

ABSTRACT

THE PROBLEM OF PRE-CONTRACTUAL RELIANCE: THREE WAYS TO A THIRD WAY

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Ben McFarlane

This paper considers a specific common law problem and raises the general question of how private law can best be reformed. The specific problem consists in the traditional common law approach, prevailing to this day in England, to pre-contractual reliance. If A and B enter into negotiations as to a potential bargain, B may incur costs in reliance on the possibility of a contract's being concluded. For example, if B, a manufacturer, expects to enter into a contract of sale, he may incur costs in preparing for timely production. The traditional common law approach is that, if B acts in the absence of a binding contract, he does so at his own risk. Simplifying somewhat, there are in general only two possibilities: A and B's negotiations have either resulted in a contract, in which case B will be protected; or they have not, and B's loss must lie where it falls.

The purpose of this paper is to argue for a third possibility: where B reasonably relies to his detriment on a belief, for which A is responsible, that a contract will be concluded, then A will be under a duty to protect B's reliance. In the absence of a contract, A will not in general be bound to protect B's expectation; rather, A's duty is to compensate B for the detriment he suffers by that absence.

Three routes to this conclusion are discussed. The first is doctrinal and focuses on the potential for various existing doctrines of English law to protect pre-contractual reliance. The second is comparative and considers approaches adopted in two other common law countries: Australia and, in particular, the United States. The third is economic and builds on arguments made in American academic literature as to the efficiency gains produced by protecting pre-contractual reliance. In this way, the paper raises the general question of how the law can best be reformed. It will be argued that, in the context of this specific problem, a purely comparative approach cannot succeed, but that doctrinal and economic analyses can provide mutual support and, combined with some comparative insights, provide a compelling case for reform.

A. The Problem and the Proposal

1. Introduction

The common law, as commonly understood, is notoriously ineffective in protecting those who rely to their detriment in anticipation of a contract which fails to materialize.¹ The problems will be considered by an examination of English law. In some ways, England may seem to be the wrong jurisdiction to select, as it has perhaps made least progress in protecting pre-contractual reliance. The decision could be defended prosaically on grounds of the author's self-interest; or politically by pointing to England as the source of the common law's approach and hence the author of its problems. However, the best justification is paradoxical: as English law is yet to engage fully with the problem of pre-contractual reliance, it has most potential to develop an appropriate solution to the problem. As a late starter, English law can learn from the experience and difficulties of those common law countries, such as Australia and, in particular, the United States, in which judges have shown more boldness in tackling the problem of pre-contractual reliance. Further, the contention of this paper is that, in the doctrine of proprietary estoppel, English law possesses a tool uniquely well-qualified to deal with the problem of pre-contractual reliance. Indeed, it may even be the case that judges in Australia and the United States could benefit from applying this paper's proposal, developed from the English law of proprietary estoppel, as to how pre-contractual reliance should be protected.

2. The Problem

There are three aspects to the problem caused by the common law's traditional approach to pre-contractual reliance: coverage; clarity; and coherence.

As to coverage, the concern is that the common law may fail to provide a claim to deserving parties. This point can be demonstrated by considering the narrow approach

¹ For surveys of the position see e.g. Barker, *Coping with Failure* (2003) 19 *Journal of Contract Law* 110 (focusing on English law); Farnsworth, *Pre-Contractual Liability and Preliminary Agreements* (1987) 87 *Col L Rev* 218 (focusing on US law); Carter, *Ineffective Transactions* in *Essays on Restitution* (ed. Finn), ch.7 (focusing on Australian law); and Jones, *Claims Arising Out of Anticipated Contracts Which Do Not Materialise* (1980) 18 *Univ W Ontario L Rev* 447 (focusing on English law, but also discussing Canadian law).

taken in *Regalian Properties v London Docklands Development Corporation*.² A, a landowner, and B, a developer, had been negotiating for the grant of a building lease. Both parties expected a contract to result and, as a result, B incurred significant pre-contractual costs in employing architects to prepare plans and in seeking planning permission for the proposed development. Progress was made towards agreeing a final contract, but following the crash in property prices that occurred in England in the late 1980s, the deal did not proceed. The fact that B was denied a claim in *Regalian* is not particularly surprising; indeed, it is consistent with the proposal this paper will make as to when pre-contractual reliance should be protected. First, A made clear that its negotiations with B were “subject to contract” and hence it is difficult to argue that B was relying on a reasonable belief that A would pay for B’s preparatory work in the event that no contract was agreed. Secondly, the deal was called off not as a result of A’s unilateral decision but rather by the significant change of circumstances constituted by the crash in the property market.

Nonetheless, the reasoning of Rattee J. looks beyond these two particular concerns and attempts to set out a general structure for dealing with pre-contractual reliance. First, it seems that if A requests that B perform work which benefits A but is extraneous to the planned contract between the parties, then B can recover reasonable remuneration from A for such work.³ Equally, if A requests that B perform some of the work which would be due under the planned contract then, by receiving the benefit of that work, A comes under an obligation to pay a reasonable sum for it.⁴ However, if A does not specifically request particular work then it seems, on the *Regalian* approach, that B will have no claim. Moreover, even where A does request work, if that work is done simply to enable B to prepare for performance under the contract, then B will, in general, have no claim. It may well be the case that A planned to provide B with some compensation for that work in calculating the terms of the planned contract, but such an understanding does not entitle B to be paid where no contract is concluded.

An important difficulty in analysing *Regalian* comes from the fact that the negotiations in that case were said to be expressly “subject to contract”. It could therefore

² [1995] 1 WLR 212.

³ As in *William Lacey (Hounslow Ltd) v Davis* [1957] 1 WLR 932.

⁴ As in *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504.

be argued that the comments of Rattee J. are confined to the situation where, by means of such a statement, A makes clear that the risk of the contract's not being concluded lies with B. Alternatively, it could be said that, even in the absence of such a statement, B must be "taken to know...that pending the conclusion of a binding contract any cost incurred by him in preparation for the intended contract will be incurred at his own risk, in the sense that he will have no recompense for those costs if no contract results."⁵ This would fit with the "aleatory" view of negotiations taken by the common law,⁶ according to which each side is free to withdraw from negotiations for any reason.⁷ Either way, the obstacles for B are clear. First, the possibility of a claim seems to depend on showing that B's pre-contractual reliance has benefited A; B is thus denied B protection if his pre-contractual reliance does not leave A with a tangible benefit. Secondly, the importance of a request from A may cause problems where B relies in a way which, whilst it may be foreseeable by A, was not specifically requested. The coverage problem is therefore evident: there may well be cases in which B relies to his detriment on a belief that a contract will be concluded and is unable to make a claim. The gap in the law can be seen in the statement, made after a thorough review of the authorities, of Nicholas Strauss QC, sitting as a Deputy High Court judge in *Countryside Communications v ICL Pathway*: "Thus I doubt whether an obligation can be imposed on [A] to repay [B] for expense incurred, reasonably or even necessarily, in anticipation of a contract which does not materialise, where this is not in the course of providing services requested by [A]."⁸

As to clarity, the concern is that the results reached by courts considering pre-contractual reliance lack transparency and predictability. Of course, if the courts were uniformly to apply an unbending rule preventing claims based on pre-contractual reliance, then this aspect of the problem would disappear. However, it seems that courts, in some circumstances, do recognize the force of B's claim and hence impliedly acknowledge that the gap in the traditional common law position needs to be filled. Yet there is no obvious route by which a judge can reach this conclusion.

⁵ Rattee J. at p. 231.

⁶ See Farnsworth, *supra* n.1 at 221.

⁷ In contrast to civilian jurisdictions, there is no general duty of good faith in contractual negotiations.

⁸ [2000] CLC 324: at p.24 of Westlaw document (1999) WL 982497 (QBD).

The recent English case of *Easat Antennas Ltd v Racal Defence Electronics* provides a good example.⁹ A planned to bid for a contract to produce communications equipment for the Ministry of Defence. In searching for a sub-contractor with the expertise to design and develop the necessary antenna system, A entered into negotiations with B. The Ministry of Defence imposed stringent requirements as to the size and weight of the antenna system and developing a conforming system would clearly require a sizable investment of time by B. Whilst B did begin some exploratory work in a “spirit of co-operation”, it was reluctant to proceed without A’s committing itself to an exclusivity agreement, under which A, if it obtained the main contract, would be obliged to award the sub-contract for the supply of antennas to B. Such an agreement was reached: it stipulated that, were A’s bid accepted by the Ministry of Defence, A and B would enter into a sub-contract, with the price to be “based on B’s quotation subject to demonstration that prices are fair and reasonable.” The terms of the contract would be based on an initial request for quotation sent by A to B “amended through good faith negotiations”. B relied on this agreement by developing plans for the antenna, and releasing those plans to A for use in its bid to the Ministry. That bid was successful, but, the planned sub-contract between A and B was not concluded. Negotiations had centred around the difficulties in B’s providing equipment of the desired weight at an acceptable price and, in the end, A decided to award the sub-contract to an alternative company who were prepared to produce the antennas more cheaply.

B’s claim in *Easat* did succeed and, along with some other recent English decisions,¹⁰ the case can be seen to acknowledge the need to increase the protection accorded to pre-contractual reliance. However, whilst evidencing a significant trend, these cases have done little to promote transparency or predictability, as the basis of B’s recovery is unclear. Indeed in *Easat*, B advanced four different claims. The first was the simple one that A had breached the exclusivity agreement. However, whilst it was found that the parties intended that agreement to be legally binding, it was too indefinite to be enforced as a contract. The “insuperable” difficulty lay with the definition of the price: Hart J. held that, in context, the intention of the parties was to “leave the door open to

⁹ Unrep. 2000 Westlaw 1084506 (Ch D) (Hart J, 28 March, 2000).

¹⁰ *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324, 1999 Westlaw 982497 (QBD); *Paul Yule v Little Bird Ltd* Unrep, 5 Apr 2001, 2001 WL 542118 (QBD).

further negotiations and to indicate the spirit in which these negotiations were to take place”.¹¹ B’s contractual claim was therefore prevented by the rule of English law that an agreement to negotiate is too indefinite to be enforced as a contract.¹²

B’s second claim was based on the law of tort, specifically of misrepresentation: prior to their exclusivity agreement, A had told B that it was not currently seeking alternative sub-contractors; that it would not do so whilst negotiating with B; and that it would inform B if its approach were to change. In fact, only days after that statement, A had, without informing B, commenced discussions with a different antenna supplier. However, the problem for B was that the law of misrepresentation deals with situations where A makes a statement which is untrue at the time of its making. If A simply states that he intends to act in a certain way then, provided A does have such intent when the statement is made, A is not committed to acting in that way.¹³

Thirdly, B attempted to allege that A was estopped from denying that the exclusivity agreement was enforceable. This argument was B’s weakest and was quickly dismissed: Hart J. simply stated that he was “unable to see how a shared mistaken belief as to the enforceability of an agreement can itself render enforceable that which *ex hypothesi* was not.”¹⁴ This rests on the fact that B was attempting to use estoppel in support of a contractual claim, but could not point to any conduct of A showing that A was somehow prevented (i.e. estopped) from relying on the indefiniteness of the agreement as a defence to B’s claim that it was contractually enforceable.

Finally, we turn to B’s fourth and ultimately successful claim, which is described by the court as the “quantum meruit” claim. The simplest description of this claim is that it allows B to claim reasonable remuneration from A for a service he renders at A’s request and in the expectation that it will be paid for by A. It is the claim contemplated in *Regalian* in a case where A requests B to carry out work extraneous to, or in accelerated performance of, a planned contract. However, the basis and scope of this claim remains

¹¹ Ibid at [43]-[47].

¹² See *Walford v Miles* [1992] 2 AC 128. Note however that some American cases do recognise an obligation to negotiate in good faith, which may even be implied in a case such as *Easat* where the parties have reached a preliminary agreement: *Teachers Insurance and Annuity Assn v Tribune Co* 670 F Supp 491 (SDNY 1987).

¹³ A’s statement of intention may be contractually binding if accepted by B and accompanied by consideration but this was not the case in *Easat*: see [52].

