Precontractual Estoppel by Convention

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Abstract

This article addresses the unresolved question as to whether estoppel by convention can arise from a precontractual understanding. Answering that question requires consideration not only of issues of fairness in contractual dealings and the need to protect the integrity of written contracts, but also the nature and history of estoppel by convention, the relationship between the common law and equity, and the need for consistency between analogous doctrines. I argue in this article that considerations of authority, justice and policy favour allowing estoppel by convention to arise from a precontractual understanding. An examination of the cases reveals an overlooked history: some of the foundational cases of estoppel by convention involved precontractual understandings. The difficult question is not whether estoppel by convention can arise from a precontractual understanding, but whether it can contradict a subsequent written agreement. Considerations of justice, including the need for consistency between analogous doctrines, favour allowing it to do so, while policy considerations do not provide a compelling case to the contrary.

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I Introduction

Whether estoppel by convention can arise from a precontractual understanding is currently unresolved.[1] Whether it should be allowed to do so raises important questions about the nature and history of estoppel by convention, the considerations of interpersonal justice underlying reliance-based estoppels, the need for consistency between related doctrines, the relationship between the common law and equity, and broader policy considerations. At stake is the balance to be struck between protecting the integrity of written contracts and ensuring fairness in contractual dealings. While Australian law appears to be moving towards the view that estoppel by convention cannot arise from a precontractual understanding, I argue in this article that the balance of considerations of authority, justice and policy favour allowing it to do so, even in the face of an inconsistent written agreement.

In Part II of the article, I assess the weight of authority for and against the proposition that estoppel by convention cannot arise from a precontractual understanding. In order to do so, it is necessary and instructive to examine closely both the facts and the reasoning in the key cases. The cases reveal a significant but overlooked history: some of the foundational cases of estoppel by convention involved precontractual understandings. The issue is not, therefore, whether estoppel by convention can ever arise from a precontractual understanding, as some English cases and commentary suggest. It clearly can. Rather, as the Australian cases indicate, the difficult question is whether an estoppel by convention can contradict a written agreement signed after the adoption of the convention. There are, in fact, three questions in issue: first, can estoppel by convention ever arise from a precontractual understanding; second, does the parol evidence rule prevent estoppel by convention arising from a precontractual understanding where the parties have reduced their agreement to writing; and, third, can estoppel by convention contradict a written agreement signed after the adoption of the convention.

In Part III of the article, I show that considerations of justice strongly favour a liberal approach to precontractual estoppel by convention, particularly when account is taken of the need for consistent treatment of analogous doctrines. An interesting question here is whether a common law doctrine, especially one that draws on equitable concepts and is closely analogous to equitable doctrines, should be given a more restrictive operation than its equitable counterparts.

In Part IV, I discuss policy considerations that might seem to favour the exclusion of evidence of precontractual estoppels by convention. That discussion concludes, however, that if the high evidentiary standard required for rectification is applied to estoppel by convention then there is a strong case — based on a weighing of considerations of justice on one side and considerations of policy on the other — for allowing precontractual estoppel by convention to contradict a written agreement.

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[1] See, eg, *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, 738 [577] (Campbell JA) ('*Franklins*'): 'The question of whether an estoppel by convention can arise from precontractual negotiations is not settled'; *Queenfield Pty Ltd v Gordon Finance Pty Ltd* [2020] VSCA 282, [47] ('*Queenfield*'): McLeish, Niall and Sifris JJA noting the conclusion of the primary judge that the issue was 'somewhat unsettled', but the predominant view was that precontractual communications may not be relied upon in support of an estoppel by convention.

II Authority: The Overlooked History of Estoppel by Convention

Before exploring the development of estoppel by convention, it is necessary to take note of the contemporary framework, understanding and relevance of the doctrine. Estoppel by convention is commonly raised in commercial litigation in relation to both pre- and post-contractual understandings as to the rights and obligations of the parties. It is an unusual form of estoppel. Like estoppel by deed, it is based on a common assumption or shared understanding between the parties, but like estoppel by representation of fact and promissory and proprietary estoppel, it is concerned to prevent harm resulting from reliance and requires a detrimental change of position. In short, its effect is that parties who mutually adopt an assumption of fact or law as the basis of a transaction are held to that assumption for the purpose of the transaction when it is necessary to do so in order to prevent detriment to one of the parties. More fully, where:

1. parties to a transaction or legal relationship adopt an assumption of fact or law (including an assumption as to the legal rights of the parties) as the basis of their transaction or relationship; and
2. the parties by words or conduct communicate that assumption in such a way that it can be said to be a shared assumption and to represent at least a tacit understanding between them; and
3. one party (the relying party) has acted on the assumption in such a way that departure from the assumption by the party against whom the estoppel is asserted would cause detriment to the relying party,

then the party against whom the estoppel is asserted will not be permitted to deny the correctness of the assumption or convention, and the rights of the parties will be determined on the basis that the assumption or convention is correct.[2]

As to the first element, it is important to note that the parties need not believe the correctness of the assumed state of affairs but 'may adopt as the conventional basis of a transaction between them an assumption which they know to be contrary to the actual state of affairs'.[3] Alternatively, the parties may not appreciate that their assumption involves a departure from the strict legal position.[4] The second element encapsulates what is distinctive about estoppel by convention among reliance-based estoppels. It arises from an understanding between the parties, rather than a representation or promise made by one to the other. It is not enough for the parties

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2 See, eg, *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, 644–6 [194]–[203] (Tobias JA) ('*Ryledar*') and the authorities there cited, which include: *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674–7 (Dixon J) ('*Grundt*'); *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, 121–2 (Lord Denning MR) ('*Texas Bank Case*'); *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 244 (Gibbs CJ, Mason, Wilson Brennan and Dawson JJ); *Republic of India v India Steamship Co Ltd (No 2)* [1998] AC 878, 913–14 (Lord Steyn) ('*The Indian Endurance (No 2)*').

3 *Grundt* (n 2) 676.

4 *Moratic Pty Ltd v Gordon* [2007] Aust Contract Reports ¶90-255, 89,914 [33] (Brereton J), quoted in *Ryledar* (n 2) 645 [201] (Tobias JA).

to adopt the assumption independently; there must be some 'conduct crossing the line'[5] between the parties so that the party against whom the estoppel is asserted can be understood to have played a part in the adoption of the assumption by the relying party.[6] As Dixon J said in *Grundt v Great Boulder Pty Gold Mines Ltd*, central to the 'justice of an estoppel' arising from a detrimental change of position is the idea that '[b]efore anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were free to ignore it.'[7] It should finally be noted that, although it is not directly relevant to the issues discussed in this article, there may be a fourth element necessary to establish an estoppel by convention. It is sometimes also said that the parties must have intended the assumption to affect their legal relationship,[8] that each must have intended the other to act on the assumption,[9] or that the person against whom the estoppel is asserted must have intended the relying party to act on it.[10]

In a highly influential passage in *Thompson v Palmer*,[11] which was repeated in *Grundt*,[12] Dixon J set out the circumstances in which different reliance-based estoppels arise. His Honour described the different situations in which a party may, because of the 'part taken by him in occasioning its adoption', be required to abide by an assumption that another party has adopted 'as the basis of some act or omission which, unless the assumption be adhered to, would operate to that [other party's] detriment'.[13] Dixon J began that list with the observation that '[h]e may be required to abide by the assumption because it formed the conventional basis *upon which the parties entered into* contractual or other mutual relations, such as bailment'.[14] From the perspective of today, when precontractual estoppel by convention is controversial, it seems remarkable that Dixon J should describe estoppel by convention only in its application to the situation in which parties *enter into* contractual or other relations on the basis of the shared assumption or convention. It is striking that Dixon J should make no reference to what is today considered the orthodox application of the doctrine in relation to a convention arising in the context of a pre-existing relationship. But estoppel by convention was, in fact, founded on giving effect to precontractual understandings: in two foundational cases, discussed in Part II(A) below, estoppel by convention arose in precisely the circumstances Dixon J described, operating to give effect to an understanding which provided the basis on which parties entered into a transaction.

