a beneficial interest was intended.

In Annen v Rattee the disputed property had been purchased with the aid of a one hundred per cent mortgage by the plaintiff, who had never lived in the property. Her co-owner then permitted the defendant, a close friend, to live in the property. The defendant contributed fifty per cent of the mortgage payments and lent £450 to meet the plaintiff's legal expenses in the purchase. Lloyd LJ held that the defendant's mortgage payments were in respect of

the use and occupation of the flat and, in the absence of any further agreement, could not give rise to a beneficial interest.\textsuperscript{136}

c) Inferability and familial conduct

Whether a financial contribution gives rise to a constructive trust depends, in the final analysis, on the judicial interpretation of familial conduct. Three cases illustrate particularly clearly the interpretation of such conduct.

In Richards v Dove,\textsuperscript{139} the plaintiff claimed that her contribution to the deposit used to purchase the defendant's property gave her a beneficial interest in that property. Walton J was not prepared to infer the common intention necessary to found a constructive trust. Since he held that the parties were living together only temporarily he was only prepared to regard that the plaintiff's monetary contribution as representing no more than an unconditional loan.\textsuperscript{140} There could therefore be no constructive trust on the facts of the case.

\textsuperscript{136}Annen v Rattee (1985) 1 EG LR 136 at 138. See also Hannaford v Selby (1976) 239 EG 812.
\textsuperscript{139}[1974] 1 All ER 888.
\textsuperscript{140}Walton J at 894 explained clearly his view of the parties' relationship, "One hesitates slightly to put the matter on the basis that the whole of the consensual arrangement between the two of them was that Mr Dove should pay the rent and she should provide the food, and that they should mutually enjoy one another's sexual company; but it looks very close to that. She came straight from Jamaica into Mr Dove's bed, and when the split took place they continued to share the same bed for over a year. This points, I think, to the whole arrangement being purely one of convenience; there was certainly no thought of marriage on the part of either of them."
In Broughall v Hunt \(^{141}\) the elderly plaintiff had volunteered £1,000 towards an extension to her daughter's property in which the plaintiff subsequently resided. The parties later were unable to live amicably together and the plaintiff left to live in a mobile home. The parties had obviously given little thought to the nature of the plaintiff's contribution of £1,000. The plaintiff claimed that her money contribution had conferred on her a beneficial interest, whereas the defendants maintained that it was merely a loan which had by now been discharged by their provision of board and lodgings for the plaintiff. Judge Wheeler QC was not prepared to find a beneficial interest in favour of the plaintiff. He explained that this was one of those all-too-frequent cases where much depends upon "individual recollection of events, many of which happened over 10 years ago and which at the time, probably had little or no significance to those concerned." The passage of time and the underlying feeling to which the family dispute had given rise had "tended to harden views as to what was said and done and, more importantly of what was not said or done, so that several of the witnesses were on occasion far more dogmatic than their actual recollection of events warranted."

Although Judge Wheeler QC was not prepared to infer an agreement to create a beneficial interest by way of constructive trust, he was nevertheless willing to impute to the parties a lesser intention, under some form of

\(^{141}\) Unreported, Chancery Division 1 February 1983.
proprietary estoppel, that the plaintiff could live there for the rest of her life in return for her payment of £1,000. Because this imputed agreement was no longer capable of fulfilment and perhaps because the plaintiff was already rehoused she was awarded a financial remedy of £1,500.142

In Re Sharpe (A Bankrupt)143 Browne-Wilkinson J was prepared on remarkably similar facts to infer an agreement to create an irrevocable licence for life in return for a loan of money by a licensee. The licensee was an elderly woman who not only required the property as her home but also needed the care of the legal title holder. Browne-Wilkinson J held that where an irrevocable licence had been granted, a substantive constructive trust arose.144 He felt bound by DHN Food Distributors Ltd v Tower Hamlets London Borough Council145 where Lord Denning MR held that "a contractual licence (under which a person has the right to occupy premises indefinitely) gives rise to a constructive trust, under which the legal owner is not allowed to turn out the licensee."146

The category of constructive trust raised in Re Sharpe (A Bankrupt)147 differs in origin if not in effect from the intention-based familial constructive trusts which are under consideration in this chapter. There is as yet no

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142See also W v W (1981) ILRM 202 at 205.
144See Woodman (1980) 96 LQR 336.
146DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852 at 859.
satisfactory explanation of the legal basis for the category of constructive trust in Re Sharpe (A Bankrupt). If the constructive trust were accepted as a purely remedial device which came into existence at the date of the court hearing, a link could be made between the Re Sharpe (A Bankrupt) type constructive trust and proprietary estoppel. The pre-existing agreement to grant a permanent occupation right could accordingly be seen in terms of a representation to the claimant which, if acted upon, would then bind the representor under the doctrine of proprietary estoppel. There are, of course, difficulties in that the 'inchoate equity' of estoppel is not generally regarded as constituting a right until the court hearing and, as such, will not bind third parties in advance of that hearing.146 Once the hearing has taken place, it is true that the remedy might take the form of a constructive trust,149 but this type of trust would itself appear to be binding on third parties only from the date of the court hearing. In Re Sharpe (A Bankrupt) Browne-Wilkinson J rejected the possibility of such a remedial constructive trust.

It can be strongly argued that in Re Sharpe (A Bankrupt)150 was a case of proprietary estoppel.151 The

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146See ante at 181 ff
149See, e.g., Morris v Morris [1982] 1 NSWLR 61; ante at 114. See also Hayton [1986] CLJ 394 at 398, 399 where it is suggested that the English courts may develop the remedial constructive trust.
151See also Martin [1980] Conv 207, 213; Sir Nicolas Browne-Wilkinson V-C has expressed the view that Re Sharpe (A Bankrupt) was a clear case of proprietary estoppel but that it was not argued on this basis. He explained that he felt bound by DHN Food Distributors Ltd v Tower Hamlets London Borough Council [1976] 1 WLR 852. (private interview 25 October 1986).
occupation right intended by the parties in this case was no different from the occupational right deemed to be the expectation of the plaintiff in *Broughall v Hunt*.\(^{152}\) If occupational rights of this type are to be protected by means of a substantive constructive trust, more detailed consideration must be given to the position of third party purchasers.\(^{153}\)

d) **In the estoppel context**

In the estoppel context substantial financial expenditure will certainly be an important factor in establishing that there has been a relevant encouragement. Where there has been substantial expenditure on the legal title holder's land, the expenditure warns the legal title holder that the person expending the money may have some expectation relating to the land.

In *Ramsden v Dyson*\(^{154}\) Lord Wensleydale observed that "equity considers it too dishonest...to remain passive and afterwards to interfere and take the profit."\(^{155}\) In the context of estoppel the courts have tended towards a more considered analysis than in the context of constructive trusts of whether the financial expenditure provides

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\(^{152}\)Unreported, Chancery Division 1 February 1983.

\(^{153}\)In *Re Sharpe (A Bankrupt)* [1980] 1 WLR 219 at 226 Browne-Wilkinson J expressed his concern at the plight of a purchaser from the relevant trustee in bankruptcy (who was not a party to the action). The purchaser was living in a caravan with his family on Hampstead Heath. Browne-Wilkinson J implied that such a third party would be bound only by actual (and not by merely constructive) notice.

\(^{154}\)(1866) LR 1 HL 129.

\(^{155}\)Ibid.
evidence of the necessary belief encouraged by the legal title holder. Where the expenditure can be seen as relating to a possible alternative belief on the part of the contributor, the courts have tended to dismiss any claim of relevant encouragement. The knowledge of the legal title holder is thus an important factor in determining whether his conduct is a relevant encouragement.156

ii) Indirect financial expenditure referable to the property

a) Constructive trust

In Gissing Lord Pearson stated explicitly that the contributions relevant in raising a constructive trust are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance there can be a contribution if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments.157

In the same case Lord Diplock similarly stated that

156See, e.g., P & L Berg Homes Ltd v Grey (1979) 253 EG 473; Fruin v Fruin (Unreported, Court of Appeal 15 November 1983); Wmnes v Hedley (Unreported, Court of Appeal 31 January 1984).

It may be no more than a matter of convenience which spouse pays particular household accounts particularly when both are earning, and if the wife goes out to work and devotes part of her earnings or uses her private income to meet joint expenses of the household which would otherwise be met by the husband so as to enable him to pay the mortgage instalments out of his moneys this would be consistent with and corroborative of an original common intention that she should share in the beneficial interest of the matrimonial home.\textsuperscript{158}

These speeches have led to confusion.\textsuperscript{159} It may be that indirect financial payments, if substantial, can provide the basis for the inference of a relevant common intention if the legal title holder could not otherwise afford to purchase the property. Although the indirect financial contributions have normally been required to be substantial in addition to being referable to the disputed property a number of Irish cases have taken a broad approach to this requirement. In F.G. v P.G.,\textsuperscript{160} for instance, the plaintiff had contributed to the general expenses of the family. These contributions meant that the defendant was able to engage in property deals in America, where the


\textsuperscript{159}See, e.g., the speech of Lord Diplock in Gissing at 909.

parties resided, without having to sell his Dublin house. The plaintiff was accordingly held to have acquired a beneficial interest in the Dublin house. Similarly, in R v R,\(^{161}\) McMahon J accepted that expenditure by the wife on herself and on household expenses gave rise to a beneficial interest in her favour. He explained that "in either case there is a saving to the husband and if that enables him pro tanto to meet the mortgage repayments the wife should be regarded as contributing towards these repayments."\(^{162}\)

It has been held however that indirect financial payments referable to the acquisition of property give rise to a constructive trust only if there is some pre-existing agreement between the parties.\(^{163}\) In the Northern Ireland case of McFarlane v McFarlane,\(^{164}\) for instance, Lord MacDermott LCJ held that a wife's substantial financial contributions to household expenditure could not, in the absence of further agreement, give rise to a beneficial interest behind a constructive trust.\(^{165}\) The Lord Chief Justice viewed financial contributions to housekeeping as "part of a joint and unselfish adventure"\(^{166}\) and could see

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\(^{161}\) Unreported, High Court of Republic of Ireland 12 January 1979. See also Cooney (1979) 14 I Jur (NS) 3.

\(^{162}\) Unreported, High Court of Republic of Ireland 12 January 1979. See also (1984) 2 IIT 40.


\(^{164}\) [1972] NI 59.