¹⁴ At [53].

unclear. There is an ambiguity as the term “quantum meruit” refers to the method in which B’s remuneration is calculated, rather than the basis on which A is liable to pay it. It can therefore encompass both situations where A is contractually obliged, by means of an express or implied promise, to pay for B’s work and cases where, absent such a promise from A, the law nonetheless imposes an obligation on A to make such a payment. The distinction between these two possibilities is further blurred by the possibility of finding that A has made an implied promise.

The ambiguous nature of a quantum meruit claim can clearly be seen in *Brewer Street Investments Ltd v Barclays Woollen Co Ltd*.¹⁵ A was the prospective tenant of premises owned by B. Before a final agreement had been reached, B, at A’s request, made costly alterations to the property: A promised to pay for this work. However, the planned lease was not concluded and A refused to pay, arguing that his promise was conditional on a lease being granted. The Court of Appeal allowed B’s claim for a quantum meruit, but the basis on which they did so is far from clear. Given A’s promise to pay for the work, it might seem that *Brewer Street Estates* can be seen as a straightforward contractual case.¹⁶ First, however, as Denning L.J. noted, A’s only express obligation was to pay for the work when completed; as no lease was concluded, this condition had not been satisfied. More importantly, the promise to pay for the work was made on the understanding that a lease would be granted, allowing A to enjoy the benefits of the work undertaken on B’s property. To make a contractual claim, B would therefore have to rely on an implied promise by A to pay a reasonable sum for the work even if no lease was agreed. However, there are obvious problems as to the exact terms of such an implied obligation: for example, should it apply only if the breakdown in negotiations is the fault of A? Moreover, there are grounds to be wary of “implied” promises as routes to liability: as the parties assumed that negotiations would be successful, it is very unlikely that the parties ever directed their minds (individually or collectively) to what would happen if the deal fell through.¹⁷ It follows that, while judges

¹⁵ [1954] 1 QB 428.

¹⁶ This analysis does derive some support from the language used in the case, especially in the judgments of Romer and Somervell LJJ.

¹⁷ Rather, as Denning LJ noted at 436: “the parties themselves did not envisage the situation which has emerged and did not provide for it; and we do not know what they would have provided had they envisaged it.”

may employ contractual reasoning in these cases, the defendant's obligation to pay is in fact not voluntarily assumed, but is rather imposed by law, and that agreement between the parties is unlikely to be the real motive for judicial intervention.

In the pre-contractual context, therefore, a quantum meruit will most commonly refer to a case where an obligation is imposed on A in order to reverse an unjust enrichment that A has gained at B's expense.¹⁸ B will therefore have to show both that A has been enriched by his reliance, and that it would be unjust for A to retain that enrichment. The enrichment issue was dealt with easily in *Easat*, as A conceded that it had benefited from B's work, which had clearly been instrumental in A's being awarded the contract. However, there are cases in which B has been allowed a quantum meruit claim even where A's enrichment is very difficult to locate. In *Brewer Street* for example, B was allowed to recover where he had undertaken work, requested by A, on B's own land. As commentators have noted, it seems to be impossible to say, in any meaningful sense, that A was enriched by B's work.¹⁹ The danger in assuming that B's work, even if requested, necessarily enriches A was noted long ago by Chief Justice Traynor²⁰ and, perhaps significantly, has now been noted by at least two English judges.²¹ Further, even if it can be said that A is enriched, there is a difficulty in identifying precisely why it would be unjust for A to retain that benefit. As noted in *Regalian*, and by the authoritative work on unjust enrichment,²² if A accepts work on the understanding that he will pay for it *if A and B enter into a contract*, then it is unclear that A is necessarily unjustly enriched if he refuses to pay for that benefit when no contract results. As a result, it is perhaps not surprising that s.23 of the Restatement (Third) of Restitution and Unjust

¹⁸ See Goff J. in *British Steel Corpn v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504; *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324, 1999 Westlaw 982497 (QBD).

¹⁹ See e.g. Beatson, *The Use and Abuse of Unjust Enrichment* (1991) at pp. 31: "[*Brewer Street*] is particularly striking as since the work was done on the *plaintiff's* property"; McKendrick, ch. 11 in *Restitution: Past, Present and Future* (ed. Cornish et al, 1998) at 178 and 185; Spence in *Protecting Reliance: The Emerging Doctrine of Equitable Estoppel* (1999). It is worth noting that in *The Law of Restitution* (LexisNexis, 2nd edn, 2002) at pp. 379-381 Professor Burrows renounces his previous restitutionary analysis, and accepts that the defendant in *Brewer Street* was not enriched.

²⁰ *Coleman Engineering Co v North American Aviation* 420 P 2d 713 at 729: "[i]n fact the performance of services has conferred no benefit on the person requesting them, and it is pure fiction to base restitution on the benefit conferred."

²¹ Nicholas Strauss QC in *Countrywide Communications Ltd v ICL Pathway Ltd* [2000] CLC 324, 1999 Westlaw 982497 (QBD) at pp.20-21 of the Westlaw document; Buckley J in *Paul Yule v Little Bird Ltd* Unrep, 5 Apr 2001, 2001 WL 542118 (QBD) at p. 7 of the Westlaw document: "In this type of situation it is not possible fairly to identify the necessary 'benefit' conferred on the defendant."

²² Goff & Jones, *The Law of Restitution* (6th edn., 2002) at 26-008 to 26-010.

Enrichment (Tentative Draft) rejects any role for unjust enrichment reasoning in cases of pre-contractual reliance.²³

To summarise, the doctrine of unjust enrichment, taking effect through a quantum meruit claim, is the principal tool which English currently uses to protect pre-contractual reliance. However, it has proved singularly unsuccessful. First, the boundaries of the claim are yet to be precisely described. The most extensive judicial examination of the authorities was conducted in *Countryside*, and the judge in that case concluded that: “I have found it impossible to formulate a clear general principle which satisfactorily governs the different factual situations which have arisen, let alone those which could arise in other cases.”²⁴ This difficulty may well stem from the fact that unjust enrichment is simply not the appropriate doctrine to govern this area. In limiting B’s recovery to benefits retained by A, it fails to meet the need, recognized by English judges in a case such as *Brewer Street*, to provide B with a claim in cases where his pre-contractual reliance does not enrich A. The question therefore is whether a more appropriate doctrine is available: as will be seen immediately below, an overlooked principle of English law may provide the answer.

The third aspect of the problem faced by English law relates to coherence. In some ways, this is the most serious concern. For example, it could be argued that the coverage problem is illusory. The view could be taken that, particularly in commercial situations, B acts rashly in taking action before the conclusion of the planned deal with A: any loss resulting from B’s pre-contractual reliance should therefore lie where it has fallen.²⁵ However, the doctrine of proprietary estoppel, an important but overlooked aspect of English law, already rejects this argument. This can be seen by considering that doctrine’s application in the seminal case of *Crabb v Arun D.C.*²⁶ B wished to obtain an easement over A’s land and the parties entered into negotiations. No final agreement had

²³ See comment c: “Anticipation of contract. One party confers benefits on another, in the hope (or indeed the reasonable expectation) of a future contract between them. If the contract is not forthcoming, the performing party will sometimes claim compensation for the benefits conferred in anticipation thereof. Although such a claim may be framed in the language of unjust enrichment, the decisive issues in determining liability involve contract or tort, not restitution.”

²⁴ *Supra* n.21 at Westlaw document p. 23.

²⁵ For arguments to this effect, in addition to those made in *Regalian*, see *James Baird v Gimbel Bros* 64 F 2d 344 (1933) and Johnston, *Investment, Information and Promissory Liability* (2004) 152 *Univ Pennsylvania L Rev* 1923.

²⁶ [1976] Ch 179.

been reached: important terms such as the price had not been resolved. However, A, by means of his conduct, led B reasonably to believe that the envisaged easement would be granted. A did not make an express promise: rather, when constructing a fence around its land, A left a gate at the planned access point for B's easement. Thereby encouraged to believe that the easement would be granted, B relied on this belief by selling off part of his own land without reserving an alternative right of way over it to his remaining land. A then pulled out of the negotiations and refused to give B the planned right of way. As a result, B had no adequate means of access to his remaining land. It could be argued that B had acted rashly in taking action before the conclusion of the planned deal with A; B's loss should therefore lie where it had fallen. However, B was able to bring a claim and, indeed, the Court of Appeal declared that B was entitled to a right of way over A's land. Moreover, to compensate B for the loss he had suffered during the period in which A had denied B access, A was ordered to grant B the easement without payment. B's claim was not based on unjust enrichment (A had clearly not benefited from B's actions) but rather on proprietary estoppel, which applies where B relies to his detriment on a belief, for which A is responsible, that B has or will acquire a right in A's land.

Although its facts may be particularly striking, *Crabb v Arun D.C.* is far from an isolated case. Whilst the doctrine of proprietary estoppel developed from, and continues to be associated with, domestic situations involving an informal grant of rights, it has an important role in protecting pre-contractual reliance, even in business situations. *Cobbe v Yeoman's Row Management Ltd.*²⁷ provides an excellent recent example. B, a planning professional, claimed he had reached a preliminary agreement with A that, were he to obtain planning permission in respect of A's land, A would sell that land to him. B then successfully performed his side of the bargain. However, the alleged agreement had not been recorded in writing and thus fell foul of the formality requirement based on the Statute of Frauds.²⁸ Moreover, A and B had not intended that their preliminary agreement would be contractually binding: rather, a legally binding contract would be drawn up at a later date, covering outstanding points such as the precise identity of the vendor and

²⁷ [2006] EWCA Civ 1139. The first instance decision is at [2005] EWHC (Ch) 266.

²⁸ s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. This requirement is in fact more restrictive than that in the Statute of Frauds, as its effect is to render a non-complying contract for the sale or transfer of an interest in land *invalid* rather than merely unenforceable.

purchaser²⁹ and the timetable for the performance of their obligations. The first instance judge, Etherton J., therefore found that, even if there had been no requirement of writing, the preliminary agreement was in any case incapable of creating contractual rights: it was insufficiently certain³⁰ and was not intended to be legally binding.³¹ Nonetheless, as was affirmed by the Court of Appeal, the doctrine of proprietary estoppel allowed B to bring a claim based on his detrimental reliance on the reasonable belief that he would enter a contract with A. This claim was based not just on the preliminary agreement, but also on A's conduct in allowing B to undertake pre-contractual reliance, whilst knowing that B was acting on the basis that a contract would be concluded.

Whilst proprietary estoppel can thus be a useful vehicle to protect pre-contractual reliance, it is only applied where B believes that he has or will acquire a right in A's land. It cannot therefore apply to other forms of anticipated contracts, such as those in *Easat* or *Brewer Street*. The coherence problem this gives rise to is strikingly obvious when considering a case such as *Brewer Street*. As A was a prospective tenant of B's land, had A relied to its detriment on a reasonable belief that a lease would be granted, it would have access to a proprietary estoppel claim. However, as it was B who relied, and the belief it relied on was not one that it would acquire a right in A's land, no such claim was available to B.

3. The Proposal

The proposal made by this paper is a simple one: the problems of coverage; clarity; and coherence can all be addressed by the application of proprietary estoppel, expanded so as to apply whenever B relies to his detriment on a reasonable belief, for which A is responsible, as to A's future conduct. As to coverage, its advantages in comparison to a contractual or unjust enrichment claim are immediately obvious. In particular, the doctrine does not require A and B to have reached a legally binding agreement, nor does it depend on A's retention of an unjust benefit: rather, it responds to B's detrimental

²⁹ In order to minimize tax liabilities arising from the transaction, either party may have preferred to act through a corporate vehicle: see [2005] EWHC 266 (Ch) at 67.

³⁰ [2005] EWCA Civ 45 at [163].