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5 *Norwegian American Cruises A/S v Paul Mundy Ltd* [1988] 2 Lloyd's Rep 343, 350 ('*The Vistafjord*'). See also *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd* [1985] 2 Lloyd's Rep 28, 35 ('*The August Leonhardt*'); *Blindley Heath Investments Ltd v Bass* [2017] Ch 389, 411–12 [88]–[92] ('*Blindley Heath Investments*'); *Grundt* (n 2) 675; Michael Barnes, *The Law of Estoppel* (Hart Publishing, 2020) 369–74 [5.52]–[5.61].

6 See especially *The August Leonhardt* (n 5) 35; *Blindley Heath Investments* (n 5) 411–12 [88]–[92]; *Grundt* (n 2) 675; Barnes (n 5) 369–74 [5.52]–[5.61].

7 *Grundt* (n 2) 675.

8 Kenneth R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 2nd ed, 2016) 129 [8-001].

9 *Ryledar* (n 2) 645 [200].

10 Barnes (n 5) 374–6 [5.62]–[5.66].

11 *Thompson v Palmer* (1933) 49 CLR 507, 547 ('*Thompson*').

12 *Grundt* (n 2) 676.

13 *Thompson* (n 11) 547.

14 Ibid (emphasis added).

A *Early English Authorities*

Perhaps the most important early case of estoppel by convention was *Ashpitel v Bryan*,[15] in which an estoppel gave effect to a fiction mutually adopted by the parties as to the nature of a transaction into which they were entering. After the death of John Peto, who died intestate, the deceased's clerk sold goods to the defendant, who by way of payment accepted a bill of exchange that purported to be drawn by the deceased and endorsed by him to his nephew James Peto. The defendant later denied liability on the basis that the bill had not in fact been endorsed by John Peto. It was true that John Peto had not endorsed the bill, since the transaction was conceived after his death and the bill was signed per procurationem by his clerk, but the plaintiff succeeded on the basis of estoppel at all levels. At first instance, Mellor J held that the plaintiff was estopped from raising the objection since he was aware of the facts at all times.[16] An appeal in the Court of Queen's Bench was unsuccessful. Drawing an analogy with estoppel by representation of fact, Crompton J held that 'when two parties agree that a commercial instrument shall be taken as founded upon a certain fact, and the position of one, by acting on that agreement, is altered, the other ought not to be admitted to deny it'.[17]

In the Court of Exchequer Chamber, Pollock CB said that where, for the purpose of a transaction, parties agree that certain facts should form 'the basis on which they would contract', they cannot afterwards dispute those facts unless there has been fraud.[18] After John Peto's death, the defendant agreed to take the goods in a transaction that was in the nature of a sale from John Peto. Pollock CB said:

> The parties agreed that the transaction should have this character, viz, that the defendant should appear to have bought the goods of John Peto, and that therefore the bill should be drawn and indorsed in the name of John Peto, and it was afterwards accepted by the defendant on the basis of that agreement. The defendant having accepted the bill after it had been drawn and indorsed in that name, and having promised payment of it, now says that it was not drawn and indorsed by John Peto; but he is estopped from doing so.[19]

The estoppel that was upheld in *Ashpitel (Exchequer Chamber)* arose from a precontractual convention as to the nature and basis of the transaction between the parties. Since the estoppel was upheld by all judges at all three levels, including the Court of Exchequer Chamber, the case provides very strong authority for the proposition that estoppel by convention can arise from a precontractual understanding.

Very soon after *Ashpitel (Exchequer Chamber)*, the Court of Exchequer Chamber gave effect to another precontractual estoppel by convention in *M'Cance v London and North Western Railway Co*.[20] In that case, the defendant railway company carried the plaintiff's horses on their railway. Before doing so, the

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15 *Ashpitel v Bryan* (1864) 5 B & S 723; 122 ER 999 ('*Ashpitel (Exchequer Chamber)*').
16 *Ashpitel v Bryan* (1862) 3 F & F 183; 177 ER 82, 84.
17 *Ashpitel v Bryan* (1863) 3 B & S 474; 122 ER 179, 185 ('*Ashpitel (Queen's Bench)*').
18 *Ashpitel (Exchequer Chamber)* (n 15) 1001.
19 Ibid.
20 *M'Cance v London and North Western Railway Co* (1864) 3 H & C 343; 159 ER 563 ('*M'Cance (Exchequer Chamber)*').

defendant asked the plaintiff to sign a declaration that the value of the horses did not exceed £10 per horse. The horses were, in fact, worth considerably more and were injured through the fault of the defendant. The defendant's liability under the contract was held to be limited by the declaration. In the Court of Exchequer, the plaintiff's declaration was held not to be part of the contract, but to constitute a representation of fact that induced entry into it. It therefore gave rise to an estoppel by representation of fact.[21] In the Court of Exchequer Chamber, *Ashpitel (Queen's Bench)* was cited in argument, and the stated value of the horses was treated as a convention mutually adopted by the parties as the basis on which they contracted.[22] Williams J, giving the judgment of the Court, held that the effect of the plaintiff's declaration as to the value of the horses 'was a mere declaration which formed the basis of the contract which the parties intended to make, and by which it was to be regulated and governed'.[23] The evidence established that 'the contract was to be regulated and governed by a state of facts understood by the parties', and so the parties were 'bound by the conventional state of facts agreed upon between them'.[24]

B *Contemporary English Cases*

Despite those origins, it is sometimes said in the contemporary English cases that an estoppel by convention can only arise from an assumption adopted by parties to an existing transaction. Without conducting a review of the doctrine, Lord Steyn observed in *The Indian Endurance (No 2)* that: 'It is settled that an estoppel by convention may arise where *parties to a transaction* act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other.'[25] More explicitly, in his book on estoppel Mr Michael Barnes KC insists that the assumption that founds an estoppel by convention 'must relate to a transaction or relationship into which the parties have already entered' at the time the assumption is made, and cannot relate to a transaction or relationship into which the parties 'are about to enter'.[26]

In support of that proposition, Barnes relies principally on the decision of the English Court of Appeal in *Keen v Holland*.[27] That case concerned a lease of agricultural land that attracted certain statutory protection for the tenant. The landlords had made it clear to the tenant that they were willing to grant a lease only on terms that would not attract the statutory protection. As a result of a mistake of law by the landlords, however, the lease they granted did attract the statutory protection. The landlords claimed that the tenant was estopped from taking advantage of the statutory protection. The Court of Appeal upheld the decision of the primary judge that the statutory provisions could not be overridden by an estoppel and that, in view of the purpose of the legislation, it could not be

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21 *M'Cance v London and North Western Railway Co* (1861) 7 H & N 477; 158 ER 559, 564 (Pollock CB), 565 (Bramwell B), 567 (Channell B), 567 (Wilde B).