\(^{165}\) Ibid at 70. See also McGill v Snodgrass [1979] IR 283; Cooney (1979) I Jur (NS) 7.

\(^{166}\) McFarlane v McFarlane [1972] NI 59 at 70. See also the view of the trial judge in Pettkus v Becker (cited in 117 DLR (3d) 257 at 265) who found that the de facto wife's contribution to household expenses "...was in the nature of risk capital invested in the hope of seducing a younger defendant into marriage." This conclusion was rejected by Ritchie J in the Supreme Court hearing as "gratuitously insulting".
no grounds for inferring a relevant common intention from such contributions.

Even if both parties are engaged in an unselfish adventure, the male role in that adventure seems to be unduly rewarded if the courts hold that there can be no inference of intention to grant a beneficial interest to the female. The male is more likely to be the main wage earner and is more likely to use his wages to finance the acquisition of the family home. The female, by contrast, is more likely to use her more limited financial resources on household expenditure, a domain which is more particularly hers by tradition.

b) Estoppel

In cases of proprietary estoppel there is no requirement that indirect financial contributions should be referable to the disputed property. Unlike the position with constructive trusts, the common expectation of the parties in proprietary estoppel cases may relate to an occupation right. Contributions to household expenditure are merely part of the total conduct from which could be inferred a belief that such a right exists.\[^{167}\]

\[^{167}\]See Vinden v Vinden [1982] 1 NSWLR 618. Cf dicta of Kirby P in Baumgartner v Baumgartner [1985] 2 NSWLR 406 at 415 to the effect that contributions not referable to the property do not give rise to proprietary estoppel.
INFERRING OF INTENTION FROM NON-FINANCIAL CONTRIBUTIONS

i) Constructive trust

a) Intention inferred

The courts have shown a marked reluctance to infer a common intention from non-financial contributions. In rare cases such contributions have been accepted as enabling an inference of a common intention if they are non-domestic, substantial and are referable to the acquisition of a family home. In Nixon v Nixon, Lord Denning MR distinguished the unpaid work of a wife in running her husband’s greengrocery business from the unpaid domestic work necessarily connected with running a home. The former, he held, gave rise to a constructive trust of the husband’s property but not the latter.

In the Irish case of C.R. v D.R., Lynch LJ accepted in principle that non-domestic work if substantial can lead to an inference of common intention. In the instant case the plaintiff had helped her husband in his veterinary practice. She had acted as his chauffeur because he was an alcoholic and was unable to drive himself. This help was not, however, deemed a sufficient basis for any inference of an agreement that the plaintiff should obtain a beneficial

166See, e.g., Wood v Wood (Unreported, Court of Appeal 7 July 1982) where the Court of Appeal refused to infer a relevant common intention from the loan of deeds as security to enable the completion of purchase of the disputed property.


interest in the defendant's property. This result may appear a little harsh since it is clear that the husband would have been unable to continue his practice without his wife's help.

In M v M\textsuperscript{171} the High Court of the Republic of Ireland took a somewhat more liberal view of non-financial contributions. Here the claimant wife had taken her children to live with her sister for eight years. Precisely because the claimant had lived rent free in her sister's house, the court deemed her to have freed her husband to make repayments on the disputed property, and the wife's share of the property was increased by means of a constructive trust. The common intention required in support of this trust was inferred from the fact that the claimant had released her husband from his obligation of support.

In Hayward v Giordani\textsuperscript{172} the New Zealand Court of Appeal maintained that it was inferring an intention to create a trust from the plaintiff's substantial improvements to property owned by his now deceased de facto wife. There was even arguably sufficient evidence for the court to have found that there was an overt agreement. Three factors may have influenced the court to take a liberal approach to the inference of intention. First, an informal homemade will was produced in court. In this document the deceased purported to leave the disputed property to "Mr E Hayward my de facto husband houe (sic) has been so

\textsuperscript{171}(1980) 114 ILTR 46. 
\textsuperscript{172}[1983] NZLR 140.
wonderful to me and given me so much happiness." §econd, the plaintiff's partner had repeatedly suggested that the property be put into joint names, but the plaintiff had always rejected this as unnecessary. He was twenty years older than she was, expected to die before her and regarded it as sufficient that there was an "unwritten and unspoken agreement between them that the property was his as well as hers". §rth, the New Zealand Court of Appeal was exploring the possibility of imputing the relevant intention or even abandoning intention as an essential requirement of constructive trusts. The Court of Appeal finally decided that neither of these ways forward was necessary for the immediate decision in the Hayward case but left open the possibility of a radical change along these lines in the future.

Prior to the decision by the Canadian Supreme Court to base the constructive trust on a theory of unjust enrichment, the Canadian courts had been prepared to recognise a limited type of domestic contribution as leading

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173 Ibid at 141 per Cooke J. Here the New Zealand Court of Appeal accepted that there was sufficient evidence to give rise to an intention-based trust, but failed to categorize this trust precisely. The Court of Appeal considered it unnecessary to consider "the alternative argument...of constructive trust." The trust accepted was clearly a constructive trust. The alternative claim was to a constructive trust not requiring common intention, as in Muschinski v Dodds (1986) 62 ALR 424. Cf Kardynal v Dodek (Unreported, Supreme Court of Victoria 12 February 1977) where the court refused to infer an intention from what it viewed as trivial improvements to the property. See also Hoare v Hoare (1982) 13 Fam Law 142 where the improvements were not only insubstantial but were seen as "no more than what a father, helping his only son to set up a house with his wife, of whom he and his wife were then very fond, would do." See also McGill v Snodgrass [1979] IR 283.

174 [1983] NZLR 140 at 144.

175 Ibid at 153.

to an inference of common intention.\textsuperscript{177} Such an inference required that the domestic contribution in question had to be an integral part of a work situation to which the woman was also making a non-domestic labour contribution. In Rathwell v Rathwell\textsuperscript{178} Dickson J was prepared to recognise the provision of meals by the claimant as relevant conduct from which a common intention could be inferred. The workplace was a farm and Dickson J observed that to grain belt farmers "the kitchen was just as much part of the farming operation as the feed lot or the machine shed."\textsuperscript{179} In other words the farmer could not earn his living without being fed and the provider of food was deemed to work on the farm as much as had she driven the combine harvester. In other commonwealth jurisdictions the recognition of similar and limited types of domestic contribution has not been extended to cover housekeeping or childrearing where the workplace is not also an integral part of the home. So far contributions of the latter kind have been recognised as evidence of detriment in the constructive trust context. In Eves v Eves\textsuperscript{180} Brightman J remarked that if a common intention had not been oral and express, the plaintiff's building work would not in itself have been conduct from which the requisite common intention could be inferred.

\textsuperscript{177}Albeit in a resulting trust context.
\textsuperscript{178}(1978) 83 DLR (3d) 289.
\textsuperscript{179}Ibid at 299.
b) **Intention not inferred**

The more usual policy of the courts towards non-financial contributions, particularly of a domestic nature, is illustrated by the case of *Burns v Burns*.¹⁸¹ Here the plaintiff was the de facto wife of the defendant. She had lived with the defendant for seventeen years, had given birth to, and taken care of their two children. During this time she had taken total responsibility for the housekeeping and decoration the defendant's property. May LJ, held, with the concurrence of Fox and Waller LJJ, that when a house is purchased in the man's name alone, in the absence of any substantial financial contribution towards either the purchase price, deposit or mortgage instalments of the family home, his partner is not entitled to any share in the beneficial interest in that home even though over a very substantial number of years she may have worked just as hard as the man in maintaining the family in the sense of keeping the house, giving birth to and looking after and helping to bring up the children of the union.¹⁸²

In *Burns v Burns* there was no overt agreement between the parties. The man would not have been able to work and so to purchase the family home if the plaintiff had not

¹⁸¹*[1984] 1 All ER 244.  See also *Wood v Wood* (Unreported, Court of Appeal 7 July 1982); *Julian v Furby* (Unreported, Court of Appeal 24 November 1981).

¹⁸²*Burns v Burns* [1984] 1 Ch 317 at 345.
accepted responsibility for the care of their children and home. Fox LJ suggested, however, that the plaintiff had been amply rewarded for her household and child care duties. According to Fox LJ the plaintiff entered upon her relationship with the defendant knowing that there was no prospect of him marrying her

and it is evident that in a number of respects he treated her very well. He was generous to her, in terms of money, while the relationship continued, and, what in the long term is probably more important, he encouraged her to develop her abilities in a number of ways, with the result that she built up the successful driving school business.183

This approach suggests in this area that the court may be just as concerned to balance out the benefits gained by the parties as to seek for any common intention which may or may not have been expressed by them.

Although the courts' refusal to infer common intentions from non-financial contributions has been sex-neutral, such a tendency is clearly more likely to affect women than men.184 In Grant v Sanderson,185 however, the Court of

182Ibid at 332.
184See Otto Kahn-Freund, Matrimonial Property: where do we go from here? (The Joseph Unger Memorial Lecture delivered in Birmingham in January 1971). See also Groutsch v Groutsch (1978) FLC 90-461 in which it was suggested that "it does appear that the fruit ripening on the tree of marriage has all fallen in the husband's basket."
185Unreported, Court of Appeal 20 April 1983.
Appeal rejected the male's contribution as giving rise to an inference of an intention to share the beneficial interest in the property. His contribution took the form of glazing, replacing guttering and facia boards and putting up scaffolding. The work here was considered to be what a normal 'do-it-yourself male' would do.

c) **Effect on the family**

Lord Scarman has said that "married women are not single women. They live with and for their husbands and children in a unit known as the family which it is the policy of the law to cherish and support."\(^{186}\) This statement may be equally true of other familial relationships which operate for the common good of the household unit. Any refusal by the courts to infer an intention to reward non-financial contributions within the family may lead to a decline in the unselfish support which is so readily given for the welfare of the family unit. It is interesting, for instance, that Article 41 2 (1) of the Irish Constitution provides that

> In particular the State recognises that by her life within the home, the woman gives to the State a support without which the common good cannot be achieved.

(2) The State shall therefore endeavour to ensure that mothers shall not be obliged by

\(^{186}\)Lord Scarman, *Woman and Equality before the Law*. See also Wade, (1979) 6 (2) Univ Tas Law Rev 97; Freeman, (1985) 38 Current Leg Problems 153 at 175.
economic necessity to engage in labour to the
neglect of their duties in the home.