³¹ *Ibid.* at [66].

reliance on a belief, for which A is responsible, as to A's future conduct. As demonstrated by the decision in *Crabb v Arun D.C.*, it can therefore protect reliance which does not benefit, or was not requested by, A. As to clarity, the doctrine of proprietary estoppel has been applied to pre-contractual negotiations in a number of decided cases: as will be seen below, these decisions provide the basis for a distinct set of principles which can be used to govern the area. Moreover, those principles adequately account for the results in cases such as *Brewer Street*. As to coherence, the current problem with English law is that proprietary estoppel is assumed to apply only where B detrimentally relies on a belief that he has, or will obtain, a right in A's land. It is not difficult to see that this distinction is impossible to justify.

It thus seems that English law can, in a stroke, solve the problems of coverage; clarity; and coherence. The expansion of proprietary estoppel ought of course to be accompanied by a change of name. Not only would the first half of the term become misleading, but the word "estoppel" is best avoided. The term "estoppel" relates to stopping or preventing: it is used where A is prevented from denying the truth of an allegation made by B. As can be seen from cases such as *Crabb* or *Cobbe*, proprietary estoppel, does more than this. It operates as a cause of action which gives B an independent claim against A and does not simply preclude A from denying the truth of a particular state of affairs. However, for the sake of convenience, the model proposed in this paper will be referred to, where necessary as the "proprietary estoppel" principle or model.

B. The Doctrinal Approach

1. The Nature of the Proposal

i) The Proposal and Contract Law

The basic doctrinal justification for the proposal is that the distinction, currently made in English law, between pre-contractual reliance where the expected contract relates to B's acquisition of a right in land, and such reliance in other cases, is incoherent and unsustainable. At this stage, it may be useful to clarify the basic nature of the proposal and to distinguish it from other possible solutions to the problem of pre-contractual reliance.

First, the proposal does not necessitate an extension of the scope of contract law. The principle of proprietary estoppel, as developed in cases relating to land, is clearly distinct from the classical common law model of contract. First, as is demonstrated by *Crabb and Cobbe*, there is no need for the parties to have reached a concluded agreement, nor even to have intended to create legal relations. Secondly, any promise made by A can be retracted, even after B has begun to rely on the promise, provided that A compensates B for the detriment he has suffered in relying on the promise. For example, in the important case of *Jennings v Rice*,³² A, an elderly widow promised to leave her entire estate to B. B relied on this by working for and looking after A without payment. A died without making the planned changes to her will, and B brought a proprietary estoppel claim. Whilst B sought the value of A's entire estate, worth over £1m, the first instance judge decided that B's detrimental reliance was not extensive enough to warrant such an award. Rather, the sum of £200,000 would be sufficient to protect B's reliance in providing care for A over a number of years without pay. The Court of Appeal affirmed this decision and the important principle that B will not automatically be entitled to have his expectation protected: rather, the right B acquires must be proportionate to the extent of the detriment he suffers in reliance on A. Aldous LJ³³ noted that it would be absurd if

³² [2003] 1 P & CR 100.

³³ At para [37].

B's right would be the same whether A had died "one month, one year or twenty years after making the representation relied on". In this sense, the doctrine protects B's "reliance interest" rather than his "expectation" interest.³⁴ Thirdly, and this is a particularly important point in the land context, a proprietary estoppel claim is not subject to the formal requirements that apply, under the Statute of Frauds and its successors, to contracts for the grants of rights in land.³⁵

The approach taken to proprietary estoppel in this paper thus differs from that of Atiyah.³⁶ He seized on the result in *Crabb v Arun D.C.* to argue that the Court of Appeal had in fact imposed contractual liability on A; as a result, he saw the case as an indictment of the orthodox contractual requirement of consideration (and, presumably, of the need for offer and agreement and definiteness in contractual terms).³⁷ This type of argument, which uses cases protecting pre-contractual reliance to support a broader contention as to the very nature of contract law, is frequently employed by commentators, particularly those who are concerned with the impact of the principle enunciated in s.90 of the Restatement (either First or Second) of Contracts.³⁸ On such a view, the possibility of bringing a claim by means of proprietary estoppel, or on the related principles reflected in s.90, is used as grounds to re-think the very nature of contract law, and in particular to dispense with some or all of its traditional requirements.

³⁴ See Fuller & Perdue, *The Reliance Interest in Contract Damages* (1936) 46 Yale LJ 373.

³⁵ See e.g. *Yaxley v Gotts* [2000] Ch 162.

³⁶ *When is an Enforceable Agreement not a Contract? Answer: When it is an Equity* (1976) 92 LQR 174.

³⁷ It is worth noting that Atiyah also invoked developments in the United States, stating that: "It is worth noting that a parallel phenomenon is occurring in the United States, where the huge growth of the doctrine of promissory estoppel threatens to engulf the entire law of contract": *ibid* at 179.

³⁸ Section 90 has been described as "perhaps the most radical and expansive development of [the 20th] century in the law of promissory liability: Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel* (1981) 81 Columbia L Rev 52 at 53. As set out in the Restatement (First) (1932) it provides that: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." The revised version in the Restatement (Second) (1981) states that: "(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." A new s.90(2) also provides a special rule allowing for promises to be enforced without reliance in cases of charitable subscriptions or marriage settlements.

This type of methodology is widespread and shared by those with directly opposed views as to the nature of contract law. For example, in *The Death of Contract*,³⁹ Gilmore contended that “the unresolved ambiguity in the relationship” between s.75 of the Restatement (defining consideration) and s.90 “has now been resolved in favor of the promissory estoppel principle of s.90 which has, in effect swallowed up the bargain principle.”⁴⁰ In stark opposition to this point of view, it has instead been argued that the need to enforce particular forms of promises is the true motivation of contract law. Yet, commentators making these arguments have also relied squarely on s.90. For example, Yorio & Theil⁴¹ argued that the effect of s.90, as applied in practice, is to enforce seriously made promises, whether supported by consideration or not. In this way, cases applying s.90 can be used to explain how a promissory theory of contract is consistent with the apparent requirement of consideration. Adopting the same methodological approach, Farber & Matheson⁴² argued that s.90 allowed contract law to further its purpose of enforcing promises made in furtherance of economic activity; and Barnett⁴³ that it ensures that promises intended to be legally binding are enforced. Those proposing a wholly different view of the nature and purpose of contract law, that it is based not on detrimental reliance or promises as such but rather on the relationship of the parties, have also sought support from s.90 cases.⁴⁴

In this way, the protection provided by proprietary estoppel and s.90 has become something of a doctrinal football, kicked around by those wishing to support a particular view as to the nature of contractual liability. This paper is not the place to explore the wider merits of those arguments, but the methodological trend has had important consequences for the problem of protecting pre-contractual reliance. It encourages an implicit assumption that the problem lies in the inability of classical contract law to afford protection to B. This in turn ensures a significant and, perhaps, unnecessary raising

³⁹ (1974).

⁴⁰ *The Death of Contract* at p. 72.

⁴¹ *The Promissory Basis of s.90* (1991) 101 Yale LJ 111.

⁴² *Beyond Promissory Estoppel: Contract Law and the Invisible Handshake* (1985) 52 Univ Chicago L Rev 903.

⁴³ *The Death of Reliance* (1996) 46 J Legal Education 518; *Is Reliance Still Dead?* (2001) 38 San Diego L Rev 1.

⁴⁴ See e.g. Feinman, *The Last Promissory Estoppel Article* (1992) 61 Fordham L Rev 303.

of the stakes as the particular question of protecting pre-contractual⁴⁵ reliance is elevated into a theoretical debate about the very nature of contract law. This in turn has important practical consequences: certainly, B may feel his claim will have less chance of success if its acceptance requires a judge to re-evaluate the prevailing model of contract law.⁴⁶

In contrast, the proposal adopted in this paper is more modest. It allows the law to develop in a way which is consistent with the classical model of contract law, whilst still affording protection to B. It should be admitted that this is not an entirely neutral approach: whilst it is not inconsistent with a re-thinking of contract law, the proposal, if accepted would provide an important buttress to the classical model, by removing the argument that contract law must be rethought in order to avoid leaving B without a claim.

ii) *The Proposal and Unjust Enrichment*

Secondly, as was seen above, the proposal put forward here does not involve a re-thinking of current principles of the law of unjust enrichment. It has been argued, for example by Barker,⁴⁷ that a modification of those principles, in particular the adoption of a wider test of benefit, could deal with the problem of pre-contractual reliance. However, Barker admits that even such a wider test would be unlikely to be satisfied in a case such as *Brewer Street*. It can also be said that the more loosely the concept of benefit is defined, the more difficult it becomes to justify the strict liability imposed by an unjust enrichment claim.⁴⁸

⁴⁵“Pre-contractual” is used here to refer to reliance in the absence of one or more factors deemed under the classical model of contract law to be essential to B’s having a contractual claim. Of course, on the various alternative models of contract law proposed, reliance which this paper analyses as pre-contractual could instead be protected by bringing a contractual claim.

⁴⁶ Chiefly for this reason, the re-thinking of contract law proposed by Ben-Shahar in *Contracts Without Consent: Exploring a New Basis for Contractual Liability* (2004) 152 *Univ Pennsylvania L Rev* 1829, which has important consequences for pre-contractual reliance is not examined in this paper.

⁴⁷ *Supra*, n.1.

⁴⁸ See e.g. Fuller & Perdue, *supra* n.34 at 393: “as the ‘benefit’ received by the defendant becomes more ethereal, the role in the total judicial motivation which is properly assignable to a desire to prevent the defendant from keeping an unjust gain becomes increasingly less, until the point is finally reached where it must be assumed to disappear altogether”.

iii) *The Proposal and the Tort of Misrepresentation*

Thirdly, the proposal does not involve extending the tort of misrepresentation. Farnsworth argued that the common law's existing mechanisms could deal adequately with the problem of pre-contractual reliance, if it were recognized that, merely by entering into negotiations, A was impliedly representing that he had a serious intent to reach an agreement,⁴⁹ and that A was further under a duty to "give prompt notice" to B if he lost that serious intent. However, the very "aleatory" approach taken by the common law to contractual negotiations is inimical to such an implication. Farnsworth bases his suggestion on an extension of the approach taken in *Markov v ABC Transfer and Storage Co.*⁵⁰ However, that was a fairly straightforward case of fraudulent misrepresentation, as A made an explicit statement that it intended to reach a deal at a time when it had no such intention. There is a crucial distinction between such a case and one in which A makes a promise intending, at the time of making it, to perform. As seen in the decision in *Easat Antennas Ltd v Racal Defence Electronics*,⁵¹ discussed above, if A simply states that he intends to act in a certain way then, provided A does have such intent when the statement is made, A is not making a misrepresentation. A similar analysis can be used against the suggestion of Barnett & Becker⁵² that some cases allowing recovery of pre-contractual reliance⁵³ can be based on an implied misrepresentation as to A's intent to carry out a promised course of action.⁵⁴

iv) *The Proposal and Estoppel by Representation*

Fourthly, the proposal does not involve extending the scope of estoppel by representation, often referred to as equitable estoppel. That doctrine is a true estoppel as it

⁴⁹ Farnsworth, *supra* n.1 at 234.

⁵⁰ 76 Wash 2d 388, 457 P 2d 535 (1969)

⁵¹ Unrep. 2000 Westlaw 1084506 (Ch D) (Hart J, 28 March, 2000).

⁵² *Beyond Reliance: Promissory Estoppel, Contract Formalities and Misrepresentations* (1987) 15 Hofstra L Rev 443.

⁵³ E.g. *Hoffman v Red Owl* 133 NW 2 267 (1965); *Goodman v Dicker* 169 F 2d 684 (DC Cir, 1948).