22 *M'Cance (Exchequer Chamber)* (n 20) 563.

23 Ibid 564.

24 Ibid.

25 *The Indian Endurance (No 2)* (n 2) 913 (Lord Steyn, with whom Lord Browne-Wilkinson, Lord Hoffmann, Lord Cooke of Thorndon and Lord Hope of Craighead agreed) (emphasis added).

26 Barnes (n 5) 345 [5.8].

27 *Keen v Holland* [1984] 1 WLR 251 ('*Keen*'); see Barnes (n 5) 348 [5.16].

unconscionable to assert the statutory protections.[28] While noting that that was sufficient to dispose of the estoppel claim, the Court observed that there were other insuperable obstacles to a successful plea of estoppel. The Court noted that this was not a situation in which the parties had, 'by their construction of the agreement or their apprehension of its legal effect', 'established a conventional basis upon which they have regulated their subsequent dealings as in the [*Texas Bank Case*]'.[29] Rather, '[t]he dealing alleged to give rise to the estoppel is the entry into the agreement itself in the belief that it would produce a particular legal result.'[30] The Court shared the primary judge's difficulty in seeing how 'a mere erroneous belief' that the form of the agreement would result in an unprotected tenancy 'can properly be described as the "conventional basis" for their dealings so as to give rise to an estoppel'.[31] It seems that Oliver LJ was saying that a mutual, erroneous belief that a contract has a particular effect cannot give rise to an estoppel by convention even if one of the parties establishes that they would not have entered into the contract had they understood its legal effect.

In *PW & Co v Milton Gate Investments Ltd*, Neuberger J considered that Oliver LJ was indicating in that passage 'that some course of dealing after the contract in question had been entered into was necessary' and that an estoppel by convention could not arise from negotiations.[32] In *Milton Gate*, a head lease contained a break clause that gave the head lessee the right to terminate the headlease on a certain date, 'subject to any permitted underleases'.[33] The headlease was negotiated and agreed on the basis that the general rule that a subtenancy comes to an end on determination of the head lease would not apply to any permitted subleases. Neuberger J held that, in view of *Keen*, such an understanding was not capable of giving rise to an estoppel by convention.[34] His Honour went on to find, however, that there was a sufficient course of dealing *after* the granting of the head lease to establish a common understanding, along with communication of that understanding between the parties, and reliance by the head lessee.[35] The estoppel by convention was therefore established.[36]

Barnes interprets *Keen* and *Milton Gate* as establishing a rule that the assumption that gives rise to an estoppel by convention must relate to an existing transaction and not the meaning or effect of a proposed transaction.[37] In *Keen*, however, the point was not clearly made and what Oliver LJ did say was offered as an alternative explanation for a conclusion that had already been reached. And in *Milton Gate*, Neuberger J went on to find that the estoppel was established in any case. Neither therefore provides strong authority. Moreover, the idea that 'some

28 *Keen* (n 27) 261 (Oliver LJ for the Court).
29 Ibid 261, referring to the *Texas Bank Case* (n 2).
30 *Keen* (n 27) 261.
31 Ibid 262.
32 *PW & Co v Milton Gate Investments Ltd* [2004] Ch 142, 185 [165] ('*Milton Gate*').
33 Ibid 152 [13].
34 Ibid 184–5 [162]–[169].
35 Ibid 190 [186].
36 Ibid.
37 Barnes (n 5) 365 [5.16], citing *Keen* (n 27) (Oliver LJ), 366 [5.45], citing *Milton Gate* (n 32) (Neuberger J).

course of dealing after the contract in question had been entered into'[38] is needed for estoppel by convention is contradicted by *Ashpitel (Exchequer Chamber)* and *M'Cance (Exchequer Chamber)*.[39]

The notion that estoppel by convention can only be founded on a post-contractual understanding is also arguably contradicted by the decision of the Court of Appeal in *The Vistafjord*,[40] where, as KR Handley notes,[41] the Court of Appeal upheld a precontractual estoppel by convention. In that case there was, however, a pre-existing contractual relationship between the parties so the matter is not entirely straightforward. The plaintiff owned two cruise ships and, in 1975, appointed the defendant as their London agent for the sale of passenger tickets. Under the terms of that agency agreement, the plaintiff agreed to pay the defendant a 15% commission on UK ticket sales. In 1979, the defendant facilitated the plaintiff's entry into an unusual arrangement involving a time charter of the plaintiff's vessel to a car maker for a series of promotional cruises. For reasons of cost, the car maker's entry into the transaction was conditional on a sub-charter of the vessel to the defendant, who planned to sell tickets on the delivery and re-delivery legs. That involved a financial risk for the defendant, which ended up making a loss on the sub-charter. Representatives of the plaintiff and the defendant entered into the charter and sub-charter transaction on the shared assumption that the defendant would be entitled to commission under the 1975 agreement. The defendant was not entitled to a commission under the terms of that agreement, but was held to have such an entitlement by way of an estoppel by convention.

It is possible to explain the decision in *The Vistafjord* on the basis that there was a pre-existing contract between the parties (namely, the 1975 agreement) and the parties subsequently adopted and acted on a convention as to their rights and obligations under that agreement (namely, that the defendant would be entitled to a commission on the time charter to the car maker). Bingham LJ, however, took the law on estoppel by convention to be as described by Spencer Bower and Turner in *Estoppel by Representation*, which required that an estoppel be founded on an assumption adopted by convention between the parties 'as the basis of a transaction into which they are *about to enter*'.[42] As Bingham LJ noted, that statement had been expressly approved by the English Court of Appeal in the well-known *Texas Bank Case*.[43] The plaintiff in *The Vistafjord* argued that the requirement set out by Spencer Bower and Turner was not satisfied because the parties were not 'about to enter' a transaction directly between them, but rather a transaction between each of them and the car maker (the charter and sub-charter).[44] Bingham LJ quoted and approved a passage in an unreported judgment of Peter Gibson J explaining why it was not necessary for an estoppel by convention that the parties be 'about to enter a

38 *Milton Gate* (n 32) 185 [165].
39 See above text accompanying nn 15–24.
40 *The Vistafjord* (n 5).
41 Handley (n 8) 141 [8-013].
42 Ibid 349 (emphasis added), quoting George Spencer Bower and Sir Alexander Turner, *The Law Relating to Estoppel by Representation* (Butterworths, 3rd ed, 1977).
43 *The Vistafjord* (n 5) 349, citing *Texas Bank Case* (n 2) 126A (Eveleigh LJ), 130G (Brandon LJ).
44 Ibid 349 (emphasis added), quoting Spencer Bower and Turner (n 42).

transaction when they made the common assumption'.[45] Rather, an estoppel by convention could arise from conduct after a contract has been made between the parties or, as in this case, from a situation in which parties enter into a transaction that does not involve a contract made directly between them.[46]

A final important point in relation to the English position is that in his Lordship's influential speech in *Chartbrook Ltd v Persimmon Homes Ltd*, Lord Hoffmann (with the concurrence of Lord Hope, Lord Roger, Lord Walker and Baroness Hale) expressed the view that an estoppel by convention could arise from precontractual negotiations and could contradict the meaning of a written agreement.[47] Lord Hoffmann said, by way of obiter dicta, that estoppel by convention lies outside the exclusionary rule relating to use of evidence of precontractual negotiations in the construction of a written contract:

> If the parties have negotiated an agreement upon some common assumption, which may include an assumption that certain words will bear a certain meaning, they may be estopped from contending that the words should be given a different meaning.[48]

In summary, there is a striking divergence of views in England as to whether an estoppel by convention can arise from precontractual negotiations. While one can point to cases in which the issue has affected the reasoning, there may be no case ever decided squarely on the basis that estoppel by convention cannot arise from a precontractual understanding. Moreover, the foundational cases in which estoppels by convention have arisen from precontractual understandings appear to have been overlooked.