If women, who are mothers, are valued in this way by the
state, it seems inconsistent to differentiate between non-
financial contributions and financial contributions. Few
men would be able to finance any alternative support system
of housekeeping and child rearing which enables them to work
and thereby acquire the family home. The contribution of
women in this manner can and should be quantified.¹⁸⁷

(ii) Estoppel

There are as yet no cases of proprietary estoppel in
which non-financial contributions alone have been accepted
as proof that the estoppel claimant has been encouraged to
believe that rights in property are being obtained. Non-
financial contributions are merely part of the totality of
the conduct which the court must examine in determining
whether any given conduct constitutes encouragement. There
seems, however, to be no reason in principle why such
contributions should not give rise to an inference of
encouragement. The inference might be that at least a
long-term occupational right was intended by the parties.
The legal title holder's awareness of his own rights and of
the nature of the expectation of the claimant would
obviously be an important factor in determining whether an
inference of encouragement could be made from non-financial

¹⁸⁷A major English insurance company, Legal and General, has
quantified the value of domestic contribution at £19,240 per
year (The Times 28 March 1986 p 38).
contributions. It is possible that the plaintiff in *Burns v Burns*\(^\text{188}\) might well have succeeded if she had pleaded proprietary estoppel rather than constructive trust. She had cared for the children of her relationship with the defendant and taken care of the domestic arrangements of the home for seventeen years. It should not have been difficult to infer that she reasonably believed that she would be housed and cared for by the defendant on a long-term basis. On this basis the plaintiff could have been awarded a financial remedy for the loss of this long-term occupational right.\(^\text{189}\)

In *Coombes v Smith*,\(^\text{190}\) however, the court rejected precisely such an approach. The plaintiff in this case had claimed that taking care of the illegitimate child of her relationship with the defendant was evidence that she had been led to believe that she had a right to occupy his property permanently.\(^\text{191}\) The court rigidly rejected the plea of proprietary estoppel, being unprepared to infer the requisite relevant expectation. It might, however, be suggested that the expectation of the plaintiff was interpreted from a male standpoint. The court was prepared to infer that the woman's expectation concerning her occupation of the property was merely for the duration of her relationship with the defendant or until their child became independent.

\(^{188}\) [1984] 1 Ch 317.

\(^{189}\) See *Dodsworth v Dodsworth* (1973) 228 EG 1115. See also the approach in *Tanner v Tanner* [1975] 1 WLR 1346 in the context of contractual licences.

\(^{190}\) [1986] 1 WLR 808.

\(^{191}\) See ante at 103 ff.
The decisions discussed in this chapter indicate that in the majority of cases relating to constructive trusts the courts will infer the existence of the required common intention only if there has been substantial financial expenditure or if (in the rare case) there has been considerable non-domestic labour. Contributions of either kind must in any event be referable to the acquisition of the disputed property. There has been little serious analysis of whether the claimant's contributions could be viewed as objectively manifesting a common intention to share in the beneficial interest of the property. This limited approach resembles the strictly circumscribed process by which intentions are imputed in the law of resulting trusts.

In their attempts to infer a relevant common intention the courts have often been accused of indulging in a mythical exercise. Helsham CJ in Equity of the Supreme Court of New South Wales has observed that it is unreal to suggest that the basis of the trusts which the court has found to exist in this matrimonial or quasi-matrimonial set up is one of actual intention. According to Helsham CJ the court attributes a common intention to the parties whenever it is fair to do so. A trust is brought into being to meet the justice and equity of the case where "what
ought to be joint property ought to be so because its acquisition or improvement has been facilitated by the joint effort."\textsuperscript{192}

In \textit{Rathwell v Rathwell}\textsuperscript{193} Dickson J described the search for a common intention as "a meaningless ritual in search for a phantom intent."\textsuperscript{194} He was later able to persuade a majority of the Canadian Supreme Court in \textit{Pettkus v Becker}\textsuperscript{195} to abandon common intention as the king bolt of the constructive trust. Giving the majority judgment of the Supreme Court Dickson J substituted the remedial constructive trust based on unjust enrichment.\textsuperscript{196}

\section*{VI ABANDONMENT OF COMMON INTENTION IN THE CANADIAN JURISDICTIONS}

\subsection*{A The extended resulting trust}

The Canadian courts have abandoned the search for the mythical common intention as a prerequisite of the

\textsuperscript{192}Helsham (1979) 8 (3) Sydney Law Review 571 at 576; See also Wade (1979) 6 (2) Univ Tas Law Rev 97; Jones (1969) 28 CLJ 196; Woodman (1980) 96 LQR 336; Zuckerman (1980) 96 LQR 248, at 252.
\textsuperscript{193}(1978) 83 DLR 289.
\textsuperscript{194}(1978) 83 DLR(3d) 289 at 299. Dickson J's view was shared by Laskin CJ and Spence J. See also \textit{C v C} [1976] IR 254; Gray, [1983] CLJ 33; Pound (1920) 33 Harv Law Rev 420.
\textsuperscript{195}(1980) 117 DLR(3d) 257. See also the dissenting judgment of Laskin CJC in \textit{Murdoch v Murdoch} (1973) 41 DLR(3d) 367 at 389.
\textsuperscript{196}(1980) 117 DLR(3d) 257 at 275.
constructive trust. 197 Prior to Pettkus v Becker 198 the resulting trust, based on financial contributions to the cost of acquisition of the property, provided the most usual means by which the courts could grant claimants an equitable share in property. 199 The Canadian courts had considerably extended the concept of resulting trusts. Post-acquisition financial contributions and substantial contributions of labour were both accepted as raising retrospectively an inference of intention to share the beneficial interest in property. 200 This broad approach had indeed been criticised as somewhat artificial. Donovan Waters stressed that in the majority of cases there was an absence of any real common intention at the time the disputed property was acquired. He observed that the retrospective inference was merely "a constructive trust approach masquerading as a resulting trust approach." 201

In giving the majority decision of the Supreme Court in Rathwell v Rathwell, 202 Ritchie J applied the extended resulting trust approach. He held that the woman's limited financial contribution to the property at the time of

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199See Rathwell v Rathwell (1978) 83 DLR(3d) 289.
acquisition plus her substantial non-domestic labour contribution thereafter gave rise to a resulting trust.

In Rathwell Dickson J held, with the concurrence of Laskin CJC and Spence J that the plaintiff was entitled to succeed either on the doctrine of resulting trust or the doctrine of constructive trust. Dickson J took the opportunity to apply the concept of the constructive trust based on unjust enrichment, thus following the dissenting judgment of Laskin J in the earlier Canadian case of Murdoch v Murdoch.203 This type of constructive trust eschews any requirement of common intention. Dickson J explained that

the relief is part of the equitable jurisdiction of the Court and does not depend on evidence of intention...the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another...but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation and the absence of any juristic reason...for the enrichment.204

203(1973) 41 DLR(3d) 367 at 377. Laskin J’s dissenting judgment was itself (1954) grounded on the Supreme Court decision, in Degiman v Guaranty Trust Co of Canada and Constantineau (1954) 3 DLR 785 which for the first time recognised the principle of unjust enrichment, as good law in Canada in the context of quasi-contractual restitutionary claims. See also Jacobsen (1974) 20 McGill Law Jour 308, where it was suggested that the decision reached in Pettkus v Becker based on Laskin J’s judgment could never happen in Canada. See also McClean (1970) 4 (1) UBC Law Rev 1.

B) **Constructive trusts based on unjust enrichment**

It was not until *Pettkus v Becker*\(^{205}\) reached the Canadian Supreme Court that a majority of the Supreme Court finally buried the artificially extended resulting trust. Dickson J, giving judgment on behalf of six of the nine members of the Supreme Court, firmly established as part of the common law of Canada the doctrine of constructive trust based on unjust enrichment.\(^{206}\) In *Pettkus v Becker*,\(^{207}\) the appellant, was a bee keeper who had lived with the respondent for almost 20 years. They had lived frugally, the respondent having paid the rent, bought the food and clothing and having paid for other living expenses. The appellant was enabled by this expenditure to save his earnings. Using these savings he eventually purchased a farm in his sole name and established a bee keeping business. The respondent worked hard in this enterprise for 14 years but received no remuneration for her efforts.

Further properties were purchased in the sole name of the appellant using moneys from the bee keeping business. After a deterioration in their relationship, the respondent departed. The appellant gave her $3,000, the car and 10% of the bee hives. Three months later the respondent returned and gave back the gifts. It was agreed that they would resume their relationship; that a joint bank account would be opened and all receipts from the sale of honey

\(^{205}\)(1980) 117 DLR(3d) 257.
\(^{206}\)The Quebec Civil Code 1980 permits a compensatory allowance to be paid to the non-legal title holder where he has "enriched" the legal title holder.
\(^{207}\)(1980) 117 DLR(3d) 257.
would be deposited in that account. The parties built a new house on land previously purchased in the appellant’s name. The cost of construction was paid for by moneys from the bee keeping business. Some time later the parties’ relationship finally came to an end and the respondent once again departed the property. She claimed a half-share in all of the appellant’s properties.

The Ontario Court of Appeal varied the judgment at trial which had imposed a constructive trust under which the respondent was entitled to receive a half-share in all of the appellant’s property. The appellant appealed to the Supreme Court. Dickson J was given the opportunity he had awaited since Rathwell to end the judicial quest for that fugitive common intention which had so far been essential for the purpose of founding a resulting trust.

It was clear in Pettkus v Becker208 the parties to the dispute had no overt common intention. The trial judge had found that Rosa Becker’s contribution to the household expenses prior to the acquisition of the first property “was in the nature of risk capital invested in the hope of seducing a younger defendant into marriage.”209 Dickson J found this statement somewhat lacking in gallantry. Ritchie J, in stronger terms, declared it to be gratuitously insulting. The Ontario Court of Appeal had upheld the finding at trial that there was no common intention but Ritchie J was prepared to disregard that finding. In his minority judgment he held that a resulting trust had arisen

208Ibid.
209Ibid at 265.
Dickson J, however, was not prepared to overrule the express finding of both the trial judge and the Ontario Court of Appeal.

There could not have been a more opportune moment for the introduction of the doctrine of unjust enrichment in the determination of familial property disputes. The fact-situation in Pettkus v Becker clearly demanded a remedy. The evidence was such that a resulting trust based on a common intention inferred from financial contributions could have been imposed and it not been for the earlier findings of the lower courts.