⁵⁴ For a convincing account of the manifold difficulties of applying misrepresentation reasoning in this context see Craswell, *Taking Information Seriously* (2006) 92 Virg L Rev (forthcoming): available on SSRN.

has a preclusionary effect: it operates where A makes a representation of fact on which B relies, and prevents A from denying that fact in later dealings with B. It therefore does not operate as a cause of action in itself, but rather allows B to establish a fact enabling him to pursue an independent claim. A good example of the operation of this doctrine is *Pickard v. Sears*.⁵⁵ Goods belonging to A were in the possession of a third party. The goods were seized under an execution against the third party, and subsequently sold to B. A knew that this sale was on the cards, but remained silent. It was held that A's failure to speak out precluded him from subsequently claiming title to the goods by an action in trover. Lord Denman C.J. said that:

“The rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time ...”⁵⁶

This doctrine is of limited use in protecting pre-contractual reliance. It cannot be used to bind A to a statement of future intention as its only effect is to prevent A from denying that, at the time he made a promise, he intended to act in a particular way: that intention alone is not enough to give B a claim. Its only possible application is where A does more than merely promise B that he will act in a particular way, but rather represents that a concluded contract *already* exists between A and B. As will be seen below, the possibility of estoppel by representation having this effect clouds the analysis of the High Court of Australia in the important case of *Waltons Stores (Interstates Ltd) v Maher*.⁵⁷ On the view put forward in this paper, there is an important difference in the remedy available to B in a contractual claim based on estoppel by representation and a claim based directly on an expanded doctrine of proprietary estoppel. In the former case, as A is prevented from denying the existence of a contract, the standard contractual remedies, including expectation damages, will be available. In the latter, A need only act in a way necessary to compensate B for his detrimental reliance.

⁵⁵ (1837) 6 Ad. & El. 469. For a similar American case, see *Horn v Cole* 51 NH 287 (1868).

⁵⁶ *Ibid.*, p. 474.

⁵⁷ (1988) 164 CLR 387.

v) *The Proposal and the “High Trees” Principle*

Finally, the proposal does not involve extending the scope of the doctrine known in English law as promissory estoppel but which will be referred to here, for reasons which will become obvious, as the “High Trees principle.” That doctrine allows some effect to be given to a promise by A to vary an existing legal relationship he has with B. The modern foundation of the doctrine stems from the judgment of Denning J. in *Central London Property Trust Ltd v High Trees House*.⁵⁸ In that case, a landlord had accepted a tenant’s proposal to pay lower rent for his continued occupation of a building which had suffered war damage.⁵⁹ The landlord then attempted to insist on receiving the originally agreed rent, arguing that the tenant had provided no consideration for the landlord’s promise to accept a lower sum. Whilst accepting that the tenant’s performance of his pre-existing duty to pay rent could not constitute consideration, Denning J. held that, as the landlord had made the promise with the intent to create legal relations, and in the knowledge that the tenant would act on it, then, when the tenant so acted, an estoppel arose to prevent the landlord reneging on the promise. This doctrine differs from proprietary estoppel in both scope and effect. First, whilst it requires some action on the tenant’s part, it seems that detrimental reliance is unnecessary: in *High Trees* itself, for example, it is hard to say that the tenant’s payment of a lower rent constitutes a detriment. Secondly, the doctrine seems to have the effect of enforcing a promise: as explained by Denning J., at least, it is not limited to protecting B’s reliance on the promise. The most important restriction on the principle was established soon afterwards in *Combe v Combe*.⁶⁰ Denning L.J. made clear that it could not give rise to a cause of action itself, but could rather only be used as a means of varying a pre-existing legal relationship: “Much as I am inclined to favour the principle stated in the *High Trees* case...[it] does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties.”⁶¹ As a

⁵⁸ [1947] KB 130.

⁵⁹ Compare *Levine v Blumenthal* (1936) 117 NJL 23, 186 Atl 457, reaching the opposite result.

⁶⁰ [1951] 2 KB 215.

⁶¹ *Ibid* at 220.

result, a wife's anticipated action in failing to apply to court for maintenance following a husband's promise to make annual payments on divorce did not suffice, in the absence of consideration, to make the husband's promise enforceable. This restriction makes clear that the *High Trees* principle cannot be used as a means to protect B's pre-contractual reliance.

2. The Operation of the Proposal

It is also worth sketching how the proposed principle would operate in the context of pre-contractual reliance. As noted above, proprietary estoppel cases have already considered its operation and provide a suitable framework. The essential requirement of a proprietary estoppel claim is that B has relied to his detriment on a reasonable belief for which A is responsible, that he has or will acquire a right in relation to A's land. Where A and B have been engaged in failed contractual negotiations, B's principal difficulty will be in establishing that his expectation of receiving a right is a reasonable one. The mere fact of A's entering into negotiations concerning the grant of a right will not suffice.⁶²

Nonetheless, it is clear that the courts will view B's expectation as reasonable if two requirements are satisfied. First, A and B must have made an "agreement in principle". Secondly, A must also have acted in such a way as to encourage B to believe that the agreement in principle will indeed be honoured.

When can it be said that the parties have reached an "agreement in principle"? Such an understanding need not be so certain as to be capable of being a contract – even issues such as the price⁶³ and the precise identity of the parties⁶⁴ may be left undecided. It is also clear that the parties need not intend the agreement to be legally binding.⁶⁵ The crucial question seems to be whether B can reasonably believe that the agreement, whilst it may not be legally binding, is nevertheless sufficiently precise to be capable of "binding in honour". Two cases can be usefully contrasted. In *Pridean v Forest Taverns*

⁶² See e.g. *Pridean v Forest Taverns Ltd* (1998) 75 P & CR 447; but note the comments of Lindsay J in *Gonthier v Orange* [2003] EWCA Civ 873 at [59]-[62].

⁶³ See e.g. *Crabb v Arun DC* [1976] Ch 179.

⁶⁴ See e.g. *Cobbe v Yeoman's Row Management Ltd* [2005] EWHC 266 (Ch)

⁶⁵ See e.g. *Cobbe*, *ibid.*

Ltd.,⁶⁶ A and B discussed the grant of a lease of a public house to a proposed joint venture company. A had accepted B's letter of intent, but subject to conditions. These conditions included an agreement as to a mechanism for protecting the rights of the minority shareholder in the proposed joint venture company; the letter further made clear that "until all these points are satisfied, the [property] is in the ownership of A."⁶⁷ As a result, the absence of any consensus as to that mechanism, a matter described by Aldous LJ as "fundamental to the whole agreement",⁶⁸ prevented there being an agreement in principle.

In *Cobbe v Yeoman's Row Management Ltd*,⁶⁹ the parties were found to have reached an outline agreement, but, as discussed above, it was not intended to be legally binding and its precise terms had not been finalised. Nonetheless, Etherton J. held that the oral agreement covered "all points of principle which were at the core of the commercial deal" and contemplated that a subsequent formal contract was needed only to take care of "legal mechanics".⁷⁰ Hence, it was decided that the parties had reached the necessary agreement in principle. Of course, a decision as to which points are "at the core of a commercial deal" and which are simply a matter of "legal mechanics" will necessarily depend on the reaction of a judge to the facts of the instant case. It is perhaps to be expected that in cases such as *Cobbe*, where B's work leads to a very large increase in the value of A's land, a court may lean in favour of deciding that an agreement in principle has been reached.⁷¹ A similar tendency may be present in a case such as *Crabb v Arun D.C.*,⁷² where B's reliance, whilst not benefiting A's land, causes B a particularly significant detriment.

When can it be said that A has acted in such a way as to lead B to believe that an agreement in principle will indeed be honoured? The most obvious case is where A has made a representation to that effect, as in *Lloyd v Dugdale*:⁷³ B had expressed his concerns to A about doing work on a property before the contract for the sale of a long

⁶⁶ (1998) 75 P & CR 447.

⁶⁷ *Ibid.* at 451-2.

⁶⁸ (1998) 75 P & CR 447, 452.

⁶⁹ [2005] EWHC 266 (Ch).

⁷⁰ *Ibid.* at [68] and [110].

⁷¹ See too *Holiday Inns v Broadhead* (1974) 232 EG 951.

⁷² [1976] Ch 179.

⁷³ [2002] 2 P & CR 13.

lease had been concluded; A told B not to worry and assured him he was “a man of his word”. However, A’s conduct alone may suffice, as in *Crabb v Arun D.C.*: A’s construction of a gate at a point of entry to a proposed right of way over A’s land encouraged B to believe that a discussed easement would be granted. As recently confirmed in *Cobbe*, A’s conduct will also suffice if it consists of allowing B to act in reliance on the belief, known to A, that a basic agreement will be honoured. In such a case, the vital factor seems to be A’s acquiescence in failing to disabuse B of the belief, known to A, that their basic understanding will be honoured.⁷⁴ Hence A’s representation, encouragement or acquiescence may suffice to ensure the reasonableness of B’s belief that he will receive a right in relation to A’s land.

It is therefore clear that, although the parties’ contractual negotiations have not led (and it may be the case, as in *Cobbe*, that neither party believes they have led) to a legally binding agreement, the presence of an agreement in principle, coupled by action or inaction by A which gives the impression that this agreement will be honoured, can generate a reasonable belief in B that a contract will be concluded and hence form the basis of a proprietary estoppel claim. Hence A cannot find himself subject to a claim simply because the parties have reached an agreement in principle: without more, B cannot have a reasonable belief that A will honour that agreement.⁷⁵ However, A cannot argue that it is only reasonable for B to expect A to confer such a right if A has made a contractual bargain to that effect; rather, the law recognises the practical reality that expectations can be generated in the absence of finalised bargains and responds to the consequent need to provide redress to those who rely on such expectations.⁷⁶

Whilst the agreement in principle model has been developed in the context of proprietary estoppel, it is certainly capable of explaining the result in a case such as *Brewer Street*. It is clear that the Court of Appeal felt that B’s pre-contractual reliance deserved protection: however, as seen above, there are formidable obstacles in the way of a contractual or unjust enrichment claim. However, it can be argued that the court’s real

⁷⁴ See too *Holiday Inns v Broadhead* (1974) 232 EG 951 and *Walton Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

⁷⁵ It is the need for this something more which secures the “floodgates” alluded to by A’s counsel in *Cobbe*: [2005] EWHC 266 (Ch) at [60], [129] and [221].

⁷⁶ This point is clearly reinforced by proprietary estoppel claims based on promises to make non-contractual transfers: see e.g. *Pascoe v Turner* [1979] 1 W.L.R. 431; *re Basham* [1986] 1 WLR 1498; *Gillett v Holt* [2001] Ch. 210.

concern, as in a proprietary estoppel case, was to protect B's detrimental reliance. First, the parties had reached an agreement in principle for the grant of a lease: indeed, both the term and the rent had been settled.⁷⁷ Secondly, by its conduct in requesting and stating that it was willing to pay for alterations of no real benefit to B, A led B reasonably to believe that the agreement in principle would, in the absence of a significant change in circumstances, be honoured. B detrimentally relied by making the alterations. The Court of Appeal's reasoning attached importance to the question of responsibility for the failure of the negotiations: this is again consistent with the model proposed here as, through its conduct, A cannot be taken to *guarantee* that a contract will be concluded. The proposed model therefore not only allows the courts a direct means to express a commitment to protecting B's detrimental reliance but also provides a framework in which the extent of that commitment can be explored.

An important question, not yet fully explored in the English cases on proprietary estoppel, is whether B's reliance on a belief that an agreement in principle will in fact be honoured is the *only* means by which B can make a claim for the protection of his pre-contractual reliance. Put in terms of proprietary estoppel analysis, the question is whether, in the absence of an agreement in principle, it can ever be reasonable for B to rely on a belief that a contract will be entered with A. This is an issue in relation to which the American experience of claims brought under the s.90 principle may be of assistance; conversely, the difficulty in deciding if the model proposed here applies on the particular set of facts in the well-known Wisconsin case of *Hoffman v Red Owl Stores Inc*⁷⁸ may partly explain why that case has divided opinion in American commentary.

3. The Effect of the Proposal

The aim of the proposal is to provide a clear and coherent scheme by which the common law can move away from the traditional aleatory approach to pre-contractual reliance. It can be seen as splitting contractual negotiations into three conceptually distinct stages. At the first stage, parties begin negotiations but each takes the risk of any

⁷⁷ See Denning LJ: "the negotiations had proceeded so far and in such mutual confidence that both parties assumed without question that a lease would be granted".