C *Australian Cases*

As noted above, in his canonical exposition of the principles of estoppel in *Thompson* and *Grundt*, Dixon J described estoppel by convention as arising where an assumption 'formed the conventional basis upon which the parties *entered into* contractual or other mutual relations'.[49] Although that statement was consistent with the origins of estoppel by convention, it appears to have been overlooked in most of the recent Australian discussions of the doctrine. In the Australian cases, the issue in contention is sometimes framed as a question whether an estoppel by convention can ever arise from precontractual negotiations. It is, however, more commonly framed as a question whether the parol evidence rule prevents it from doing so where the contract between the parties is wholly in writing, or whether estoppel by convention can contradict a subsequent written agreement.

In *Johnson Matthey Ltd v AC Rochester Overseas Corporation*, McLelland J said: 'In my opinion the parol evidence rule operates to exclude evidence of an

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45 *The Vistafjord* (n 5) 351–2, citing *Hamel-Smith v Pycroft & Jetsave Ltd* (High Court of Justice, Chancery Division, Peter Gibson J, 5 February 1987).

46 *The Vistafjord* (n 5) 351–3.

47 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, 1122 [47].

48 Ibid.

49 *Thompson* (n 11) 547 (emphasis added); *Grundt* (n 2) 676 (emphasis added).

estoppel by convention alleged to arise from pre-contract negotiations.'[50] *Johnson Matthey* concerned a long-term contract for the supply of goods manufactured by the plaintiff seller. Article 13.3 of the agreement gave the defendant buyer a power to terminate the contract if the seller failed to be competitive with other suppliers of the product on, inter alia, price. The buyer purported to exercise the power to terminate under art 13.3 on the ground that the seller's prices were not competitive with those of suppliers in the United States. The seller disputed the purported termination on the basis of evidence of a pre-contractual understanding that: (a) the seller's prices would only be compared with those of other Australian producers for the purposes of art 13.3, and (b) modifications to an earlier draft would have the effect of giving the seller that protection.

McLelland J held that, since a comprehensive entire agreement clause made it clear that the agreement was wholly in writing, no parol evidence was admissible to add to, vary or contradict the language of the document.[51] His Honour therefore excluded the evidence of precontractual negotiations for the purpose of establishing an estoppel by convention.[52] Moreover, his Honour held that the entire agreement clause 'itself gives rise to an estoppel by convention which excludes any antecedent estoppel which might otherwise have had effect'.[53] The reasoning in relation to estoppel by convention did not affect the outcome, however, because McLelland J held that, as a matter of construction of the written agreement, a price comparison for the purpose of art 13.3 could only be made with another Australian supplier.[54]

A precontractual estoppel by convention was upheld, and the approach of McLelland J in *Johnson Matthey* not followed, by Rolfe J in *Whittet v State Bank of New South Wales*.[55] The defendant bank agreed to provide Mr Whittet with a $100,000 overdraft facility for his business on the security of a mortgage of the family home owned by Mr and Mrs Whittet as joint tenants. Mrs Whittet (the plaintiff) was reluctant to risk the family home and retained her own solicitor to ensure that the principal sum secured by the mortgage would not exceed $100,000. The solicitor made a verbal 'arrangement' with the bank to that effect before the mortgage was signed, but his attempts to have the arrangement confirmed in writing were unsuccessful. The mortgage signed by Mr and Mrs Whittet secured all present and future indebtedness to the bank and was unlimited in amount. For several years the bank treated the overdraft as limited to $100,000, but when the bank suffered substantial foreign exchange losses on Mr Whittet's behalf, the bank sought to recover those amounts under the mortgage. Rolfe J held that an estoppel by convention could arise from precontractual negotiations and did so on the facts.[56] His Honour found that the security of written instruments could adequately be maintained by requiring clear and convincing proof.[57]

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50 *Johnson Matthey Ltd v AC Rochester Overseas Corporation* (1990) 23 NSWLR 190, 195 ('*Johnson Matthey*').
51 Ibid 194.
52 Ibid 195.
53 Ibid 196.
54 Ibid 196–7.
55 *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146 ('*Whittet*').
56 Ibid 154.
57 Ibid 153.

The approach of McLelland J in *Johnson Matthey* was followed by Bryson J in *Australian Co-operative Foods Ltd v Norco Co-operative Ltd*, but expressly by way of obiter dicta.[58] Norco claimed that a precontractual convention or promise allowed it to engage in co-branding without prior approval, which would otherwise have been in breach of a trade-mark licensing agreement made between Norco as licensee and Dairy Farmers as licensor. Bryson J held that there was no factual foundation for any estoppel because the conduct of the parties did not establish a convention adopted by the parties, and nor were any assurances made by Dairy Farmers. But his Honour found that the terms of the agreement, which included an entire agreement clause, showed that it was intended to be a comprehensive record of the parties' agreement, and so no estoppel by convention or promissory estoppel could be recognised even if there were a factual basis for it.[59] Bryson J said that the *Whittet* approach 'does not, in my respectful opinion, accord appropriate weight to indications of finality and completeness which the parties give when they adopt formal written expression'.[60]

The closest Australian courts appear to have come to a decision against the *Whittet* approach are the judgments of Miles CJ of the ACT Supreme Court in *Skywest Aviation Pty Ltd v Commonwealth*[61] and the Queensland Court of Appeal in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*.[62] In *Skywest*, Miles CJ held, following *Johnson Matthey*, that an estoppel claim relating to precontractual conduct could not, as a matter of law, succeed, and that evidence relating only to that issue was inadmissible.[63] Although the case was argued as one of estoppel by convention, Miles CJ said that was 'a type of promissory estoppel'.[64] The claim in fact involved an alleged assumption as to the future conduct of the Commonwealth (that it would compensate Skywest for the cost of certain aircraft modifications), which was an assumption that could only give rise to a promissory or equitable estoppel and not an estoppel by convention.[65] In any case, Miles CJ found, with reference to promissory estoppel cases, that 'the Commonwealth did not induce in Skywest any assumption upon which Skywest relied to its detriment' and there was 'nothing unconscionable in holding the parties to the terms of their contract'.[66]

In *Equuscorp*, investors purchased units in limited liability partnerships established to engage in crayfish farming. The units were purchased with loans provided by a company related to the promoter of the scheme. The investors claimed to have been told that the loans would be 'limited recourse' loans, which would primarily be repaid from income generated by the aquaculture business and would require investors to make just three payments. Loan agreements subsequently signed by the investors made the investors personally liable to the lender to repay the

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58 *Australian Co-operative Foods Ltd v Norco Co-operative Ltd* (1999) 46 NSWLR 267 ('*Norco*').
59 Ibid 279 [51].
60 Ibid 279 [52]
61 *Skywest Aviation Pty Ltd v Commonwealth* (1995) 126 FLR 61 ('*Skywest*').
62 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2006] QCA 194 ('*Equuscorp*').
63 *Skywest* (n 61) 106.
64 Ibid 102.
65 See, eg, Barnes (n 5) 355 [5.28]: 'The type of assumption which cannot give rise to an estoppel by convention is an assumption as to what one party is or is not to do in the future engendered by a promise.'
66 *Skywest* (n 61) 112.

principal sum lent with interest. A 'guarantee' later signed by the promoters of the scheme indemnified the investors against any liability to the lender beyond the three payments the investors claimed represented the limit of their liability. The scheme failed and the partnerships were dissolved. The loans were assigned to Equuscorp Pty Ltd, which sought repayment from the investors.