C The requirements of unjust enrichment

In Pettkus v Becker Dickson J reiterated the principles of unjust enrichment which he had laid down in Rathwell. In his view three requirements must be met as a basis for any finding of unjust enrichment: i.e., an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment. For the court to impose a constructive trust based on unjust enrichment, there must be a causal relationship between the unjust enrichment and the acquisition of the disputed property. Here the appellant had been enriched by the respondent’s nineteen years of unpaid labour. The respondent had been correspondingly

210Tbid.

211Pettkus v Becker was decided in 1980 after a six-year battle. Rosa Becker spent a further six years attempting to have her interest under a constructive trust enforced. In November 1986 she committed suicide leaving letters stating that her death was a protest against a legal system that denied her the fruits of her victory. (The Montreal Gazette 11 November 1986 p 1 col 1).
deprived of the value of her labour during this time. The third requirement was fulfilled, according to Dickson J, if one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in the property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation.\(^{212}\)

This third requirement implies that once a reasonable expectation comes to the knowledge of the legal title holder he is under a duty to refuse the contribution of the claimant. If he accepts such a contribution, he is taken to have acquiesced in the claimant’s expectation and must give effect to it. The language in which this third requirement is couched is reminiscent of the requirement of encouragement under the doctrine of proprietary estoppel.

It can reasonably be questioned whether Dickson J’s third requirement is little more than ‘common intention’ by another name. If the claimant must have a reasonable expectation that she would receive an interest in the legal title holder’s property and the latter must know or ought to have known of that expectation, there would appear to be a requirement of at least implied common intention. If the title holder does not reject the contribution, he is

\(^{212}\)(1980) 117 DLR(3d) 257 at 274.
effectively implying that he shares the claimant's expectation concerning his property. The Canadian Courts have not, however, accepted such an interpretation, taking a much more liberal view of Dickson J's third requirement. The burden of proof is on the legal title holder to demonstrate that his enrichment at the expense of the claimant occurred without any knowledge of the claimant's expectation. Once he knows of that expectation, he may not in justice accept the claimant's contribution without giving effect to the expectation. If he cannot satisfy this burden of proof, the courts have been prepared to impute the necessary reasonable expectation even where the claimant has clearly not given any thought as to what her expectation was. By imposing a principled basis for the constructive trust, Dickson J was able to evade the accusations of "palm tree justice" which were levelled at Lord Denning MR's attempts to impose constructive trusts where justice, equity and good conscience require the court to provide some remedy.

D Domestic contribution as unjust enrichment

Once the concept of a constructive trust based on unjust enrichment had become accepted law in Canada, the way was opened for the recognition of domestic contribution as unjust enrichment.

213 See Girard (1983) 28 McGill L Jour 977 at 1000.
214 This was indeed the case in Pettkus v Becker.
In Sorochan v Sorochan\(^2\) the Supreme Court finally recognised that domestic contributions could confer unjust enrichment on a legal title holder just as readily as financial contributions. The parties in Sorochan had lived together in a de facto relationship for 42 years. They had worked the family farm together and produced six children. The appellant did all the domestic labour associated with running the household and caring for the children. She also laboured long hours alone on the family farm whilst her de facto husband worked as a travelling salesman.

The Alberta Court of Appeal had reversed the trial judge’s finding of a constructive trust in favour of the appellant. It held that there was no causal connection between her contribution of labour and the acquisition of the property by the respondent. Judgment in the Supreme Court was given by Dickson CJC. He did not differentiate between the appellant’s domestic contribution to the household and her labour on the farm but held that the respondent had derived a benefit from both types of labour. According to Dickson CJC, this benefit included the valuable savings made by the respondent by reason of the appellant's performance of essential farm services and domestic work without remuneration.

Dickson CJC was reinforced in his refusal to differentiate between domestic contribution and other types of labour by the decision of the Alberta Court of Queen’s

Bench in Herman v Smith. This case concerned a claim of a constructive trust based on a contribution of domestic labour alone. The Alberta court held that the rendering of normal spousal services by the woman amounted to a valuable service resulting in an enrichment for the man and a corresponding deprivation for the woman. In the Sorochan case the appellant was equally held to have enriched her de facto husband with corresponding deprivation to herself. Nor was there any juristic reason for that enrichment: the Supreme Court held that there had been no obligation, contractual or otherwise, binding the appellant to perform domestic or other labour. She had a reasonable expectation of receiving some benefit in return for her 42 years of labour. She had asked the respondent to marry her and to place property in her name. These two incidents convinced Dickson CJC that Alex Sorochan ought to have known that his de facto wife had formed a reasonable expectation of obtaining a share in his land. In the context of both proprietary estoppel and constructive trusts in other commonwealth jurisdictions, a continuation of expenditure on another's land after a refusal of transfer by the owner is considered foolish and no equitable interest could arise on this basis.

The legal title holder in Sorochan already owned the disputed land when the claimant went to live with him. The respondent therefore argued that there could be no logical or causal relationship between the appellant's contribution

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217(1984) 34 Alta LR (2d) 90. See also Lawrence v Lindsay (1982) 21 Alta LR (2d) 141.
218See, e.g., Ramsden v Dyson (1866) LR 1HL 129; Burns v Burns [1984] Ch 317.
of domestic and farm labour and his own acquisition of the property. However, the Supreme Court rejected this narrow view as treating "a particular manifestation of the rule as the rule itself." 219

According to the Chief Justice the cases "reveal the need to retain flexibility in applying the constructive trust." Dickson CJC recognised that it was important to require that some nexus exist between the claimant's deprivation and the property in question but the link need not always take the form of a contribution to the actual acquisition of the property. "A contribution relating to the preservation, maintenance or improvement of property may also suffice. What remains primary is whether or not the services rendered have a clear proprietary relationship...when such a connection is present, proprietary relief may be appropriate." 220

Purely domestic activity according to the Canadian courts may fall into the category of contribution to which Dickson CJC thus referred. In Murray v Roty, 221 the Ontario Court of Appeal had already employed a similar test of general causal connection. Cary JA explained that domestic activity maintains and preserves the property and in this sense is both substantial and direct. It also releases the legal title holder from having to pay for domestic help or from having to perform domestic labour himself. The money or time thus saved permits him to

219 Sorochan v Sorochan (1986) 29 DLR(4th) 1 at 8.
220 Ibid.
221 (1983) 147 DLR(3d) 438 at 445.
improve and maintain his property either by payments to another, using the money saved, or by his own efforts, using the time saved.\textsuperscript{222}

It was argued in the \textit{Sorochan} case that the value of the property had inflated over the period of habitation by the claimant for reasons totally unconnected with any contribution made by her. This argument was rejected by the Supreme Court although it was accepted that there might be circumstances in which it would be appropriate to take into account the inflationary origin of increased values.

The principle of unjust enrichment has been broadened by the Canadian courts. There are few relationships involving joint participation in a communal, familial venture which will be able to evade the imposition of a constructive trust. The Canadian Supreme Court has finally recognised that domestic contributions are equal in value to financial contributions in the creation of trusts of property in the familial context. This recognition is a realistic acknowledgement that living in a familial relationship is a common enterprise; each member contributes according to his abilities and according to the needs of the other members of the household. If the common enterprise breaks down, its property will be distributed in accordance with these contributions; financial contributions will not be valued more highly than domestic contributions.

\textsuperscript{222}Cf Oosterhoff (1979) LV 111 Can Bar Rev 356 at 370.
Lord Simon of Glaisdale, at one time President of what is now the Family Division of the English High Court, recognised that

men can only earn their incomes and accumulate capital by virtue of the division of labour between themselves and their wives. The wife spends her youth and early middle age in bearing and rearing children and in tending the home; the husband is thus freed for his economic activities. Unless the wife plays her part the husband cannot play his. The cock bird can feather his nest precisely because he is not required to spend most of his time sitting on it.  

The Canadian Supreme Court has acknowledged the truth of Lord Simon’s view of the co-operative nature of the familial enterprise.

E Canadian constructive trusts and proprietary estoppel

Since Sorochan v Sorochan there will be very few cases where there will not be a constructive trust of property when the parties participate in a joint familial venture. There may, however, be some circumstances

223 ’With All My Worldly Goods...’ (Address to the Holdsworth Club, University of Birmingham 20 March 1964) p 32.
225 The appellant in Sorochan v Sorochan was found to be under no obligation to make her domestic contribution in the respondent’s home. Whether the Canadian courts will accept that there is no obligation on the part of a spouse to
which could not give rise to a Canadian constructive trust but could instead give rise to a plea of proprietary estoppel. Even if there is encouragement and a detrimental alteration of position sufficient to found the latter plea, the alteration of position may still fall short of unjust enrichment. Furthermore there need be no causal connection between the alteration of position and the disputed property to found an estoppel claim.

In *Pettkus v Becker* Dickson J intimated that the fact that the relationship of the parties was "tantamount to spousal" was significant. Later Canadian cases have taken this to mean that a "tantamount to spousal" relationship is a necessary element. In cases of proprietary estoppel the English courts have only concerned themselves with the nature of the relationship between the parties only in so far as it helps them to infer encouragement or to determine whether given conduct constitutes a detrimental alteration of position. The Canadian courts may have been influenced in their view that a quasi-spousal relationship is required, by the enactment of legislation which grants rights of support to de facto provide domestic services in the family home remains open to question. See, however, Rankin (1984) 17 Ottawa L Rev 72 at 80.

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226 See *Riches v Hogben* [1986] 1 Qd R 315 where the representee's detriment did not unjustly enrich the representor.
227 Ibid.
228 (1980) 117 DLR(3d) 257.
229 Ibid at 274.
230 In *Neiderberger v Memnook* (1982) 130 DLR(3d) 353 the British Columbia Supreme Court rejected the plea of a constructive trust. Bouch J maintained that the relationship between the parties was too casual to imply a trust. See also *Murray v Roty* (1983) 134 DLR(3d) 507; (1980) 19 RFL(2d) 165 McLeod.
231 See ante at 26ff.
spouses at the end of their relationship.\textsuperscript{232} There can be no logical reason to restrict the Canadian constructive trust to spousal or quasi-spousal situations. Indeed Dickson J stated in \textit{Pettkus v Becker}\textsuperscript{233} that

the equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.

In proprietary estoppel there has been no attempt to restrict the equitable principle to spousal or quasi-spousal situations.