⁷⁸ 133 NW 2d 267 (1965).

pre-contractual reliance. Unless and until A makes a clear signal that a contract will be concluded, B cannot hope to recover the costs of pre-contractual reliance. This stage, as will be discussed further below in Parts D and E, creates a valuable space for the parties in which they can communicate without incurring any liability for the other side's reliance. It also allows a party, if they wish, to voluntarily incur costs in preparing for contractual performance, perhaps in order to signal their willingness to perform and their suitability as a contractual partner. At the second stage, the parties have not yet concluded a binding contractual agreement, but A's conduct has led B reasonably to believe that a contract will be concluded. Of course, the mere fact that A has entered into negotiations will not suffice to give B such a belief, but it is clear that there are some circumstances in which, even though no contract has been concluded, it can be reasonable for B to rely. A clear example provided by the proprietary estoppel cases consists of the situation in which A and B have reached an agreement in principle and A, by an express representation or by conduct, has indicated that he intends to honour that agreement. It is vital to note that, at this stage, B's only claim will be to have his reliance protected: in the absence of final commitment, he has no entitlement that A put him in the position he would be in were the agreement in principle performed. In the absence of a legally binding agreement, A preserves the choice as to whether he is to perform. However, the passage from the first to the second stage does provide B with some security, by ensuring that he will not be made worse off by relying on the contract's being concluded. This second stage provides both parties with a useful means to encourage potential contracting partners to undertake preparatory work which, if a contract is concluded, may well be of mutual benefit. Finally, if the traditional contractual hurdles such as offer and acceptance; definiteness; and consideration are cleared, then a legally binding agreement is concluded. At this moment of commitment, B gains the right that A put him in the position he would be in were the contract to be performed and hence can make use of the availability of expectation damages as a means to protect his reliance on A.

The argument of this paper is that this three-stage model is inherent in English law, but hidden within the doctrine of proprietary estoppel. A comparative approach may be useful in seeing if the model is more explicitly recognised in other common law jurisdictions.

C. The Comparative Approach

1. The Position in Australia

Australian law is generally seen as more successful than English law in protecting pre-contractual reliance. Two landmark decision of the High Court, *Waltons Stores (Interstate) Ltd v Maher*⁷⁹ and *Commonwealth of Australia v Verwayen*,⁸⁰ certainly contain the potential to form the basis of a cause of action closely resembling the proposal made in this paper. However, the Australian position is less clear than it might appear, as the distinctiveness of the cause of action protecting B's reliance has not been fully recognized.

In *Waltons Stores*, A and B agreed the terms of a prospective lease. It was envisaged that B, the owner of the land, would demolish a building and build a new one in line with the B's specifications. After forwarding an executed lease to the lessee's solicitor "by way of exchange", B began to demolish the building. A then began to have doubts about the project, but, although it knew B was commencing work, it did nothing to warn him. It was only when the original building had been demolished, and its replacement was 40% complete, that A informed B that it did not intend to proceed. The High Court held that in the absence of an exchange of documents, no contract had come into existence. Nonetheless, B's detrimental reliance meant that an estoppel arose which was decisive in giving B a claim. Two of the five justices explained this result on the basis of a standard estoppel by representation, or preclusionary estoppel, finding that A had represented to B that a contract *had already been concluded*.⁸¹ On this basis, as noted above, B's claim is contractual, and all contractual remedies are open to him. In contrast, three of the justices found that A had rather promised B that a contract would be concluded, but went on to reach the significant conclusion that a statement of intention

⁷⁹ (1988) 164 CLR 387.

⁸⁰ (1990) 170 C.L.R. 394.

⁸¹ See the judgments of Deane and Gaudron JJ.

could form the basis of an estoppel claim.⁸² This resembles the proposal made here, which would result in B's having a claim that his reliance on A be protected. However, there was equivocation among these three justices as to the appropriate response to such a claim. Mason CJ and Wilson J speak of B's claim as involving the "enforcement of voluntary promises",⁸³ which suggests that B's expectation will necessarily be protected; although they do also suggest that, "[h]olding the representor to his representation is merely one way of doing justice between the parties."⁸⁴ Brennan J's version of the doctrine most closely resembles that proposed in this paper: he emphasizes both the independent nature of the cause of action and that A's obligation is to remove the detriment suffered by B. However, he regards the Australian doctrine as limited in scope, applying only where B has a reasonable belief that "a particular legal relationship" has or will exist between himself and B.⁸⁵ This restriction seems hard to justify: it means, for example, that a promise by A to enter a contract to provide a service to B may give rise to a claim, but that a promise by simply to perform that service may not. In some ways, Brennan J's suggested restriction resembles the limited *High Trees* doctrine, and thus, whilst the other judgments in the High Court do not sufficiently distinguish the cause of action from estoppel by representation, it may be that Brennan J does not sufficiently distinguish it from the *High Trees* doctrine of promissory estoppel.

Despite, or perhaps because of, the presence of two extra justices, the decision of the High Court in *Verwayen* did little to clarify the basis of the Australian doctrine. B had been injured in a collision between two Australian Navy vessels in 1964. He took no legal action at the time but, well after the limitation period had expired, A, the government, told the sailors injured in the accident that it would not invoke its limitation defence. As a result, B began proceedings. A initially kept its promise but it then changed

⁸² See the joint judgment of Mason CJ and Wilson J as well as the judgment of Brennan J.

⁸³ (1988) 164 CLR 387 at 406.

⁸⁴ *ibid.*, p. 405.

⁸⁵ See Brennan J. (1988) 164 CLR 387 at 428.

its mind and attempted to plead the limitation defence. B argued that A was estopped from doing so. The facts present a clear choice between the application of estoppel by representation, or the *High Trees* principle, which would both result in A's being unable to plead the limitation defence, and a wider doctrine based on protecting B's detrimental reliance, which would allow A to invoke the defence provided it compensated B for his reliance on the promise not to do so by, for example, refunding B's legal costs. By a bare majority the Court opted for the former remedy. The three dissenting judges⁸⁶ adopted a doctrine based on protecting detrimental reliance and thus held that A could plead the limitation defence, subject to an award of legal costs. In particular, Mason C.J. made his position much clearer than he had in *Waltons Stores*,⁸⁷ remarking that "equitable estoppel will permit a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more."⁸⁸ For the majority, only Deane and Dawson JJ. based their decision on estoppel. Deane J. held that the estoppel entitled the respondent to an expectation remedy.⁸⁹ Dawson J. was non-committal on the general remedy issue,⁹⁰ taking the expectation route on the basis that an award of costs would not fully compensate the loss to the respondent caused by the Commonwealth's conduct.⁹¹ Finally, Toohey and Gaudron JJ. found for B on the basis of waiver, which of its nature entailed an expectation award. Indeed, as Toohey J. made a point of saying that elimination of detriment was all that was required in cases of the wider doctrine,⁹² it can be argued that, despite the result, the majority of the justices were in favour of a wider doctrine centred on protecting B's detrimental reliance.

⁸⁶ Mason C.J., Brennan and McHugh JJ.

⁸⁷ See generally, *Verwayen*, pp. 545-48.

⁸⁸ *ibid.*, p. 546. For reasoning of Brennan and McHugh JJ. to similar effect, see pp. 550-4, and pp. 585-7, respectively.

⁸⁹ pp. 557-8.

⁹⁰ p. 564-5.

⁹¹ p. 568.

⁹² see pp. 574, 579.

However, in the absence of a clear lead from the High Court, it is no surprise that, in applying that wider doctrine, Australian judges have tended to protect B's expectation by enforcing a promise of A relied on by B.⁹³ The lesson seems to be that, unless its distinctiveness is emphasized and its conceptual basis clearly set out, a doctrine designed to protect B's detrimental reliance, particularly if it is labeled as "estoppel", will be assumed by first instance judges to be an extension of existing forms of preclusionary estoppel, such as estoppel by representation, or of the *High Trees* version of promissory estoppel, enforcing variations to pre-existing legal relationships.

It therefore seems that any recommendation of a direct transplantation of the Australian doctrine into English law would be misguided or, at least, misleading. Given the uncertainties in Australian law, such a process could not be neutral. Rather, a prior decision would have to be made about the true position in Australian law and this is a question on which reasonable observers may differ.⁹⁴ In preferring one version to another, the biases of the observer will necessarily come into play. The process will therefore be more transparent if the reasons in favour of a particular version are directly debated, rather than being hidden in a supposedly neutral comparative process.

Indeed, this problem of selectiveness is nicely highlighted by observing the current influence of Australian law on the English doctrine of proprietary estoppel. As was noted above, the Court of Appeal decision in *Jennings v Rice* made the significant point that a successful proprietary estoppel claimant will not always be entitled to have his expectation enforced. Rather, the concept of proportionality applies and demands that the right B acquires must be proportionate to the detriment he has suffered. That concept

⁹³ For a survey of Australian cases see Robertson, *Reliance and Expectation in Estoppel Remedies* (1998) 18 Legal Studies 360. This trend can also be seen in the recent High Court decision in *Giumelli v Giumelli* (1999) 196 C.L.R. 101.

⁹⁴ Even if they are both employed by the same institution: compare e.g. Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (the Australian doctrine is centred on protecting B's reliance) and Edelman, *Remedial Discretion or Remedial Certainty after Giumelli?* (1999) 15 JCL 179 (the doctrine is a "cousin" of contract and allows promises to be enforced in the absence of consideration).

was first developed in the judgment of Hobhouse LJ in *Sledmore v Dalby*,⁹⁵ which drew heavily on the judgment of Mason CJ in *Verwayen*. As a result, English law has not been influenced by the totality of Australian law, but rather by that particular strand of thinking represented by Mason CJ's judgment in *Verwayen*. If Hobhouse LJ had instead drawn on the judgments of, for example, Deane J. in *Waltons Stores* and *Verwayen*, or even, perhaps, on the earlier judgment of Mason CJ in *Waltons Stores*, Australian law could have been used for the very different purpose of arguing that the purpose of proprietary estoppel is to protect B's expectation.

2. The Position in the United States

i) *The Selectivity Problem*

Any attempt to argue that English law should simply import the approach to pre-contractual reliance taken in the United States is immediately doomed to failure, due to the selection problem discussed above in relation to Australian law. That problem is all the more acute in relation to American law, first as there are significant variations in the law pertaining in particular states⁹⁶ and secondly as there is a wealth of wildly diverse views amongst commentators. Indeed, anyone setting out to discover the "American position" will quickly find themselves in the position of Flaubert's Bouvard and Pécuchet, the hapless researchers continually frustrated by the conflicting opinions of experts.⁹⁷ When it comes to detrimental reliance, for instance, Hillman⁹⁸ and Kosritsky⁹⁹

⁹⁵ (1996) 72 P & C.R. 196.

⁹⁶ Holmes' survey, *Restatement of Promissory Estoppel* (1996) 32 Willamette L Rev 265 groups the states into four distinct categories, but there is further room for sub-division within these broad groups.

⁹⁷ See e.g. p. 30 of the English translation by Polizzotti (2005), on their research into farming methods: "When it came to marl, for instance, Puvis recommended it, the Roret manual was steadfastly against it. As for gypsum, despite Franklin's example, Rieffel and Mr Rigaud seemed less than enthusiastic."

⁹⁸ *Questioning the New Consensus on Promissory Estoppel: An Empirical and Theoretical Study* (1998) 98 Columbia L Rev 580.

⁹⁹ *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data* (2002) 37 Wake Forest L Rev 531.

recommend it, the Yorio & Thel¹⁰⁰ and Farber & Matheson¹⁰¹ articles are steadfastly against it. As for intention to create legal relations, despite Barnett's example,¹⁰² Knapp¹⁰³ and Holmes¹⁰⁴ seem less than enthusiastic.

The observation made above about the selective impact Australian law has made on English law can also be extended to the United States material. In his elaboration of the *High Trees* principle in *Combe v Combe*, Denning LJ adopted a formulation which is almost identical to the description of promissory estoppel given in the 1936 edition of Williston on Contracts. In explaining that the *High Trees* principle was concerned merely with the variation of existing rights and hence did not create a new cause of action, Denning LJ stated that:

“That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties... The principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.”¹⁰⁵

Whereas the formulation in Williston was as follows:

“where one party has by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be

¹⁰⁰ *The Promissory Basis of Section 90* (1991) 101 Yale LJ 111.

¹⁰¹ *Beyond Promissory Estoppel: Contract Law and the Invisible Handshake* (1985) 52 Univ Chicago L Rev 903.