The investors' primary argument was that the oral 'limited recourse' agreement was binding on the lender as a matter of contract. That argument was ultimately rejected by the High Court of Australia.[67] The High Court doubted that the evidence established a sufficiently certain consensus between the parties that the loan was to be a limited recourse loan, but held in any case that: 'The oral limited recourse terms alleged by the respondents contradict the terms of the written loan agreement. If there was an earlier, oral, consensus, it was discharged and the parties' agreement recorded in the writing they executed.'[68] The matter was remitted to the Supreme Court of Queensland to deal with issues that had not been decided by the primary judge in the original hearing.

The primary judge in the second hearing held that the investors were liable to repay the loans in full and that decision was upheld by the Court of Appeal.[69] Of interest is the question whether an estoppel by convention operated against the lender. McPherson JA held, following *Johnson Matthey*, that an estoppel by convention could not arise from a 'common assumption' that is at odds with the terms of an express contract subsequently entered into by the parties with knowledge of its terms.[70] Jerrard JA held that no estoppel arose because any assumption was fulfilled by the guarantee given by the promoters.[71] Holmes J was willing to assume that an estoppel by convention could arise from precontractual negotiations, but held that the evidence did not establish a common understanding sufficient to support such an estoppel.[72] Moreover, her Honour held that the pleaded common assumption was 'as to the effect of the loan agreement' and any such assumption could not stand in the face of evidence from the investors' representative that he had read the loan agreement and knew that it did not limit the borrowers' liability to repay.[73] That seems to leave open the possibility that an estoppel by convention could arise from a common assumption adopted by the parties as to their rights which, as in *Whittet*, the parties knew to be inconsistent with the contract terms, provided the assumption was not 'as to the effect of' the agreement. Only McPherson JA, then, would have decided the case on the basis that, as a matter of law, estoppel by convention cannot arise from a precontractual understanding that is contradicted by a written agreement subsequently signed by the parties with knowledge of its terms.

Whether the parol evidence rule prevents estoppel by convention or promissory estoppel arising from negotiations culminating in an inconsistent written agreement has been discussed by way of obiter dicta in several other cases in recent

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67 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471.
68 Ibid 484 [36] (Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ).
69 *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2005] QSC 172, [39]; *Equuscorp* (n 62) [34], [90], [125].
70 *Equuscorp* (n 62) [30].
71 Ibid [84]–[90].
72 Ibid [116]–[117].
73 Ibid [116].

decades.[74] In some cases, it has not been necessary to distinguish between promissory estoppel and estoppel by convention, or between contracts that contain entire agreement clauses and contracts that do not.[75] Tobias JA discussed the issue in *Ryledar Pty Ltd v Euphoric Pty Ltd*, noting Handley's view that 'those authorities which decided that a pre-contract convention could not support an estoppel were contrary to both principle and authority'.[76] Since there was neither clear nor convincing proof of a convention adopted by the parties, however, it was unnecessary to resolve the issue.[77] In *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd*, the Victorian Court of Appeal noted its agreement with McLelland J in *Johnson Matthey* that the parol evidence rule excludes evidence of an estoppel by convention arising from precontractual negotiations, but found that no estoppel by convention arose on the facts of the case.[78] That view of the law was challenged by one of the parties in *Queenfield Pty Ltd v Gordon Finance Pty Ltd*, but again it was unnecessary to decide on the facts of the case.[79]

D *The Position in New Zealand*

In *Vector Gas Ltd v Bay of Plenty Energy Ltd*, three members of the Supreme Court of New Zealand accepted that an estoppel by convention could arise from precontractual negotiations, and did so on the facts of the case.[80] The Court found, however, that an objective interpretation of the agreement accorded with the precontractual understanding between the parties, so estoppel by convention provided only an alternative ground for the decision. Moreover, as Bunting has noted, the Court did not acknowledge or address the controversy in the English and Australian case law as to whether estoppel by convention could arise from a precontractual understanding.[81] That, along with the fact that estoppel by convention provided only an alternative ground for the decision, weakens the strength of the case as authority in support of a liberal approach.

E *Conclusions on Authority*

The above discussion of the case law shows that the idea that estoppel by convention cannot arise from precontractual dealings, and can only arise from a post-contractual

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74 See, eg, the review of the authorities in *FJ & PN Curran Pty Ltd v Almond Investors Land Pty Ltd* [2019] VSCA 236, [213]–[226].

75 See, eg, *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424, 543 [444]–[449] (Allsop J) ('*Branir*').

76 *Ryledar* (n 2) 648 [214], citing Kenneth R Handley, *Estoppel by Conduct and Election* (Sweet & Maxwell, 1st ed, 2006) 124 [8–012]. See now the second edition: Handley (n 8) 141 [8–013].

77 *Ryledar* (n 2) 650 [226]–[227].

78 *Retirement Services Australia (RSA) Pty Ltd v 3143 Victoria St Doncaster Pty Ltd* (2012) 37 VR 486, 522 [137]–[139] (Warren CJ, Harper JA and Robson AJA).

79 *Queenfield* (n 1) [100].

80 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, 461 [31] (Tipping J), 464 [43] (Tipping J), 472 [74] (McGrath J), 475–7 [84]–[97] (McGrath J), 482–3 [124] (Wilson J), 487–8 [140]–[145] (Wilson J) ('*Vector Gas*').

81 Kristina Bunting, 'Estoppel by Convention and Pre-Contractual Understandings: The Position and Practical Consequences' (2011) 42(3) *Victoria University of Wellington Law Review* 511, 527.

understanding, is not supported by the authorities. Foundational English cases upheld estoppels by convention arising from precontractual understandings, and it appears that no decision rests squarely on the proposition that an estoppel by convention cannot arise from a precontractual understanding. Of the Australian cases, only the controversial *Whittet* case involved a clear decision on the issue.[82] But the Australian cases raise a more significant concern, which is whether estoppel by convention arising from precontractual dealing can contradict a written agreement that is signed after the adoption of the convention. That concern raises questions of justice and policy that will be discussed below.

III Justice: Foundations, Consistency, Common Law and Equity

Barnes has suggested that it 'appears to be fundamental to estoppel by convention' that the founding assumption 'cannot relate to a transaction into which those who hold the assumption are about to enter … but must relate to a transaction or some legal relationship into which they have entered prior to the time at which the assumption is made.'[83] To say that a rule is fundamental to a legal doctrine suggests that the rule is constitutive of the doctrine or is one on whose existence the integrity of the doctrine depends. The expression is often used more loosely, however, to mean that the rule serves an important purpose or is particularly longstanding and well-accepted. A rule that estoppel by convention cannot arise from precontractual dealings could be argued to serve an important purpose, but is not sufficiently well-established to be characterised as 'fundamental'. It is certainly not constitutive of or essential to estoppel by convention.