\textbf{VII Detrimental reliance}

It is clear in the law of trusts that once an agreement to share the beneficial interest in property has been proved, the claimant must demonstrate a detrimental alteration of position in reliance on the agreement. Lord Diplock emphasised in \textit{Gissing v Gissing}\textsuperscript{234} that if

the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a

\textsuperscript{232}See Family Law Reform Act 1978 (Ont) c 2 (Now RSO 1980 c 152).
\textsuperscript{233}(1980) 117 DLR(3d) 257 at 275.
\textsuperscript{234}[1971] AC 886.
merely voluntary declaration of trust and unenforceable for want of writing.235

According to Lord Diplock the relevant detrimental alteration of position must in some sense relate to the property.

It has been argued that a detrimental alteration of position is not necessary in all the intention-based family home constructive trusts. Warburton has suggested that a detrimental alteration of position is only required where the agreement between the parties is overt.236 She has argued that where the agreement is inferred from substantial financial expenditure or substantial labour no further detrimental alteration of position is required. For analytical purposes, however, the financial contribution in these circumstances performs the twofold function of demonstrating the necessary intention and the detrimental alteration of position in reliance on that agreement.237 Strictly speaking, therefore, detrimental alteration of position is required but no additional proof of it is necessary. Where, however, the agreement is an overt agreement, detrimental alteration of position as a separate element must be proven.

235Gissing v Gissing [1971] AC 886 at 905. See also Midland Bank v Dobson [1986] 1 FLR 171 at 176 per Fox LJ.
237See Grant v Edwards [1986] 2 All ER 428 at 432.
Detrimental alteration of position

In *Grant v Edwards*, Nourse LJ accepted that the detrimental alteration of position need not comprise financial expenditure on the property but must at least be conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house. If she was not to have such an interest she could reasonably be expected to go and live with her lover, but not for example to wield a 14 lb sledge hammer in the front garden.

According to this view, what constitutes a detrimental alteration of position seems to be a matter of discretion for the court rather than a rigidly defined category of conduct. If the conduct can be seen as referable to the acquisition of the property, it will clearly constitute a detrimental alteration of position. In the context of proprietary estoppel by contrast, the relevant alteration of position need not be referable to the property.

1) Financial contribution and non-domestic labour

In the context of both constructive trust and proprietary estoppel the courts have had little difficulty in accepting a detrimental alteration of position on the

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238 [1986] 2 All ER 428.
239 Ibid at 433.
basis of financial contribution and non-domestic labour contributions even when such contributions would be insufficient to lead to an inference of common intention.\textsuperscript{240} Contributions of these kinds may facilitate, albeit indirectly, the acquisition of property.

ii) **Other conduct which benefits the legal titleholder**

Domestic activity and other conduct which benefits the legal titleholder may be accepted as detrimental alteration of position in the context of constructive trust.\textsuperscript{241} This approach pays lip service at least to Lord Diplock's requirement of conduct which facilitates the acquisition of the property, provided that the notion of acquisition can be extended to include preventing the loss or depreciation of property.

In the New South Wales case of Ogilvie v Ryan,\textsuperscript{242} for instance, the plaintiff had kept house for, and had personally taken care of, the deceased during the later part of his life. The defendant had received an undoubted benefit from the plaintiff. There was no discussion of how this conduct facilitated the acquisition of the home. It must be implied that the court in granting the plaintiff an interest under a constructive trust took a liberal approach in this matter. If the deceased had not been cared for by the plaintiff, he would probably have had to pay for this

\textsuperscript{240}See Eves v Eves [1975] 1 WLR 1338; Grant v Edwards [1986] 2 All ER 426.

\textsuperscript{241}See Riley v Osborne [1986] VR 193.

service and possibly give up his home. The plaintiff’s care permitted him to remain in his home until he died.

In Hohol v Hohol\textsuperscript{243} the Victoria Supreme Court accepted that the claimant had acted detrimentally in that she was induced to leave the security which she had enjoyed in a rented home where she lived with her four children and move to live in a garage in the most primitive of circumstances.\textsuperscript{244} She had also undertaken improvements to the house which benefited the defendant. It is uncertain whether the act of leaving her comfortable home in itself could be seen as sufficient detriment, since such conduct would not in itself have benefited the legal title holder.

In Grant v Edwards\textsuperscript{245} Sir Nicolas Browne-Wilkinson V-C attempted to broaden the category of conduct from which detriment could be inferred, in order to include domestic contributions. He took the liberal view that once a common intention has been proved, any act done by the claimant to her detriment which related to the joint lives of the parties was sufficient detriment to qualify. "The acts do not have to be inherently referable to the house".\textsuperscript{246} This approach implicitly accepts that the success of the family enterprise is not dependent on financial contributions alone. Any contribution to the welfare of the family may indirectly facilitate the acquisition or prevent the loss of the family home. The Vice-Chancellor’s view of detriment

\textsuperscript{243}[1981] VR 221.
\textsuperscript{244}Ibid at 227.
\textsuperscript{245}[1986] 2 All ER 426. See also Sorochan v Sorochan (1986) 29 DLR(4th).
\textsuperscript{246}Ibid at 439. See also Harpum (1982) 2 Ox Jour Leg Stud 277 at 278.
was, of course, obiter and was not shared by Nourse and Mustill LJJ. The alteration of position of the claimant in Grant v Edwards was without question referable to the acquisition of the property. She had made financial contributions to the defendant without which he could not have paid the mortgage instalments. It is not without significance that the Vice-Chancellor's dicta on detriment were founded totally on cases of proprietary estoppel. His approach was not dissimilar to that adopted by the Canadian courts in relation to the causal link between unjust enrichment and the legal title holder's property.

In the estoppel context conduct which benefits the legal title holder will generally be viewed as detriment.

iii) Conduct which does not benefit the legal title holder

In Christian v Christian Brightman LJ regarded the equitable interest behind a constructive trust as primarily concerned with property interests; a detrimental alteration of position must therefore reflect that concern. In Christian v Christian, the plaintiff, a de facto wife, claimed that she had acted to her detriment by permitting her own home to be sold and by moving to a new property which she had purchased jointly with the defendant. The defendant had promised the plaintiff that if she did this he would place her name on the title deeds of additional land which were in his sole name. The new jointly owned

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247[1986] 2 All ER 426.
248Ibid at 438.
249(1981) 131 NLJ 43.
property was subject to a planning restriction and was in close proximity to the defendant's estranged wife.

Brightman LJ rejected the plaintiff's claim that she had altered her position to her detriment. In relation to the planning restriction, he maintained that as the property was purchased at a discount it could be sold at a discount and there would be no loss to the plaintiff. In relation to the proximity to the defendant's wife, he held that

equity is concerned with the protection of property and proprietary interests, not with the protection of people's feelings. The only contributions, detriment and sacrifices, that move the court in this field are those of a monetary or proprietary nature.  

Where an alteration of position has no financially quantifiable consequences if the encouragement is frustrated there can be no detriment to establish an estoppel claim.  

It is possible however that the first claim of detriment in Christian v Christian could have been held to be financially quantifiable for the purposes of proprietary estoppel. Property subject to an agricultural planning restriction will be more difficult to sell than a property free of such a restriction. This delay in sale is certainly financially quantifiable. The opportunity cost of

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250Ibid.  
251See ante at 91  
252Unreported, Court of Appeal 6 November 1980.
money tied up in property pending a delayed sale has a value.

What may have been more significant in Christian v Christian\(^\text{253}\) was that the claimed detriment was not seen as conferring any benefit on the legal title holder. In the context of constructive trusts this appears to be an important factor in determining whether conduct is detrimental to the claimant.\(^\text{254}\)

Proprietary estoppel is concerned with the prevention of loss to the representee and/or unjustifiable profit to the legal title-holder which would result from an unconscionable retraction of a representation which has already been acted on. The court is therefore concerned with the question of whether the representee's act would be considered detrimental to him or her if the representation was not adhered to.\(^\text{255}\) Constructive trusts are concerned, however, with the prevention of unconscionability resulting from contribution which relates in some way to the property of the legal title holder. The latter may not retain the benefit of any contribution which he has accepted in return for his agreement to grant a beneficial interest. The difference between the relevant kinds of detrimental alteration of position for the purposes of establishing either an estoppel or constructive trust claim may relate to the different natures of the interests being granted.

\(^{253}\)Ibid.
\(^{254}\)See also Thwaites v Ryan [1984] VR 65.
\(^{255}\)See ante at 73
In the estoppel context the detrimental alteration of position need not necessarily benefit the legal title holder. In Riches v Hogben the claimant had incurred considerable expenses in emigrating to Australia to take up residence, as agreed with his widowed mother, the legal title holder. She obviously stood to benefit emotionally by his presence but would not benefit in any other way accepted by the courts in cases of constructive trusts. The Queensland Supreme Court nevertheless accepted that the claimant had altered his position to his detriment and awarded a remedy based on proprietary estoppel.

In the estoppel context a failure to act at all may constitute detriment if the claimant would have acted if the representation had not been made. The failure to act may result in a financially quantifiable loss to the claimant if the representation is not fulfilled, even though it may not necessarily benefit the representor.

A recent trend can however be discerned towards a limitation of the activities which may be properly considered as detrimental alteration of position for the purposes of an estoppel claim. In Watts v Story the court refused to accept that a young, fit male who had moved house and had given up a job had altered his position detrimentally when what he received in return was rent-free

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257Ibid at 320.
occupation in a pleasant home in his grandmother's house. The court ignored Dixon J's dicta in Grundt v Great Boulder Pty Gold Mines Ltd\(^{260}\) that detriment was to be judged at the time the representor sought to retract his representation and not whilst it was being fulfilled.

iv) Alteration of position by a third party

Both in the law of constructive trusts and in the law of proprietary estoppel the alteration of position need not be undertaken by the claimant himself; it may be the act of a third party.\(^{261}\)

v) Enjoyable conduct and conduct for which compensation has already been paid

The courts have dismissed as a relevant detrimental alteration of position any activity which is perceived to be enjoyable\(^{262}\) or for which compensation has already been paid.\(^{263}\) Under the doctrine of constructive trusts and of proprietary estoppel the former activity is not viewed as involving any sacrifice on the part of the claimant. In the latter situation any detrimental element which may have existed has been spent.

\(^{260}\)(1938) 59 CLR 639. See ante at 73

\(^{261}\)See Neale v Willis (1968) 19 P & CR 836; In re Basham (decd) [1986] 1 WLR 1498 at 1505.

\(^{262}\)See, e.g., Hannaford v Selby (1976) 239 EG 811 at 813.