¹⁰² *The Death of Reliance* (1996) 46 J Legal Education 518; *Beyond Reliance: Promissory Estoppel, Contract Formalities and Misrepresentations* (1987) 15 Hofstra L Rev 443 (with Becker).

¹⁰³ *Rescuing Reliance: The Perils of Promissory Estoppel* (1998) 49 Hastings L J 1191.

¹⁰⁴ *Restatement of Promissory Estoppel* (1996) 32 Willamette L Rev 265

¹⁰⁵ [1951] 2 KB 215 at 219 and 220.

acted on accordingly, then, once the other party has taken him at his word and acted on it, the party who gave the promise cannot afterward be allowed to revert to the previous relationship as if no such promise had been made. This does not create a contract where none existed before, but only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them.”

Indeed, when turning to the *High Trees* principle in a later case,¹⁰⁶ Denning LJ explicitly adopted Williston’s terminology and referred to it as “promissory estoppel”. However, even by the time of *High Trees* itself, the scope of that doctrine in the United States had long since progressed beyond promises to abandon or vary existing legal rights; certainly, s.90 of the Restatement (First) of Contracts contained no such limit. Therefore it could perhaps be said that, had Lord Denning relied on a different American source, English law could have developed in a significantly different direction. Alternatively, a more likely explanation is that his Lordship’s choice of that particular passage was a deliberate choice, designed to ensure, as was emphasized in *Combe*, that the *High Trees* principle should not be used to undermine the doctrine of consideration.

ii) *The Protection of Reliance: s.90 of the Restatement of Contracts*

Given his avowed desire to support the doctrine of consideration, it is not surprising that Lord Denning shied away from engaging with s.90 of the Restatement (First) of Contract, headed as it is: “Informal Contracts Without Assent or Consideration”.¹⁰⁷ That section is often said to represent the principle of “promissory estoppel” and that term is so commonly used as to be unavoidable. However, for reasons discussed above, the term “estoppel” is inappropriate. Echoing a much earlier comment

¹⁰⁶ *Dean v Bruce* [1952] 1 KB 11, at 14.

¹⁰⁷ See supra n. 38 for the content of s.90.

of Corbin, this point was noted by the court in *Pavel Enterprises v AS Johnson*,¹⁰⁸ rejecting the use of the phrase “promissory estoppel:

“We prefer to use the phrase detrimental reliance, rather than the traditional nomenclature of “promissory estoppel” because we believe it more closely expresses the concept intended. Moreover, we hope that this will alleviate the confusion which until now has permitted practitioners to confuse promissory estoppel with its distant cousin, equitable estoppel.”

It is certainly the case that, unlike estoppel by representation (generally referred to in American cases and commentary as “equitable estoppel”), promissory estoppel operates as a cause of action and does more than merely preclude A from denying the truth of a particular state of affairs. There is certainly a clear difference between the American understanding of promissory estoppel as the principle behind s.90 and the English understanding of promissory estoppel as the High Trees principle. Certainly, the American approach comes much closer to the proposal made in this paper.

However, the proposal here is that B’s cause of action, based on his detrimental reliance, should lead to A’s being under an obligation to protect that reliance. In contrast, given the heading and location of s.90, the American principle of promissory estoppel seems to lead to the enforcement of A’s promise and the protection of B’s expectation. It certainly seems to have been Williston’s intention that the effect of s.90 was to render a promise contractually enforceable.¹⁰⁹ However, there was some scope for a different view, as one of the conditions stated by s.90 is that A’s promise “is binding if injustice can be avoided only by enforcement of the promise.” This raises the possibility that an offer by A to pay B a sum protecting B’s reliance on the promise may remove the “injustice” that B would otherwise suffer were A’s promise not to be enforced. Indeed,

¹⁰⁸ 342 Md 143, 674 A 2d 521 (Md 1996). See too Holmes, *Restatement of Promissory Estoppel* (1996) 32 Willamette L Rev 265 at fn 24, preferring the term “equitable detrimental reliance” (although not enough to use it in the title of his article).

¹⁰⁹ Note the famous exchange between Coudert and Williston during the American Law Institute’s deliberations on the proposed section 90 in 1926. Mr. Frederic Coudert, a member of the New York Bar, put a hypothetical to Professor Williston, in which Uncle promised Johnny a gift of \$1000 to buy a car. In reliance on that promise, Johnny bought a car for \$500. Was Johnny entitled to the \$1000 promised, or only the \$500 he had spent? Williston responded that Uncle had to pay over the \$1000: “Either the promise is binding or it is not.” 4 ALI Proceedings App pp.97-106 (1926).

this is made explicit in the revised s.90 contained in the Restatement (Second) which adds a sentence stating that “The remedy granted for breach may be limited as justice requires.” Yet that revised version of s.90 is headed even more baldly than its predecessor as “Contracts without Consideration” and so it is possible to argue that the protection of B’s expectation should be the standard approach whether A’s promise is enforceable due to the presence of consideration or due to the application of s.90.

This tension within s.90 has been one of the principal causes of the massive literature on the protection of reliance. It is possible to find strong academic and judicial support both for the view that the standard remedy under s.90 should be the enforcement of A’s promise and for the contrary contention that it should be the protection of B’s reliance. This again raises the selectivity problem which may hinder the comparative approach. However, it may be the case that a comparison between English law and s.90 may assist in understanding the ambivalent nature of s.90. Put simply, it seems clear that the tension within s.90 is the result of its playing two distinct roles.

The first purpose of s.90 is to supplement the limited definition of consideration espoused by Oliver Wendell Holmes and adopted in s.75 of the Restatement. In this way, the requirements set out in s.90 function as an “equivalent for consideration.”¹¹⁰ This reflects the account given by Gilmore of the drafting of the Restatement (First):¹¹¹ having defined consideration narrowly in s.75, the Institute was faced with accounting for categories of decided cases which could not be fitted within that definition, but in which, due to B’s detrimental reliance,¹¹² promises had nevertheless been enforced. Originally, then, s.90 was a means to supplement s.75 and to ensure that the Restatement stayed loyal to the task of accounting for the law as it stood. In contrast, English law adopts a wider version of the doctrine of consideration, focusing not only on whether B had furnished the “price” for A’s promise, but asking more generally if A has received some benefit as

¹¹⁰ See Cardozo J.’s dictum, in the context of charitable subscriptions, in *Allegheny College v National Chautauqua County Bank of Jamestown* 159 NE 173 (NY 1927): “we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions.”

¹¹¹ Gilmore, *The Death of Contract* at pp. 62-65. The dramatic nature of Gilmore’s account has been doubted by e.g. de Long, *The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: section 90 as Catch-22* (1997) Wisc L Rev 943.

¹¹² See too Farnsworth, *Contracts* (4th edn., 2004) at 2.19: “even during the nineteenth century, reliance on a gratuitous promise came to be recognized as a basis for recovery in a few categories of cases.”

a result of his promise or if B's action, expressly or impliedly requested by A, has caused B to suffer some detriment.¹¹³

It is in fact useful to see how English law treats the cases which led to the introduction of s.90. For example, one such group consists of gratuitous promises by bailees:¹¹⁴ in English law, these promises can be enforced, as judges have taken a very relaxed view of the consideration requirement;¹¹⁵ indeed, the leading work on English contract law treats gratuitous bailments as a "special case" in which such enforcement is possible despite the likely absence of consideration.¹¹⁶ A further group of cases leading to the adoption of s.90 consists of gratuitous promises within the family.¹¹⁷ In *Ricketts v Scothorn*,¹¹⁸ for example, A gave B, his granddaughter, a promissory note representing a promise to pay her \$2000 on demand, telling her he had "fixed out something that you have not got to work any more" and that "none of my grandchildren work, and you don't have to." B gave up her job, but, on A's death, his executor refused to honour the promise. The court nonetheless enforced it, stating that "Having intentionally influenced [B] to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit [A] to resist payment on the ground that the promise was given without consideration." It is clear that English law would reach the same result, by finding that B had provided consideration by giving up her job. A useful English comparison is *Shadwell v Shadwell*.¹¹⁹ A wrote to B, his nephew that "I am glad to hear of your intended marriage; and as will pay you £150 yearly during my life". The promise was held to be enforceable, as B was deemed to have provided consideration as he: "may have made a most material change in his position, and induced the object of his affection to do the same, and may have incurred a pecuniary liabilities resulting in embarrassments."¹²⁰ Similarly, A had received a benefit as marriage is "an object of interest to a near relative."

¹¹³ For a comparison of the United States and English views of consideration, see Treitel *The Law of Contract* (11th edn., 2003) at p.71.

¹¹⁴ See e.g. *Spiegel v Spear & Co* 234 NY 479, 138 NE 414 (1928).

¹¹⁵ See e.g. *Bainbridge v Firmstone* (1838) 8 A & E 743.

¹¹⁶ See Treitel, *The Law of Contract* (11th edn., 2003) at p.156.

¹¹⁷ See Farnsworth *Contracts* (4th edn., 2004) at 2.19.

¹¹⁸ 77 NW 365, 367 (Neb 1898).

¹¹⁹ (1860) 9 CB (NS) 159.

¹²⁰ Erle CJ at 174.

Viewed from the perspective of English law, it is therefore no surprise that a number of cases which fall under s.90 lead to A's promise being enforced as a contract: in these cases, an English court would simply hold that B's detrimental reliance sufficed to provide consideration for the promise. If the story ended here, the argument that s.90 is a means to give contractual effect to promises would have to be accepted. More importantly for the purposes of the present paper, a doctrinal challenge could then be made to the proposal for a cause of action protecting detrimental reliance. It could be argued that English law's failure to develop such a claim is a consequence of its wider definition of consideration which ensures that, whenever B's detrimental reliance deserves protection, B can bring a contractual claim.

The doctrinal response to this challenge has been outlined above, and consists chiefly in the impossibility of justifying the orthodox position in English law that pre-contractual reliance can be protected only where the anticipated deal involves the grant of a right relating to land. A further, comparative response can also be given by examining New York law which, due to the influence of Cardozo J., has adopted a definition of consideration very close to the English version. Indeed, Cardozo J's decision in *de Ciccio v Schweitzer*¹²¹ is very similar to that in *Shadwell v Shadwell*.¹²² This has led at least one commentator to argue that New York law therefore has no need of adopting a further, non-contractual route to protecting detrimental reliance.¹²³ However, the decision of the Second Circuit, applying New York law, in *Cyberchron Corp v Calldata Systems Development*¹²⁴ provides an excellent example of the necessity, in New York law as in English law, of an independent cause of action protecting detrimental reliance. The facts of *Cyberchron* are in fact very similar to those of *Easat*, discussed above. B was a sub-contractor and the proposed deal with A was for the supply of portable military

¹²¹ 221 NY 413, 117 NE 807 (NY 1917).

¹²² Indeed, it is possible that an English court could follow the reasoning of Cardozo J in *Allegheny College v National Chautauqua County Bank of Jamestown* 159 NE 173 (NY 1927) to find that consideration had been provided for a seemingly gratuitous promise to make a gift to a charity. However, the facility a donor has in English law to make a binding donative promise by means of a deed has, it seems, removed the need for any other doctrine to regulate this area.

¹²³ See Schwatz *The Second Circuit 'Estopped': There is No Promissory Estoppel in New York* (1997) 19 Cardozo L Rev 1201; compare Collins, *The Enigma of Promissory Estoppel in New York* (1984) 48 Albany L Rev 822.

¹²⁴ 47 F 3d 39 (2nd Cir. 1995)

equipment; again, the chief difficulty in negotiations was as to the weight and price¹²⁵ of the equipment B was to provide. In *Cyberchron*, A had already been awarded the main contract and, due to the deadlines it imposed, was anxious for B to begin development work. B however was reluctant to incur costs in the absence of a concluded agreement with A as to weight and price. A's representative therefore directed B to proceed with its work as though agreement had been reached on the outstanding issues. B did so, and also sought a written commitment from A, but A responded that "everything would be fine" and that B should proceed with its preparations. B worked on the project for three months before A terminated the negotiations, having found another, seemingly cheaper supplier. As in *Easat*, B's contractual claim failed: there had been no agreement on weight or price and, in the words of the district court, these were "two of the most essential, material and substantial terms of the proposed contract".¹²⁶ Further, in contrast to *Easat*, but consistently with the analysis proposed above, the district court rejected B's quantum meruit claim "in view of the lack of any benefit to [A], the failure of [B] fully to perform, and the absence of any unjust enrichment by [A]." Neither of these findings were challenged on appeal.