Estoppel by convention rests on the same foundation as the other reliance-based estoppels: namely, estoppel by representation, promissory estoppel and proprietary estoppel by encouragement and acquiescence.[84] As Dixon J explained in *Grundt*, the 'basal purpose' of reliance-based estoppels is to avoid detriment to the relying party as a result of their change of position by 'compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting'.[85] The justice of the estoppel depends on the party against whom the estoppel is asserted having 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it'.[86] The participation required to make it unjust to depart from the assumption includes the entry into 'contractual or other mutual relations' on the conventional basis of the assumption.[87] An estoppel arises because the party against whom the estoppel is asserted bears sufficient

82 *Whittet* (n 55).
83 Barnes (n 5) 348 [5.16]. See also Barnes (n 5) 365 [5.44] ('fundamental rule').
84 Though note that 'estoppel by acquiescence' may encompass two distinct principles: one based on an induced assumption and detrimental reliance and another based on mistake and the conferral of benefit: see Andrew Robertson, 'The Form and Substance of Equitable Estoppel' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 249, 271–3.
85 *Grundt* (n 2) 674.
86 Ibid 675.
87 Ibid.

responsibility for creating the risk of detriment that it is considered unfair, unjust or unconscionable for them to behave inconsistently with the assumption.[88] At a deep level, the justice of estoppel by convention is not, therefore, dependent on the point in time at which the assumption is adopted or whether it arose before or after the entry into a contract.

In Australia, it is now commonly accepted that promissory estoppel can arise from precontractual dealings culminating in the execution of a comprehensive written contract but estoppel by convention cannot. A superficially attractive justification for that difference is that promissory estoppel is equitable, while estoppel by convention is a common law doctrine. Since precontractual promissory estoppel is now so well accepted in Australia, and precontractual estoppel by convention so controversial, the robustness of the distinction between the two doctrines is pivotal to the issue addressed in this article.

A *Precontractual Promissory Estoppel*

It is now well accepted that promissory estoppel can arise from a precontractual promise by one party that induces another to enter into a contract, even if the promise contradicts the written terms of the contract. In *State Rail Authority of NSW v Heath Outdoor Pty Ltd*, McHugh JA reasoned that promissory estoppel should be permitted to arise where a person promises, before a right is given, not to exercise the right when it is acquired.[89] His Honour reasoned that the case for applying promissory estoppel is particularly strong where one party is induced to confer a right on another by the second party's promise not to exercise that right or only to exercise it in limited circumstances.[90] McHugh JA concluded that it is unconscionable for a person to insist on their strict legal rights when those rights have been conferred on the faith of an assurance that they will not be enforced and the exercise of the rights would be contrary to the assurance.[91] In other words, when the act of reliance on a promise not to exercise rights involves the conferral *of those very rights* by the promisee on the promisor, the case for promissory estoppel is particularly strong.[92]

Although the matter has not been free from controversy,[93] there have been numerous cases, including several at the appellate level, upholding claims of promissory estoppel arising from precontractual conduct. Promissory estoppels have arisen in some cases from precontractual promises that commercial benefits would be provided in addition to those required by the contract terms.[94] Of greater interest in the present context are those cases involving promises that directly contradict the

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88 Robertson (n 84) 253.

89 *State Rail Authority of NSW v Heath Outdoor Pty Ltd* (1976) 7 NSWLR 170 ('*Heath Outdoor*').

90 Ibid 193 (McHugh JA).

91 Ibid.

92 See also *Branir* (n 75) 542–4 [439]–[446] (Allsop J suggesting that this line of reasoning would also deny the capacity of an entire agreement clause to defeat an equitable estoppel claim).

93 See, eg, *Heath Outdoor* (n 89) 177–8 (Kirby P).

94 See, eg, *ACN 074 971 109 Pty Ltd (as Trustee for the Argot Unit Trust) v The National Mutual Life Association of Australasia Ltd* (2008) 21 VR 351, *Yarrabee Chicken Co Pty Ltd v Steggles Ltd* [2010] FCA 394 (equitable estoppel ruling not challenged on appeal: *Steggles Ltd v Yarrabee Chicken Co Pty Ltd* [2012] FCAFC 91).

contract terms. In *Wright v Hamilton Island Enterprises Ltd*, the Queensland Court of Appeal unanimously upheld promissory estoppels arising from promises of licence renewals for restaurant and bar concessionaires.[95] Two of the Justices held that the promises contradicted the holding-over clauses of subsequent written agreements and could not, for that reason, give rise to collateral contracts, but could give rise to promissory estoppels.[96] The third member of the Court found no contradiction, but mentioned in obiter dicta that his Honour would have upheld the promissory estoppel claim even if it directly contradicted the written agreement.[97] In *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd*, the Victorian Court of Appeal upheld a promissory estoppel that arose from a precontractual promise made by the buyer of shares not to exercise its power to terminate the contract under a due diligence clause.[98] Again, in that case the promissory estoppel directly contradicted the written terms.

Most significantly, in *Saleh v Romanous*, the New South Wales Court of Appeal upheld a promissory estoppel arising from a precontractual promise made by sellers of land that they would allow the buyers to terminate the contract if the buyers were unable to negotiate a development joint venture agreement with the adjoining land owner.[99] Handley AJA, with whom Giles and Sackville JJA agreed, rejected arguments that the parol evidence rule and an entire agreement clause in the written contract precluded a precontractual promissory estoppel. The justification was framed in three different ways: first, that 'the legal rights trumped by equity include those protected by the parol evidence and entire contract rules';[100] second, that equitable remedies cannot be defeated by 'a common law rule about the construction of documents';[101] and, third, that 'equity would not permit an entire agreement clause to stultify the operation of its doctrines'.[102]

B *Distinguishing Estoppel by Convention from Promissory Estoppel*

If promissory estoppel can arise from precontractual conduct, can contradict a subsequent written agreement, and is unaffected by an entire agreement clause, then can estoppel by convention justifiably be given a more restrictive operation?

A superficially attractive justification is that mentioned above: that common law doctrines are restricted by common law rules about parol evidence, while equitable doctrines are not.[103] As we have seen, estoppel by convention developed as a common law doctrine in the Court of Queen's Bench, the Court of Exchequer and the Court of Exchequer Chamber in the second half of the 19th century. Although it is commonly suggested that estoppel by convention developed from estoppel by

95 *Wright v Hamilton Island Enterprises Ltd* [2003] Q ConvR ¶54-588.
96 Ibid [6] (McMurdo P), [13] (McMurdo P), [83] (Mackenzie J), [89] (Mackenzie J).
97 Ibid [54] (Jerrard J).
98 *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd* (2004) 50 ACSR 679.
99 *Saleh v Romanous* (2010) 79 NSWLR 453 ('*Saleh*').
100 Ibid 461 [68].
101 Ibid, quoting *Branir* (n 75) 544 [446].
102 *Saleh* (n 99), quoting *Franklins* (n 1) 734 [554] (Campbell JA).
103 See *Franklins* (n 1) 621 [34] (Allsop P), 738–9 [577] (Campbell JA).

deed, the evidence given in support of that suggestion is not particularly strong.[104] In *Ashpitel (Exchequer Chamber)*, Pollock CB did draw on an analogy with estoppel by deed during argument,[105] but in the Court of Queen's Bench, Crompton J understood the applicable principle to be analogous to estoppel by representation.[106] Both Wightman J and Crompton J expressly distinguished the applicable principle from estoppel by deed and held that, unlike estoppel by deed, it did not need to be pleaded.[107] Estoppel by convention appears to owe something to both estoppel by deed and estoppel by representation, but to be much more closely related to estoppel by representation. It originates in a shared understanding, but requires a change of position and operates to prevent inconsistent conduct causing detriment.