\(^{263}\)See, e.g., Layton v Martin [1986] 2 FLR 227.
vi) Detrimental alteration of position in the Canadian jurisdictions

In the Canadian jurisdictions where constructive trusts are based on unjust enrichment, it is necessary to show a detrimental alteration of position in the form of a "corresponding deprivation".264 Financial expenditure and labour (including domestic labour) are equally accepted if they unjustly enrich the legal title holder.265

B Reliance on Common Intention in the context of Constructive Trusts

The claimant of a constructive trust must be able to demonstrate not only that he suffered a detriment but also that he did so in reliance on a relevant common intention.266 This causal link between detriment and intention is essential.

i) Express Bargains

The causal link is clearly established if there is an express bargain between the parties that the claimant will be granted a beneficial interest in return for making a specific sacrifice and the claimant performs in accordance with the bargain.267 Such an unequivocal agreement is, however, rare in the family setting.

265See ante at 302 ff
267See Grant v Edwards [1986] 2 All ER 426.
ii) Incomplete bargains

A difficulty in establishing the causal link between intention and detriment arises when there is an overt agreement between the parties but silence as to what constitutes the relevant *quid pro quo*. In *Grant v Edwards* [268] Mustill LJ held that where the bargain was not completely expressed it was the court’s task to fill in the gaps by inferring the bargain. If the detrimental acts could be inferred to be part of the bargain between the parties, the court would accept that these acts were undertaken in reliance on the express but incomplete common intention. He implied that for this inference to be made, the detrimental acts must be "referable to" the property. The argument appears to be somewhat circular: if the detrimental action appears to be sufficient the court will hold that it must have been in reliance on the common intention and will therefore make the necessary inference that the detrimental action was part of the bargain.

In *Midland Bank Plc v Dobson* [269] there was an overt agreement between the spouses that Mrs Dobson should have a beneficial interest but the precise nature of the bargain was not specified. Mrs Dobson claimed that she had acted to her detriment but Fox LJ found that her conduct was

not in reliance upon any understanding as to joint ownership of the house. She did it, presumably, simply because she thought the

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[268]Ibid at 436.
expenditure appropriate and she had the money. She also did some ordinary periodic decorating, but I see no reason to suppose that was because of any arrangement that she would do so on account of a common intention as to joint ownership. It was the sort of work that members of a family do in a house.\textsuperscript{270}

Mrs Dobson's expenditure was on household expenses, including purchase of domestic equipment. The courts have been reluctant to accept a detrimental alteration of position which is not referable to the property as being in reliance on a common agreement. The Court of Appeal's approach in \textit{Midland Bank Plc v Dobson} was unnecessarily restrictive and can perhaps be explained by the fact that a third party, the bank, would have been deprived of its mortgage security had the necessary reliance been found. The Court of Appeal also cast doubt on the existence of a common intention but was not prepared to over-rule the findings of the judge at first instance.

Conduct which does not conform to sex-stereotyped roles is usually accepted as establishing the necessary causal link between detriment and common intention. In \textit{Eves v Eves}\textsuperscript{271} Brightman J found it difficult to suppose that the plaintiff

\textsuperscript{270}Ibid at 176.
\textsuperscript{271}[1975] 1 WLR 1338. Freeman, (1985) 38 Current Leg Problems 153 at 154 suggests that "the message is clear: what women normally do, or are expected to do has no economic value. But 'real' work must be compensated."
would have been wielding the 14 lb sledge hammer, breaking up the large area of concrete, filling the skip and doing the other things which were carried out when they moved in except in pursuance of some expressed or implied arrangement and on the understanding that she was helping to improve a house in which she was to all practical intents and purposes promised that she had an interest.272

It might equally well be argued that no-one, other than a married partner, protected by matrimonial legislation, would undertake the onerous duties of housekeeping and caring for children if it were not in reliance on a common intention.

iii) Inferred Bargains

Where there is some agreement inferred from substantial financial contribution or labour, the evidence required to establish this agreement is always accepted as demonstrating a detrimental reliance on the inferred common intention. The substantial nature of the detriment moves the court to find the necessary link, and such detriment is obviously referable to the property.273

272Eves v Eves [1975] 1 WLR 1338 at 1345.
273Ibid.
iv) A broad view of detrimental reliance

In *Grant v Edwards* Sir Nicolas Browne-Wilkinson V-C took a broad view of the requirement of reliance on common intention in the familial context. He accepted that there had to be a link between the common intention and the acts claimed to be detrimental, but his approach resembled that taken in proprietary estoppel. He explained that it is often impossible to say whether or not a claimant would still have done the acts relied on as detriment if she thought she had no interest in the house. In his view familial acts such as setting up house together, having a baby, making payments to general housekeeping expenses (not strictly necessary to enable the mortgage to be paid) may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house.

In the absence of evidence to the contrary, the Vice-Chancellor thought it right to infer that a claimant has acted in reliance on the relevant common intention, the burden resting on the legal owner to prove that she did not do so. Sir Nicolas Browne-Wilkinson V-C cited *Jones v Jones* and *Pascoe v Turner* in support of his view. These cases were both cases involving proprietary estoppel.

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274 [1986] 2 All ER 426 at 439.
277 [1979] 1 WLR 431.
If the *dicta* of the Vice-Chancellor are accepted in future cases, detrimental reliance in proprietary estoppel and constructive trusts will be identical.

C Reliance in the estoppel context

In *Greasley v Cooke*, Lord Denning MR maintained that the burden of proof is on the legal title holder to prove that the claimant of an 'inchoate equity' of estoppel did not act in reliance on the representation made. For the most part reliance will be a foregone conclusion if the detriment is deemed to be sufficient unless the legal title holder can prove that there was no reliance on the part of the estoppel claimant.

VIII THE NATURE OF THE EQUITABLE INTERESTS

A The constructive trust - remedial or substantive

The English courts have, for the most part, regarded the constructive trust as a substantive rather than remedial institution. In *Muschinski v Dodds* Deane J considered the perceived dichotomy between the remedial and the substantive approach to the constructive trust. In his view the constructive trust could be seen in both institutional and remedial terms. He explained that

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278[1980] 1 WLR 1306.
The use or trust of equity, like equity itself, was essentially remedial in its origins... In time, the relationships in which the trust was recognised and enforced to protect actual or presumed intention became standardised and were accepted into conveyancing practice (particularly in relation to settlements) and property law as the equitable institutions of the express and implied trusts... the constructive trust developed as a remedial relationship... (it) shares however some of the institutionalised features of express and implied trust.  

There is a further sense in which the expression 'institution' and 'remedy' are used in the trust context. 'Institution' has been accepted as a relationship which arises and exists independently of any court order whilst the 'remedial' trust is created through the court's imposition of a relationship by the court order. However, even in those jurisdictions where the constructive trust is regarded as a remedial rather than substantive institution, equity regards as done that which ought to be done and the remedy is retrospective.  

In that sense there is little difference between those jurisdictions which view the intention-based constructive trust in a remedial sense and jurisdictions which view it as a substantive trust.

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283 Ibid. The constructive trust imposed here was however truly remedial.  
285 See Neave (1978) 11 Melb Univ L Rev 343. The constructive trust imposed in Muschinski v Dodds (1986) ALR 429 at 450 appears to be an exception in that it dates only
In the Canadian jurisdiction, where the constructive trust is considered to be of a remedial nature and comes into existence in order to prevent an unjust enrichment, the type of unjust enrichment which gives rise to the constructive trust is no less institutionalised than the conduct which gives rise to the substantive constructive trust. The legal process is a dynamic one. As new situations are held to give rise to constructive trusts, the trusts will be held to be remedial. As those situations become circumscribed by the legal process they will, in effect, be similar to substantive constructive trusts.

B Constructive trusts arise at the time of detrimental alteration of position

Dewar has described the effects of the constructive trust (whether institutional or remedial) as being identical although "the remedial trust necessarily is not imposed until the hearing of the action; however, it is deemed to have arisen at the time of the wrongful act which gave rise to the claim." Dewar thus implies that the equitable interest does not arise until the legal title holder attempts to defeat the beneficial interest. Rankin, however, in discussing the Canadian remedial constructive trust based on unjust enrichment, has argued that once the

from the court order. See also Hayton, [1986] CLJ 394 at 398.
287See Scott on Trusts (1967) 462.4.
claimant of the beneficial interest has unjustly enriched the legal title holder and the causal link is satisfied.

the circumstances have occurred that give rise to a constructive trust, and it follows that the date of contribution should be the date on which property rights vest under a constructive trust.289

According to Rankin, therefore, the constructive trust binds third parties with notice from the time when the unjust enrichment occurs. The trust is an equitable proprietary right from that moment onwards and cannot subsequently be revoked.

C The 'equity of estoppel'

The 'inchoate equity' of estoppel does not arise until the representor resiles from his representation. Third parties are not normally bound by the 'inchoate equity'. The 'inchoate equity' may not be assigned and is revocable.290 Where the constructive trust has been accepted as a possible remedy to satisfy the 'inchoate equity', this type of constructive trust dates from the court order.291

290 Ante at 160 ff
291 See ante at 114
D  The satisfaction of the constructive trust

In cases of constructive trust the court has no flexibility to grant a discretionary remedy to the parties. Once the circumstances for a constructive trust exist, the court must usually give effect to the intentions of the parties. The Canadian constructive trust appears, however, to be an exception to this rule, in that the court may award some alternative form of remedy. In Sorochan v Sorochan the Supreme Court made it clear that a plea of unjust enrichment can be remedied either by a constructive trust of the property or by the grant of financial compensation for the deprivation suffered and on the facts of the instant cases awarded both kinds of remedy.

E  The constructive trust may not protect occupation

Whilst the 'inchoate equity' of estoppel may in certain circumstances be satisfied by the award of an occupation right, the equitable interest behind a constructive trust may not always protect the occupation of the beneficiary. The constructive trust clearly gives the beneficiary a right to live in the property prior to sale but the legal title holder retains the right to sell the property. If and when he does so, the rights of the beneficiary are overreached and translated into the proceeds of sale. The beneficiary will lose his occupation right provided that the purchase

292 See post at 333
money is paid to two trustees.294 If the proceeds of sale are paid to a single trustee, the beneficiary's occupation will be protected in registered land as an overriding interest.295 In unregistered land the doctrine of notice may well have the effect of protecting the right of occupation.296 Occupation rights in proprietary estoppel cannot be overreached.