The district court nonetheless found that B's pre-contractual reliance could be protected as a result of its detrimental reliance on A's "clear and unambiguous" promise that a contract would be made.¹²⁷ B could not claim damages for profits it had lost by A's failure to enter into a contract, but the costs it had incurred in reliance could be recovered from A. On appeal to the Court of Appeals, Second Circuit, A, relying on an earlier New York judgment,¹²⁸ made the important argument that detrimental reliance, in the guise of "promissory estoppel" could only be used as "a substitute for consideration" or as a bar to

¹²⁵ Including the issue of what penalties were to be applied if the equipment supplied was over-weight.

¹²⁶ See 831 F. Supp 94 at 108: "to find an enforceable contract, there must be a manifestation of mutual consent to the essential terms so that performance can be rendered reasonably certain and so that the Court can determine whether the contract has been breached."

¹²⁷ In *Cyberchron*, neither the district court nor the Court of Appeals cite s.90. Rather, they rely on the formulation of promissory estoppel in New York law as requiring: (a) a clear and unambiguous promise; (b) reasonable and foreseeable reliance thereon; and (c) an unconscionable injury, resulting in injustice that could be remedied only by invoking the doctrine of promissory estoppel. In practice, however, this formulation is not significantly different to the s.90 requirements: in both cases, the real question is how the requirements are to be interpreted. As *Elvin Associates v Franklin* 735 F Supp 1177 (SDNY, 1990), discussed below, demonstrates, there is, for example, some flexibility in deciding if A has made a "clear and unambiguous promise".

¹²⁸ *Swerdloff v Mobil Oil Corp* 74 AD 2d 258, 427 NYS 2d 266; appeal denied 50 NY 2d 803, 409 NE 2d 1003 (1980).

the assertion of the Statute of Frauds. This contention draws some support from the reasoning of the court in *Ricketts v Scothorn*. In that case, it was said that, due to B's detrimental reliance on A's promise, A would be "estopped" from relying on the argument that A's promise lacked consideration. On this view, promissory estoppel, like estoppel by representation, operates simply to remove a bar to B's contractual claim. As a result, it would be of no assistance to B in *Cyberchron*, as, even if A were prevented from pleading a lack of consideration, there were additional obstacles in the way of any contractual claim, most notably the lack of agreement as to terms.

However, the Second Circuit rejected this limited view of promissory estoppel as simply a substitute for consideration. It held that A's assurances to B that it should proceed as though the outstanding contractual issues had been settled could be used as the basis of a claim. It also affirmed that the purpose of such a claim was to protect the reliance B had incurred as a result of the assurances, stating that: "The district court correctly noted that '[t]he damages recoverable in a promissory estoppel case are sometimes referred to as 'reliance damages', namely, the actual expenditure made in preparation for performance or in performing the work which has been induced by [A]."¹²⁹

The decision in *Cyberchron* is useful for a number of reasons. First, it shows that, even where an expanded definition of consideration is adopted, there is a need for an independent doctrine protecting B where he reasonably relies to his detriment on a belief as to A's future conduct. This doctrine can then apply in cases where the parties have not reached a mutually binding agreement: it is hence available in cases of pre-contractual reliance. This reasoning accords with a number of decisions reached in other American jurisdictions, the best-known of which is *Hoffman v Red Owl Stores*,¹³⁰ which demonstrate that the principle behind s.90 is not confined simply to expanding the definition of consideration. Rather, it has a second role: to permit an independent, non-contractual cause of action which can protect B's detrimental reliance.¹³¹ In light of this, it is no surprise that there is so much debate as to the function of s.90 and to the measure

¹²⁹ At 46, referring to the passage in the district court's judgment at 831 F Supp 116.

¹³⁰ 133 NW 2d 267 (1965).

¹³¹ See Metzger & Phillips, *The Emergence of Promissory Estoppel as an Independent Theory of Recovery* (1983) 35 Rutgers L Rev 472.

of damages available under it. Simply put, it is impossible to come to a unitary understanding of s.90: instead, it must be acknowledged that the section performs two distinct roles.¹³² Unfortunately, this point seems to have been somewhat lost in the American literature, chiefly because of the insistence in using s.90 to make points about the nature of contract law as a whole.¹³³

Secondly, the decision in *Cyberchron* provides a useful contrast to the laboured approach of the English courts, discussed above. The availability of a doctrine which squarely aims to protect B's detrimental reliance and is not confined to cases involving land provides a convenient and compelling means to give effect to the desire, evident in a case such as *Easat* or *Brewer Street*, to give some protection to pre-contractual reliance.

Thirdly, the reasoning in *Cyberchron* ties in closely with the basis of the model proposed in this paper and developed from the English law of proprietary estoppel. The English cases show that the concept of an agreement in principle is broad enough to include situations in which terms as to price or the exact manner of performance have not been agreed. When, in response to enquiries from B, A gave assurances that B could proceed as though the price and weight issues had been resolved, A gave B grounds reasonably to believe that the contract would be concluded. Indeed, a number of further American decisions support this requirement that A must have done more than simply reach an agreement in principle with B, or have manifested his consent to be bound by particular terms, and instead must also have acted in such a way as to lead B to believe that the agreement in principle will be honoured.¹³⁴ Finally, B acquired a claim against A not to have his expectation enforced but rather to protect his detrimental reliance on A.¹³⁵

¹³² This point is implicitly conceded in the analyses of Yorio & Thel and Barnett & Becker: whilst in each case the authors wish to emphasize the function of s.90 in enforcing promises, they are forced to recognize that this approach cannot explain all s.90 cases and hence are forced to suggest alternative explanations for those cases, focussing on the possibility of a tort claim for misrepresentation. As seen above, such an analysis of cases such as *Hoffman v Red Owl* is unconvincing.

¹³³ Metzger & Phillips *The Emergence of Promissory Estoppel as an Independent Theory of Recovery* (1983) 35 Rutgers L Rev 472 do recognise the significance of cases such as *Hoffman v Red Owl Stores*, but they also use these decision as the basis for a wider assessment of the nature of contract law, arguing at 505 that: "in its customary role as substitute for various contractual elements, promissory estoppel has eroded the integrity of the classical syndrome from within."

¹³⁴ See e.g. *Werner v Xerox Corp* 732 F 2d 580 (CA Wis 1984); *Elvin Associates v Franklin* 735 F Supp 1177 (SDNY, 1990); *Bixler v First National Bank of Oregon* 49 Or. App.195, 619 P 2d 895 (Or. App., 1980).

¹³⁵ See too *Hoffman v Red Owl Stores*; *Werner v Xerox Corp*; *Elvin Associates v Franklin*; *Janke Construction Co v Vulcan Materials Co* 386 F Supp 687, 16 UCC Rep Serv 937 (1974).

iii) *Conclusion*

Despite the initial difficulties presented by the position in the United States, decisions in some of its jurisdictions can provide useful support for the model proposed in this paper. In particular, decisions such as *Cyberchron* provide a refreshing and compelling alternative to the current approach of English law to protecting pre-contractual reliance and demonstrate the effectiveness of a doctrine, independent from contract law, which aims directly to protect B's detrimental reliance. However, just as the usefulness of the Australian approach is compromised by its failure clearly to distinguish the cause of action protecting B's reliance from estoppel by representation, the value of the American experience is reduced by a failure fully to separate the cause of action from contract law. First, the independent cause of action has largely been developed from s.90 and has therefore been confused with the other role of s.90 in extending the definition of consideration. Secondly, as noted above, scholars attempting to re-think contract law have frequently made use of s.90 and have hence overlooked the possibility that the section may lead to a non-contractual cause of action which need not undermine but can rather complement classical contractual doctrine. Contrary to some "realist" opinions,¹³⁶ this is not simply a technical concern: important practical consequences follow from deciding if a claim brought under the s.90 principle is contractual or not. First, whilst the standard contractual remedy is the protection of B's expectation, under the independent doctrine the aim will be to protect B's reliance. Secondly, in the absence of a recognized exception, the Statute of Frauds may apply to block a claim to enforce a contract; however, there seems to be no need for the Statute to apply to prevent a claim based on the independent doctrine.¹³⁷

Paradoxically then, it may be that the English route to protecting detrimental reliance has some advantages over its American counterpart. The English doctrine of

¹³⁶ See Knapp *Rescuing Reliance: The Perils of Promissory Estoppel* (1998) 49 Hastings LJ 1191 at 1244: "People make promises, people break promises, other people get hurt. Is this tort? Is this contract? As Karl Llewellyn once pungently remarked, "What the hell!"

¹³⁷ As was recognized in *Janke Construction Co v Vulcan Materials Co* 386 F Supp 687, 16 UCC Rep Serv 937 (1974). However, there is no clear response in the American case-law to the interaction of promissory estoppel with the Statute of Frauds.

proprietary estoppel is clearly distinct from contract law, and, unlike the principle behind s.90, does not attempt to play two different roles simultaneously. Moreover, unlike s.90, it is not framed in terms of “promises”. The potential significance of this is apparent in a case such as *Crabb v Arun D.C.*, where it was A’s conduct in installing a gate, rather than any verbal assurance that the contract would be entered, which was vital in giving B a claim. Could it be said in such a case that A had “promised” to grant B an easement? Of course, the negotiations between the parties had resulted in an agreement in principle, but it is questionable whether this non-binding understanding could qualify as a “promise”. For example, in *Cyberchron*, it is A’s later assurances that B should proceed “as if” the outstanding contractual issues had been resolved and that “everything would be fine”,¹³⁸ which constituted the “clear and unambiguous promise” necessary for a claim, not the earlier understandings contained in the non-binding incomplete agreement. A useful case to contrast with *Crabb v Arun* is *Elvin Associates v Franklin*.¹³⁹ B, a concert promoter, had reached an agreement in principle with A, Aretha Franklin, for the staging of a musical in which she was to star. However, the final contractual documents had not been signed, and the language used in the draft agreements made clear that A (or rather the production company through which she acted) did not intend to be legally bound otherwise than by the signing of a final contractual documents. Yet, as the plan had been for Franklin to sign the documents on her arrival in New York shortly before the opening of the show, it was clear to both sides that B would have to undertake extensive preparatory work before the contract was concluded. B was in regular contact with A, who was aware of and advised on the preparations. According to the court,¹⁴⁰

“[A] was enthusiastic about appearing in the production and...she early on stated to [B]: ‘This is what I am doing’. Combined with her oral agreement, through her agents, to the basic financial terms of her engagement, her continued expression of this enthusiasm to [B] more than amply afforded [B] a reasonable basis for beginning to make the various arrangements and expenditures necessary to bring the production to fruition.”

¹³⁸ 47 F 3d 39 at 44.

¹³⁹ 735 F Supp 1177 (SDNY, 1990).

¹⁴⁰ 735 F Supp 1177 at 1183.

Indeed, the court stated that “It is difficult to imagine a more fitting case for applying” the doctrine of promissory estoppel, but to do so under New York law it needed to find a “clear and unambiguous promise”. It is debatable, however, whether the language of promise is useful here: the important point, as in *Crabb*, rather seems to be that A’s conduct has made it reasonable for B to believe that A will honour an agreement in principle. It may therefore be the case that, in relation to the protection of pre-contractual reliance, a comparative approach can lead to a mutually beneficial, two-way exchange between English law and the law in jurisdictions of the United States.

D. The Economic Approach

The use of economic analysis to explain and justify particular legal principles marks a clear difference between English and American academic approaches to the common law. Whilst such analysis is widespread in the United States, it is only rarely employed by English commentators or judges. Nonetheless, it will be argued in this section that the burgeoning economic analysis of pre-contractual reliance, present in the American literature, can provide useful and important support for the proposal made in this paper.