Although estoppel by convention clearly developed as a common law doctrine, it is well-recognised that it is one that, like the action for money had and received, has been infused with equitable concepts and justifications.[108] The English Court of Appeal has observed that, although it developed in the common law courts, in recent decades 'its principles have largely been explained in equitable terms and expanded as another variant of equitable estoppel'.[109] In the *Texas Bank Case*, Lord Denning MR justified holding the parties to the convention they had adopted on the basis that it would be 'inequitable' to insist on the strict legal position 'having regard to dealings which have taken place between the parties'.[110] In *Keen*, the Court of Appeal held that no estoppel by convention arose because it could not be said to be unconscionable to rely on the statutory protections in question.[111] In *The Leila*, Mustill J held that, as in the equitable doctrines of estoppel by acquiescence and encouragement, the test for estoppel by convention 'is always whether it would be unconscionable to allow one party to assert the contrary of what he and his opponent had once assumed to be true'.[112] Mustill J justified the estoppel on the facts on the basis that 'it would not in all the circumstances be conscionable to allow the defendants to insist on' an arbitration clause when the parties had mutually assumed and acted on a mistaken assumption that the contract was governed by an English jurisdiction clause.[113] In *The Vistafjord*, Bingham LJ considered the requirements of estoppel by convention set out in the Spencer Bower and Turner text to be deficient because they were not qualified, 'as they should be, by *considerations of justice and*

104 See Elizabeth Cooke, *The Modern Law of Estoppel* (Oxford, 2000) 29; Handley (n 8) 130 [8-002]; Barnes (n 5) 345 [5.8].

105 *Ashpitel (Exchequer Chamber)* (n 15) 1000.

106 *Ashpitel (Queen's Bench)* (n 17) 185–6.

107 Ibid 184–5, 185–6.

108 See Rory Derham, 'Estoppel by Convention — Part II' (1997) 71(12) *Australian Law Journal* 976, 981–4; Matthew NC Harvey, 'Estoppel by Convention — An Old Doctrine with New Potential' (1995) 23(1) *Australian Business Law Review* 45. The influence of equity on the action for money had and received is discussed extensively in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560.

109 *Blindley Heath Investments* (n 5) 407 [72] (Hildyard LJ for the Court).

110 *Texas Bank Case* (n 2) 121.

111 *Keen* (n 27) 261 (Oliver LJ for the Court).

112 *Government of Swaziland Central Transport Administration v Leila Maritime Co Ltd* [1985] 2 Lloyd's Rep 172, 179 ('*The Leila*').

113 Ibid 180. On the element of unconscionability in estoppel by convention, see further Barnes (n 5) 383–5 [5.82]–[5.84].

equity'.[114] Estoppel by convention is sometimes thought, incorrectly, but tellingly, to be a form of promissory estoppel.[115]

In view of developments such as these, Cooke has suggested that estoppel by convention 'seems to have moved house, from the common law tradition to equitable estoppel'.[116] Whether the doctrine should be regarded as a common law or equitable doctrine was expressly left open by the New South Wales Court of Appeal in *Franklins Pty Ltd v Metcash Trading Ltd*.[117] Campbell JA said that 'in considering the correctness of *Johnson Matthey* closer attention should be paid to whether estoppel by convention is a doctrine of the common law rather than of equity'.[118] His Honour said that was 'because it seems more in accord with principle that a common law doctrine like the parol evidence rule should restrict the operation of estoppel by convention if estoppel by convention were itself solely a common law doctrine'.[119] In the same case, Allsop P agreed that 'if the estoppel employed is equitable in character, [then] the common law parol evidence rule will not impede its proper operation'.[120]

A court could determine the limits of estoppel by convention by reference to whether the doctrine is a common law or equitable form of estoppel, as Campbell JA suggests, or by reference to whether it is 'equitable in character', as Allsop P suggests. But it would be preferable to determine the scope and limits of the doctrine on a more substantive and principled basis. Whether estoppel by convention should be given the same scope of operation as promissory estoppel should depend on whether it is analogous to promissory estoppel and is, as a matter of justice, indistinguishable. If estoppel by convention is driven by the same principle of justice as promissory estoppel, then justice demands that it be given the same scope of operation. Like cases must be treated alike, and it is a weak justification for different outcomes in analogous cases that one is governed by the common law and another equity.[121]

As Dixon J has explained, reliance-based estoppels share the 'basal purpose' of avoiding detriment resulting from a change of position.[122] In each case, the justice of the estoppel depends on the party against whom the estoppel is asserted having 'played such a part in the adoption of the assumption that it would be unfair or unjust' if they 'were left free to ignore it'.[123] It could perhaps be argued that estoppel by convention presents a weaker justice case than promissory estoppel on the basis that a party to a shared understanding bears less responsibility for the adoption of an assumption than one who has made a promise. To put it differently, it could be

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114 *The Vistafjord* (n 5) 352 (emphasis added), referring to Spencer Bower and Turner (n 42) 157.
115 See, eg, *Vector Gas* (n 80) 472 [74] (McGrath J); *Skywest* (n 61) 102 (Miles CJ).
116 Cooke (n 104) 31, quoted with apparent approval in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 27,605, 27,643 [335].
117 *Franklins* (n 1) 621 [34] (Allsop P), 738–9 [577] (Campbell JA).
118 Ibid 145–6 [577].
119 Ibid.
120 Ibid 28 [34].
121 Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1; Andrew Burrows, 'We Do This at Common Law but That In Equity' (2002) 22(1) *Oxford Journal of Legal Studies* 1.
122 *Grundt* (n 2) 674.
123 Ibid 674–5.

argued that behaving inconsistently with an assumption that one has induced in another is more reprehensible than behaving inconsistently with an assumption that was mutually adopted.