IX QUANTIFICATION

A Overt agreements

Where there is an express agreement to grant a beneficial interest in the property, the extent of the beneficial interest under a constructive trust will directly correlate with that agreement. In the New Zealand case of Gough v Fraser,297 Richmond P concluded that Lord Diplock in Gissing v Gissing298 made a clear distinction between cases where it is possible to establish an express agreement between the parties as to their respective interests, and those in which their common intention was that one of the parties should have some beneficial interest without any express agreement concerning the respective shares of each party.299 In the former type of case the court was bound

294See Law of Property Act 1925, s 2(1)(ii); Swadling [1986] 2 WLR 1266.
295See s70(1)(g) Land Registration Act 1925; Williams and Glyn's Bank Ltd v Boland [1981] AC 487.
296See Kingsnorth Trust v Tizard [1986] 2 All ER 54. See also Potter v Gyles (Unreported, Court of Appeal 10 October 1986).
299See also Gough v Fraser [1977] 1 NZLR 279 at 281.
to give effect to the express agreement, while in the latter
type of case the court was free to arrive at a 'fair' share
for each party in the light of the evidence as to their
subsequent contributions and transactions. In Gough v
Fraser the parties had agreed to a fixed half share
each. The claimant had only contributed one third of the
cost of the property but the agreement between the plaintiff
and the defendant as to a half-share in the property
prevailed.

Where there is an overt agreement that there should be
a beneficial interest in favour of the plaintiff but the
extent of that interest is unclear, the English courts have
claimed to have inferred the agreement from the subsequent
conduct of the parties. In Eves v Eves, for example,
the overt intention of the parties was to have both names
put on the legal title, but this intention was never carried
out. The court imposed a constructive trust which gave the
parties unequal shares. The plaintiff’s contribution was
inferred to be part of the bargain. The court held that
this contribution gave her a one-third share in the property
because the agreement was part overt and part inferred.
This approach appears to be in reality almost as flexible
an approach as prevails in cases of proprietary estoppel.
The court is permitted to satisfy the equity of proprietary
estoppel by granting the remedy which it deems to be
equitable having taken account of all the circumstances the

300 Ibid.
301 Ibid.
302 Ibid.
303 [1975] 1 WLR 1338.
parties' conduct and financial and housing situation. Eves v Eves does not disclose as to how the Court concluded that the plaintiff's one-third share represented the bargain between the parties. Brightman J indeed acknowledged that there was no ready answer to the problem. He expressed the view that

there is a case for saying that in the absence of any contrary indication it can only be a joint interest in equity, leading to a half interest for each party as seen as the joint tenancy is severed. He nevertheless concurred with Lord Denning MR and Browne LJ that a one-third beneficial interest for the plaintiff was the correct solution.

The problem of quantification was again referred to in Grant v Edwards. Here the agreement had been that the parties would have been joint legal title holders, were it not for their precise shares not being specified. However, the parties had shared equally the fire insurance moneys awarded to them after a fire in the property and, Nourse LJ was thus influenced to give the plaintiff an equal

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304 See Chapter Four.
305 [1975] 1 WLR 1338.
306 It may be that Brightman J employed the so-called judicial one-third rule employed in division of property under the Matrimonial Causes Act 1973 see, e.g., Wachtel v Wachtel [1973] 1 All ER 829.
307 Eves v Eves [1975] 1 WLR 1338 at 1345. See also Smith v Ahone (1975) 56 DLR(3d) 454.
308 [1986] 2 All ER 426.
share in the property. Sir Nicolas Browne-Wilkinson V-C held that "prima facie the interest of the claimant will be that which the parties intended." However, he went on to say that the law of proprietary estoppel might provide useful guidance in the future in deciding the extent of the claimant's interest. If the flexible approach of proprietary estoppel were followed, the constructive trust would not be an identifiable interest prior to the court hearing.

B Inferred agreements

Where a relevant agreement is inferred from the claimant's substantial financial or labour contribution, the quantification of the interest will be in direct relationship to this contribution.

C In the estoppel context

Even where the representee's expectations are unequivocal the court may satisfy the 'inchoate equity' in a manner contrary to the representee's expectations.

309[1986] 2 All ER 426 at 434. See also the judgment of Mustill LJ at 437.
310Ibid at 439.
311The Vice-Chancellor has accepted that at some stage in the future the two doctrines may merge but not until the problem of third parties and the doctrine of notice has been settled - (personal interview 22 October 1986).
312See, e.g., Dodsworth v Dodsworth (1973) 228 EG 1115 (ante 131ff).
X  TIME OF VALUATION

The date of valuation of the beneficial claimant's share in the context of constructive trust is at the date of realisation of the interest.\textsuperscript{313} In this respect proprietary estoppel and constructive trusts are different. Under the former doctrine, the time of any valuation which is required falls within the area of total discretion which the court enjoys in granting a remedy.

XI  CONCLUSION

The doctrines of proprietary estoppel and constructive trust have separate origins. The constructive trust whether substantive or remedial has been regarded for the most part as protecting a proprietary right pre-dating the court hearing. In the context of the family home the constructive trust has emerged as an amalgam of a traditional constructive trust, a resulting trust and proprietary estoppel. Proprietary estoppel is a long-established remedial 'inchoate equity' which generally has no proprietary qualities until satisfied by the court. Nevertheless, both concepts operate to protect those who act to their detriment in the belief that they are acquiring rights in or over property, against any unconscionable denial of those rights by the legal title holder.\textsuperscript{314}

\textsuperscript{314}See Dewar (1984) 47 MLR 735.
The informal relations between individuals in a family setting are complex and do not readily submit to the formal process of legal analysis. The facts of the cases decided under the doctrine of constructive trusts comprise a relatively small number of verifiable events and actions whose significance is beyond reasonable doubt and a much larger area which remains subject to interpretation of inference by the courts. The strict requirements of the constructive trust have forced the courts to consider familial events in terms of categories of conduct into which they do not readily fit. In this respect the constructive trust lacks the flexibility of proprietary estoppel. The concept of proprietary estoppel is potentially a more appropriate legal construct for solving familial disputes concerning the family home, but the concept lacks the valuable equitable proprietary nature of the constructive trust, at least prior to the court hearing.

A merger of the concepts of constructive trust and proprietary estoppel would solve the problems outlined above. Such a merger would require a broadening of one concept to cover all the circumstances of the other concept. The present Vice-Chancellor has tentatively approved of such a merger, but only if the problems of third party rights are given prior consideration.315

The Canadian courts have already, by implication, merged the two concepts.316 Proprietary estoppel is no

315Personal interview 22 October 1986.
316The New Zealand courts have tentatively suggested that they too may accept the Canadian doctrine of unjust
longer referred to in the resolution of familial home disputes. The language of proprietary estoppel has been translated into the constructive trust context with a slight alteration of the requirement of detriment. If detriment unjustly enriches the legal title holder, as opposed to merely depriving the claimant, a constructive trust will be found. Since a different form of detriment is acceptable in proprietary estoppel, it remains uncertain whether a merging of the concepts would leave some claimants unprotected.

By contrast the Australian courts have opposed any merger of the concepts. The Australian cases suggest a desire to make more stringent the requirements of constructive trusts whilst retaining the doctrine of proprietary estoppel as a separate equitable cause of action. The remedy of a new type of constructive trust dating from the court hearing may then be awarded in satisfaction of estoppel claims.317

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CONCLUSION

Setting up a family home is often characterised by considerable measures of faith, hope and trust by all the parties concerned. Legal title holders frequently come to a very informal, ill-defined agreement or even no agreement at all relating to the occupancy of their properties as family homes. If there is some future conflict between the legal owner and the occupier the amicable, if somewhat muddled, arrangement at the outset can, particularly when coloured by the ensuing ill-feeling between the parties, become difficult to disentangle. The resolution of the disputes which ensue from such circumstances has provided a major problem for property and family lawyers during the last twenty-five years. In the majority of these disputes little attention has been paid by the parties at the commencement of the relationship to any implications which might result from a breakdown in their personal relationship.2

The analysis of the doctrine of proprietary estoppel undertaken in this dissertation has shown how this doctrine, somewhat neglected in the first part of the twentieth century,3 has been revitalised as one potential means of granting to occupants of the family home at least some rights in respect of that home. Case law considered in this dissertation has revealed, however, that there are both

1See, e.g., Rogers v Eller (Unreported, Court of Appeal 20 May 1986) where Croom-Johnson LJ referred to the phenomena of "family non-arrangements".
2See, e.g., Broughall v Hunt (Unreported, Chancery Division 1 February 1983) (ante at 281 ff).
3The first 20th century English case to employ the estoppel doctrine was Inwards v Baker [1965] 2 QB 29.
advantages and limitations in the employment of the estoppel doctrine for the purpose of alleviating homelessness in the family context.

The modern formulation of the estoppel doctrine, as discussed in Chapter One, has distilled two broad requirements from the earlier and more complex formulations of the doctrine. In the familial context the estoppel claimant must now first prove that he has been encouraged by the legal title holder to expect that he should obtain rights in or over his family home. Second, the onus is on the estoppel claimant to prove that there has been a detrimental alteration of position in reliance on the engendered expectation. There remains, however, a judicial tendency to demand that claimants must prove that they have fulfilled the more rigid requirements of the five probanda outlined by Fry J in Willmott v Barber. This strict approach may lead to the failure of claims which could have possibly succeeded under the modern formulation of proprietary estoppel.

Chapter Two examined the first requirement, i.e., that of encouragement. It was seen that judicial interpretation of conduct as a relevant encouragement in the absence of any explicit agreement depends on a number of interrelated factors. These factors comprise the nature of the relationship between the parties; the quality of the representor's conduct and knowledge; the extent of the

4 Ante at 10
5 (1880) 15 Ch D 96 at 140 (ante at 14 ff).
6 See, e.g., Coombes v Smith [1986] 1 WLR 808.
7 Ante at 26
representee's alteration of position and any familial or social consequences which may result from a recognition of conduct as encouragement.