Three responses could be made to an argument along those lines. The first is that the requirement of a 'promise' in promissory estoppel is much weaker than it might seem, and may even be considered artificial, since promissory estoppel claims are commonly founded on promises that are implied in circumstances in which there is no evidence of a commitment having been made.[124] Like other forms of estoppel, it can arise from silence.[125] Second, in practice, estoppel cases do not divide neatly into the different categories.[126] In the *Whittet* case, for example, the assumption adopted by Mrs Whittet could be understood as a shared assumption as to the legal effect of the mortgage (that it secured only a principal sum of $100,000) or as an assumption induced by the bank as to its future conduct (that the bank would enforce the mortgage only to the extent of a principal sum of $100,000). In *ING Bank NV v Ros Roca SA*, Carnwath LJ applied estoppel by convention while Rix LJ took the view that 'the same solution can be found in the doctrine of promissory estoppel … supported by a duty to speak'.[127] Third, to the extent that the principle of justice underlying estoppel by convention can be distinguished from that underlying promissory estoppel, it is closely analogous to another equitable doctrine that operates in relation to precontractual understandings that are not reflected in written terms: namely, rectification for common mistake. As Campbell JA explained in *Ryledar*, the 'injustice or unconscientiousness' underlying rectification for common mistake lies in one party's insistence on terms set out in a written agreement that do not accord with the common but mistaken intention of both parties at the time they entered into that agreement.[128] Similarly, it has been observed that the basis for the finding of unconscionability that is 'fundamental to the availability of estoppel by convention' lies in one party's adoption of a position that is 'inconsistent with that which he had previously led the other party to believe was common ground' along with 'potential prejudice from that inconsistency'.[129]

In summary, estoppel by convention operates according to a principle of justice that underlies all reliance-based estoppels and is therefore shared with promissory estoppel. It ought not, therefore, be given a more restricted operation simply because it originated in the common law courts. The tendency of courts to import equitable justifications, concepts and requirements to estoppel by convention, and even to treat it as an equitable doctrine, reflect the fact that it is, as a matter of justice, closely analogous to equitable doctrines. To permit those equitable doctrines to operate in relation to precontractual conduct, while denying the capacity of estoppel by convention to do so on the basis that it is a common law doctrine, would be to allow form to triumph over substance.

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124 See Robertson (n 84) 264–71.

125 See Andrew Robertson, 'Estoppels by Silence' in Elise Bant and Jeannie Marie Paterson (eds), *Misleading Silence* (Hart Publishing, 2020) 263.

126 Beale also notes that it can be difficult to distinguish between promissory estoppel and estoppel by convention: Hugh Beale (ed), *Chitty on Contracts* (Sweet & Maxwell, 33rd ed, 2018) 482 [4-108].

127 *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472, 492 [71] (Carnwarth LJ), 495 [85] (Rix LJ).

128 *Ryledar* (n 2) 665–7 [305]–[315].

129 *Crédit Suisse v Borough Council of Allerdale* [1995] 1 Lloyd's Rep 315, 367 (Colman J).

IV Policy: Maintaining the Reliability of Written Agreements

The strongest arguments for limiting estoppel by convention to post-contractual understandings lie not in considerations of justice or the relationship between common law and equity, but in policy. In *Johnson Matthey*, McLelland J gave four reasons for excluding evidence of an estoppel by convention that is claimed to have arisen from precontractual negotiations.[130] First, allowing estoppels by convention to arise from precontractual conduct would introduce uncertainty, would unduly shake the security of written contracts, and would threaten the stability of commercial relationships.[131] Second, evidence of oral statements made during negotiations is 'inherently less reliable' than the 'permanent written record', especially when it may be given 'many years after the event when witnesses may have become unavailable, and when memories may have faded or become distorted by subsequent occurrences and changing perceptions of self-interest'.[132] Third, investigation into 'the wilderness of pre-contract conversations' is time-consuming and unrewarding and leads to protracted and expensive litigation.[133] Fourth, holding parties to written terms and limiting the development of the law of estoppel promotes 'the adherence to bargains which are such an important feature of modern economic life'.[134]

Although they are essentially empirical claims that would be very difficult to prove or disprove, these arguments clearly carry some force. They underlie the broad contractual principle that favours 'giving effect to the formal, final and considered expression of the parties' contractual intention'.[135] Bryson J explained in *Norco* why he favoured the *Johnson Matthey* approach:

> My adherence to this view has been reinforced with the passage of time and accumulation of experience of this and many other forensic endeavours to set up estoppels out of the circumstances or terms of precontractual exchanges; the evidence offered is often extensive, discursive and inconclusive and, where it is of any value at all, clearly of less value than the considered written expression. Poorly based and incompletely considered forensic attempts to set up pre-contractual estoppels are unfortunately common, and in most cases they are quite unuseful and very wasteful of resources.[136]

In giving effect to a precontractual estoppel by convention in *Whittet*, Rolfe J imported the requirement of 'clear and convincing proof' from the law of rectification and considered that it provided adequate protection for maintaining the integrity of written agreements.[137] The requirement might be seen to address all but the third of the four arguments set out above. It helps to maintain certainty and the

130 *Johnson Matthey* (n 50) 195.
131 Ibid.
132 Ibid.
133 Ibid, quoting *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352, *Heath Outdoor* (n 89) 177 (Kirby P).
134 *Johnson Matthey* (n 50) 195, quoting *Heath Outdoor* (n 89) 177 (Kirby P).
135 *Norco* (n 58) 279 [52].
136 Ibid.
137 *Whittet* (n 55) 153 (Rolfe J).

security of written agreements. It ensures that there is a solid evidentiary platform before an estoppel by convention can be recognised. And by ensuring that estoppel by convention will arise only in exceptional circumstances, it minimises any undermining of adherence to bargains. It is noteworthy that in England it has also been held that, since estoppel by convention has the same effect as rectification, 'ie to change and contradict the true meaning of the written contract', the court should require the same standard of proof as for rectification, 'ie convincing proof of the allegedly shared or common assumption'.[138]

On the third of McLelland J's points mentioned above, it is difficult to see how allowing precontractual estoppel by convention would lead to time-consuming investigations and protracted and expensive litigation any more than rectification, promissory estoppel and claims of misleading or deceptive conduct already do. Indeed, the doctrines are so closely related that estoppel by convention is often pleaded as an alternative to rectification or promissory estoppel. In those cases, the relevant evidence is already before the court. At most, allowing precontractual estoppel by convention slightly broadens the range of fact situations in which precontractual negotiations need to be investigated for the purpose of giving legal advice and scrutinised in litigation. And since, as discussed above, estoppel by convention is based on the same principle of justice as promissory estoppel, and is based on a closely related principle of justice to rectification, it is difficult to see why the policy considerations mentioned should prevail over one and not the others. As Rolfe J said in *Whittet*, it would be strange if matters arising in the course of precontractual negotiations, 'which could be proved to the extent necessary to justify rectification, namely, by clear and convincing proof, could not also be relied upon to found an estoppel by convention'.[139]

V Conclusions

On balance, considerations of authority, justice and policy favour allowing estoppel by convention to arise from a precontractual understanding. They also favour allowing it to contradict a written agreement. While the issue has much more often been discussed than decided, the cases in which the issue was relevant to the decision clearly favour a liberal approach to precontractual estoppel by convention. We should pay more attention to the cases in which the issue was actually decided because it is only in those cases that acting on the policy concerns about precontractual estoppel by convention would have required the judges to allow a party to behave unconscionably and to deny justice to one of the parties before the court. Considerations of justice clearly favour allowing estoppel by convention to arise from precontractual dealings. Fairness requires that like cases are treated alike. Since estoppel by convention is based on the same principle of justice as promissory estoppel, and is closely analogous to rectification, it would be unjust to deny estoppel by convention the same scope of operation on the basis that it is a doctrine of the common law rather than equity. Policy considerations justify caution, but no more

[138] *T&N Ltd (in administration) v Royal & Sun Alliance plc* [2003] 2 All ER (Comm) 939, 974 [193] (Lawrence Collins J). See further Barnes (n 5) 362–3 [5.40].

[139] *Whittet* (n 55) 153 (Rolfe J).

so in relation to estoppel by convention than in relation to promissory estoppel or rectification. With the evidentiary safeguard of clear and convincing proof in place, precontractual estoppel by convention poses no greater a policy danger than promissory estoppel or rectification.