One obvious limitation on the estoppel doctrine emerges from the courts' selective interpretation of conduct as a relevant encouragement. If the courts reject the alleged behaviour as a relevant encouragement the legal title holder may then retain the benefits, if any, of the estoppel claimant's detrimental alteration of position. The claimant is regarded as foolish to undertake a detrimental alteration of position in the absence of encouragement. It may, however, be unrealistic if not impossible for a claimant to withdraw from the alteration of position in these circumstances. In Coombes v Smith, the claimant could not easily abandon the daughter of her relationship with the legal title holder when the court later made her aware that she had misunderstood the meaning of the legal title holder's agreement to provide her with a roof over her head. The claimant, of course, would continue to take care of their child. The legal title holder would be able to accept this contribution without further recompense to the claimant.

Chapter Three considered the second requirement, i.e., that of a detrimental alteration of position in reliance on the claimant's expectation engendered by the legal title holder's encouragement. The courts have tended

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8See, e.g., Ramsden v Dyson (1866) LR 1 HL 129 at 140, 141 per Lord Cranworth LC.
9[1986] 1 WLR 808 (ante at 93 ff).
10Ante at 72
to find a relevant detrimental alteration of position where the estoppel claimant has expended substantial money or labour. Where the expenditure of labour or money has, however, been insubstantial or where the detrimental alteration has taken some alternative form such as child rearing or housekeeping, the courts have not consistently accepted such conduct as fulfilling the requirement of detriment. It was suggested in this dissertation that the rejection of conduct involving no direct financial expenditure as a detrimental alteration of position results from a tendency to confuse the meaning of this second requirement.11 The relevant detriment for the purpose of estoppel is not the financial loss resulting from the alteration of position itself but the financial loss which will result from the alteration of position if the estoppel claimant's expectation is frustrated. Where the parties have a close familial relationship the courts have accepted that an alteration of position which benefits the representee but involves no financial loss to the representee during the currency of the expectation may be a relevant detriment. It is notable that de facto marital relationships have been placed within the category of close familial relationships; the relationships of lover/mistress have not been so treated.12

The most significant advantage of the estoppel doctrine lies in the flexibility of the courts in their satisfaction of the 'inchoate equity'. This flexibility gives the

12Contrast the decision in Maharaj v Jai Chand [1986] 3 All ER 107 with the decision in Coombes v Smith [1986] 1 WLR 808.
courts considerable scope to alleviate homelessness but at the same time commits the claimant to an uncertain outcome. The estoppel claimant who reaches this stage in the judicial process risks receiving a remedy which will actually make him homeless. It was seen in Chapter Four\(^1\) that the courts may grant any remedy, regardless of the parties' expectations, in satisfaction of the 'inchoate equity'.

The courts' flexible approach to the satisfaction of the 'inchoate equity' was seen to be reminiscent of the reallocative process of the Family Division in cases of divorce. In Chapter Four nine factors were identified as having particular significance in the exercise of judicial discretion. Some of these factors were seen to be similar to those factors which the courts had already taken into account in determining prior issues relating to encouragement and detrimental alteration of position. Two of the nine factors relevant to the satisfaction of the 'inchoate equity' are concerned with the nature of the relevant encouragement and detrimental alteration of position. The courts have not always granted a remedy which protects the occupancy of the family home. Financial compensation for the claimant's detrimental alteration of position has often been deemed an appropriate remedy, yet such compensation will rarely rehouse the estoppel claimant.\(^1\)\(^4\) In some cases the courts have even decided that the 'inchoate equity' has already received sufficient satisfaction in the form of the occupancy enjoyed by the claimant prior to the court hearing.

\(^{13}\)Ante at 107

\(^{14}\)See, e.g., Dodsworth v Dodsworth (1973) 228 EG 1115.
There remains considerable uncertainty concerning the nature of the 'equity of estoppel'. The nature of the 'equity of estoppel' was examined in Chapter Five. The estoppel claimant was seen to be in a vulnerable position with regard to the occupation of his family home at all stages prior to the court hearing. Because his equity is inchoate prior to the court hearing, an estoppel claimant risks losing his right, either because the court deems him to have had sufficient satisfaction for his detrimental alteration of position, or because his conduct bars him from relief. In the familial context this latter risk is very real. The relationship between the parties has normally broken down prior to the court hearing. The parties are likely to be in a state of ill-humour particularly if they have been living together in conflict. The claimant's fear of losing his home may lead him to indulge in acrimonious and unpleasant conduct. The courts have shown a reluctance to define with any precision the type of conduct which would deprive the estoppel claimant of a remedy. Fraudulent conduct has sometimes led to the revocation of an 'inchoate equity', but there remains uncertainty in relation to other types of misconduct which might bar the claimant's relief. Where the 'inchoate equity' has been satisfied, by the grant of some form of right of occupancy the claimant may risk the loss of his 'satisfied equity'.

15Ante at 151
16See, e.g., Williams v Staite [1979] Ch 291.
If the legal title holder assigns the property to a third party prior to the court hearing, the estoppel claimant may lose his 'inchoate equity'. It was seen that the 'inchoate equity' is held to be binding on third parties in only strictly limited circumstances.\(^1\) The 'inchoate equity' was held to bind third parties where the representation was that a permanent right had been granted; where the third party was also a member of the claimant's family or where the court imposed the 'greater hardship' test. Once the 'inchoate equity' has been satisfied, the 'satisfied equity' has, by clear contrast, much greater potential to bind third parties.\(^2\)

The estoppel claimant cannot normally assign his 'inchoate equity' or even his 'satisfied equity' unless he has been granted a legal proprietary right or a conventional equitable proprietary interest.\(^3\) The claimant may have a secure home himself but, if he is unable to assign his 'equity of estoppel', his family's occupation will remain vulnerable. If the claimant dies or abandons his family, the family will be left homeless. The non-assignability of the 'equity of estoppel' may have other wide reaching effects on the estoppel claimant and his family. For example, if he is unable to obtain employment in the area where he is currently housed, he will probably be unable to seek employment elsewhere without the risk of making his family homeless.

\(^{1}\) Ante at 181 ff
\(^{2}\) See however Maharaj v Chand [1986] 3 All ER 107 at 112.
\(^{3}\) Ante at 173 ff
In Chapter Six\(^{22}\) it was suggested that the Limitation Acts could not be called upon to protect the estoppel claimant's right either prior to the court hearing at which the 'inchoate equity' was satisfied or even thereafter. The claimant is therefore unable to enlarge his 'equity of estoppel' into any kind of possessory title.

The remedial nature of the doctrine of proprietary estoppel has led to the labelling of the 'equity of estoppel' as a lesser right than the right arising under a substantive constructive trust.\(^{23}\) In Chapter Seven\(^{24}\) the equitable interest which arises from a constructive trust was seen to have many overlapping features with the 'equity of estoppel'; but the constructive trust has generally been viewed as a more satisfactory device for the protection of the family home. It is in the nature of a right arising under a substantive constructive trust that even prior to the court hearing this right cannot be revoked. The right is assignable and is potentially binding on third parties. However, the beneficial interest behind a substantive constructive trust may be overreached, leaving the beneficiary with a mere share in the proceeds of sale\(^{25}\) rather than any right of occupancy. In this respect the constructive trust may be a less satisfactory device than the estoppel doctrine for the purpose of protecting informally obtained rights in the family home.

\(^{22}\)Ante at 223

\(^{23}\)See, e.g., Walker v Walker (Unreported, Court of Appeal 12 April 1984) per Browne-Wilkinson LJ.

\(^{24}\)Ante at 242

There remain further limitations on the potential of the constructive trust to protect the family home. The requirements of an actual or inferred intention to share in the beneficial interest in the property, plus a detrimental alteration of position referable to the property, have often been demonstrated as over stringent in the familial context.26

It was acknowledged in Chapter Seven27 that the Canadian doctrine of constructive trusts based on unjust enrichment may provide a more realistic means of resolving familial property disputes than the intention-based constructive trust. For this purpose unjust enrichment includes enrichment resulting from domestic contribution,28 and the Canadian doctrine is therefore particularly suited to familial property disputes. The abandonment by the Canadian courts of any search for common intention means that a legal title holder cannot expect to continue to receive benefits without compensating the claimant whose alteration of position has provided these benefits. Once the claimant can be viewed as having a reasonable belief that rights in the legal title holder's property will be granted, the legal title holder cannot deny these rights if he has accepted the benefits flowing from the claimant's alteration of position.

By contrast, the intention-based doctrine of proprietary estoppel and the doctrine of constructive trusts

26See, e.g., Burns v Burns [1984] Ch 317.
27Ante at 242
permit a legal title holder to evade any diminution of his property rights if he can prove that the claimant's detrimental alteration of position was referable to some alternative kind of arrangement between the parties. The legal title holder may then retain the benefits resulting from the claimant's alteration of position.

The doctrine of proprietary estoppel nevertheless retains one significant advantage over both the intention-based constructive trust and the Canadian constructive trust based on unjust enrichment. The estoppel doctrine recognises a wide category of detrimental alteration of position. Theoretically an estoppel claim may be founded on any alteration of position which subsequently proves to be detrimental when the legal title holder resiles from his representation. There need be no benefit to the legal title holder.29

At present there remains considerable uncertainty as to whether a plea of constructive trust simultaneously encompasses a plea of proprietary estoppel. Until this issue is clarified by an appellate court, those who wish to protect informal rights in their family home may find it necessary to plead both the doctrine of constructive trust and the doctrine of proprietary estoppel in the alternative. Where certainty is required and the stringent conditions required to found an intention-based constructive trust can be met, a plea of a constructive trust may be more appropriate than a plea of proprietary estoppel. There

are, however, very real dangers that claimants will attempt to force the facts of a given situation into the constructive trust framework and risk the loss of an estoppel remedy, a remedy which may benefit a claimant to a greater extent than a substantive constructive trust. The estoppel claimants in both Pascoe v Turner\[30\] and in Re Basham (decd)\[31\] would not have received a 100% beneficial interest in their respective family homes had they pleaded a constructive trust. These defendants benefited by the judicial discretion in satisfying the 'inchoate equity' of estoppel permitted by the doctrine of proprietary estoppel.

J D Davies has called for a wider employment of the estoppel doctrine and a less frequent resort to constructive trust doctrine in resolving the disputes inherent in 'muddled' familial arrangements.\[32\] If, as seems likely, members of families and legal title holders continue to make 'muddled' arrangements relating to the occupancy of property as a family home and subsequently fall out with each other, there will be a continuing need for an equitable concept to help courts resolve the ensuing conflict. The case law considered in this dissertation has shown that the doctrine of proprietary estoppel is a particularly useful means of resolving such conflict.

\[30\] [1979] 1 WLR 431.
\[31\] [1986] 1 WLR 1498.