Of course, it is possible to question whether economic analysis can ever be useful in understanding the common law.¹⁴¹ Equally obviously, that issue is beyond the scope of this paper. More pertinently, the value of such analysis in the particular context of promissory estoppel has been doubted. Robertson, in an article entitled *The Failure of Economic Analysis of Promissory Estoppel*,¹⁴² gives two reasons in support of his title. First, that the “law in this area is not a tool for promoting efficient behaviour, but a means for providing protection against a particular type of harm.”¹⁴³ Secondly, that looking to the incentives which legal rules provide for rational actors “rests entirely on the questionable assumption that promisors and promises are motivated by the legal consequences of their actions.”¹⁴⁴ These concerns may seem particularly pertinent to English law, as the protection of detrimental reliance through proprietary estoppel is

¹⁴¹ See e.g. Dworkin, *Is Wealth a Value?* (1980) 9 J Leg Stud 191.

¹⁴² (1999) 15 Journal of Contract Law 69

¹⁴³ At 73.

¹⁴⁴ At 74.

traditionally associated with domestic rather than commercial cases. When, for example, the law intervenes to protect a son who has relied to his detriment on an apparent gift of land from his father,¹⁴⁵ it may seem inappropriate and unnecessary to apply an economic analysis. However, as noted above, proprietary estoppel does already extend to commercial cases, such as *Cobbe*, in which business people may be negotiating valuable deals. In these cases, it does seem plausible to have at least some concern with the potential effect of the law on overall efficiency and to take the view that the parties, who will often be repeat players, may well be aware of the legal framework in which they are operating.

Katz¹⁴⁶ makes a useful distinction between two different approaches to setting the legal rules which govern negotiating parties. The first, the “conventional” approach,¹⁴⁷ can be seen as a bottom up process. It seeks to discover and give effect to B’s reasonable expectations as to how A may act. Katz states that the conventional approach “makes sense if the parties’ expectations are largely independent of legal practices.”¹⁴⁸ Certainly, that approach characterizes the law of proprietary estoppel, developed in situations where parties’ awareness of the law is likely to be very limited. A nice example is provided by *Gillett v Holt*.¹⁴⁹ Over almost 40 years, B had worked for A, foregoing numerous opportunities partly as a result of A’s promises to leave B his land in his will. A argued that B’s reliance on A’s promise was unreasonable: A had simply promised to write a will in B’s favour, but wills are revocable and A could thus have complied with the promise and later revoked the will. Although this argument had found support in an earlier first instance decision,¹⁵⁰ it was decisively rejected by the Court of Appeal.

Katz argues that where the parties are instead aware of the legal rules which regulate their behaviour, then the conventional approach is “ultimately circular”. Instead, a “regulatory” approach should be adopted: a top-down view which assumes that parties will respond to legal rules and calibrates those rules to encourage parties to act in an

¹⁴⁵ As in *Dillwyn v Llewellyn* (1862) 4 De FG&J 517.

¹⁴⁶ *When Should an Offer Stick? The Economics of Promissory Estoppel in Preliminary Negotiations* (1996) 105 Yale LJ 1249.

¹⁴⁷ Katz at 1251 prefers to call this the “coordination” or “interpretive” approach, but, in the context of English law, “conventional” has a useful double meaning.

¹⁴⁸ *Ibid* at 1251.

¹⁴⁹ [2001] Ch 210.

¹⁵⁰ *Taylor v Dickens* [1998] 1 FLR 806.

appropriate, which is to say efficient, fashion. The charge of circularity may perhaps be over-stated, but there is certainly some merit in exploring how different responses to pre-contractual reliance may affect the incentives of negotiating parties. Indeed, one of the chief arguments against imposing liability for pre-contractual reliance has been that it would have an unwelcome “chilling” effect on such parties.¹⁵¹ A’s fear of incurring liability to B, even in the absence of a concluded contract or the receipt of a benefit from B, may prevent him from entering negotiations or from exchanging useful information with B when negotiating.

One of the chief merits of economic analysis is that it can rebut such fears and uncover the paradox that A’s potential liability for B’s pre-contractual reliance may actually be in A’s interests. For example, in the context of contractual negotiations, Craswell notes that the ability to enter into some form of binding commitment to B may be of value to A, as, by doing so, A can encourage B to make investments which will be of benefit to both A and B.¹⁵² For example, in *Easat* or *Cyberchron*, B’s exploratory work in developing the equipment could enable it to come up with a cheaper method of production, allowing A to make a bigger profit on its main contract; in *Franklin*, B’s work in preparing for the planned musical could increase the potential profits from the show, to the benefit of both parties. It is clear then that pre-contractual reliance can be mutually beneficial by increasing the size of the “pie” or contractual surplus which A and B will divide up in their anticipated contract.

Indeed, in a detailed economic analysis, Bebchuk and Ben-Shahar¹⁵³ provide a rigorous proof that a regime allowing for the recovery of at least some pre-contractual reliance has *less* of a chilling effect than a general rule against such recovery. For, if B bears the risk of having to bear the full costs of his reliance should no contract be made, then B may well be dissuaded from making pre-contractual investments.¹⁵⁴ Yet in certain

¹⁵¹ See e.g. Farnsworth, *Contracts* (4th edn., 2005) at 3.26; Johnston *Investment, Information and Promissory Liability* (2004) 152 Univ Pennsylvania L Rev 1923.

¹⁵² See *Offer, Acceptance and Efficient Reliance* (1996) 48 Stan L Rev 481.

¹⁵³ *Pre-Contractual Reliance* (2001) 30 Journal Legal Stud 423.

¹⁵⁴ This is an example of the “hold-up” problem: unless B is in a position of bargaining power when negotiating the contract, then A will be able to capture some or all of the benefits of B’s reliance without those reliance costs being reflected in the price: see Katz, *supra* n. 146 and the example given by Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability* (2004) 152 Univ Pennsylvania L Rev 1829 at fn 39.

situations such investments will be necessary to ensure that there is *any* surplus for the parties to share in an eventual contract: hence, if the investment is not made, no contract will result.

From an economic perspective, then, the ability of A to commit himself to protecting B's pre-contractual reliance can be seen to offer a facility rather than impose a burden. However, this is not in itself enough to justify imposing liability for pre-contractual reliance. It must also be asked why A has not simply expressly committed himself to B, either by means of entering the planned contract or by means of a collateral contract accepting (part of) the cost of B's reliance. A recent analysis by Schwartz and Scott, *The Law and Economics of Preliminary Agreements*,¹⁵⁵ is helpful as to the first question. It suggests that pre-contractual reliance may often be useful not just in increasing the surplus available from the contract, but also in defining the nature of the project that contract will carry out. For example, in *Cyberchron*, exploratory work by B would assist in establishing what weight of equipment could feasibly be produced. Moreover, in the absence of clarificatory preliminary work, some projects will necessarily be too complex to reduce into a binding contractual agreement.

Schwartz and Scott are, however, less persuasive in explaining why, in such cases, A and B do not enter a collateral contract dealing with the costs of B's preliminary work. They point to difficulties in verifying the extent of such reliance, and to the fear that such a commitment might encourage excessive reliance. They therefore raise the "better question" of why the parties do not set a limit to the extent of A's liability under such a collateral contract. Their answer is that "such clauses would probably be treated as penalties"¹⁵⁶ and hence be denied enforcement by a court. However, this is wholly unpersuasive. The penalties doctrine applies to regulate the consequences of a breach of contract and would have no effect at all on a simple promise by A to meet the costs of pre-contractual work undertaken by B.

It is therefore necessary to look elsewhere to justify imposing liability for B's pre-contractual reliance in the absence of an express commitment from A to meet those costs. One response is to say that such a rule would achieve the result of promoting

¹⁵⁵ Forthcoming, Harvard L Rev 2007: available on SSRN.

¹⁵⁶ At 32.

economically efficient pre-contractual investments without imposing on the parties the transaction costs of making such a collateral contract. That may be the case, but the expense incurred by the parties in litigation and the courts in intervening to protect B's reliance would have to be factored into any cost-benefit analysis. A different response may come from a surprising source. Whilst the introduction to this section noted the distinction between the domestic context in which the doctrine of proprietary estoppel developed and the commercial situations in which a "regulatory" approach may be suitable, it may in fact be the case that parallels drawn from the domestic context can bolster that economic analysis.

First, the assumption that A and B could simply contract around a default position in which pre-contractual reliance is unprotected may be unwarranted. This is impliedly accepted in the domestic context, where proprietary estoppel was developed in part to allow B to claim a right in land in the absence of a necessary formality, such as the completion of a written contract. Similarly, informal promises by one spouse or partner to another to share ownership of a co-habited home have been given legal effect where detrimentally relied on.¹⁵⁷ These cases acknowledge that the relationship between the parties makes it unrealistic, and even inappropriate, to expect B to insist on the execution of a formal document before relying on A's promise. Surprisingly, there may be an analogy here to the position of commercial parties negotiating a contract: it may be equally unrealistic and inappropriate to expect B to attempt to acquire a binding collateral contract from A before making a pre-contractual investment.

There are two reasons for this. First, given that the entry into such collateral contracts does not seem to be standard practice, B may feel that asking for such a commitment from A may send A unwelcome signals as to B's suitability as a contracting party. As a result, it may be unrealistic to expect B to insist on a collateral contract before making a pre-contractual investment. This point is explored by Ben-Shahar and Pottow,¹⁵⁸ who argue that default rules may be "stickier", i.e. more likely to apply, than is commonly assumed, as "unfamiliar terms may...raise suspicions and scare away

¹⁵⁷ See e.g. *Eves v Eves* [1975] 1 WLR 338.

¹⁵⁸ *On the Stickiness of Default Rules* (2003) 33 Florida State University L Rev 651.

potential counterparties.”¹⁵⁹ In this context, the significance of their argument is that the law cannot simply set a default rule against the protection of pre-contractual reliance and then assume that parties will negotiate around it when it is in their interests to do so.

Secondly, and linked to the first point, is the notion that it might be inappropriate for B to require a collateral contract before relying. In a co-habitation context, an attempt by B to insist that A execute a formal document giving effect to an oral promise to share ownership of the home may run counter to the very trust inherent in, at least some, co-habiting relationships. Trust may also play an important role between commercial parties negotiating a contract. This issue has been explored by Scott,¹⁶⁰ who, drawing on recent work in experimental economics, argues that commercial parties may deliberately opt for incomplete agreements, even if they know them to be legally unenforceable, as they prefer to trust that notions of reciprocal fairness will provide a sufficient incentive for performance. Certainly, the practical power of informal assurances in inducing reliance is clear from the cases analysed in this paper. From the “conventional” perspective, Scott’s argument can thus support the view that it may be reasonable for B to rely on such an informal assurance. From the economic perspective, it can explain why a default rule preventing the recovery of pre-contractual reliance would be unduly “sticky”: B may be loath to ask A for a collateral contract protecting such reliance as to do so would be to violate the trust which negotiating parties attempt to build up in their progress to a final, legally binding agreement.

It seems therefore that economic analysis can support the model proposed in this paper in the following way. First, there are certainly situations in which B’s pre-contractual reliance will benefit both A and B by increasing the gains each party can make from the planned contract. However, B’s incentives to incur such reliance will not be optimal if there is no means for B to recover the costs of that reliance. As it may be unrealistic and even inappropriate to expect the parties to reach a collateral agreement to cover B’s reliance costs, a default rule allowing for their recovery is to be preferred.

Economic analysis may be of further use in setting the precise conditions of a default rule protecting pre-contractual reliance. This question will not be considered here,

¹⁵⁹ *Ibid* at p. 682.

¹⁶⁰ *A Theory of Self-Enforcing Indefinite Agreements* (2003) 103 Col L Rev 1641.

but it is worth noting the surprisingly narrow scheme proposed by Schwartz and Scott. On their view, B's claim is dependent not only on the parties having reached a preliminary agreement, but also on that agreement having laid down an investment timetable which A has breached by delaying a specific investment. Part of their motivation is a desire to avoid A's being liable to B in the absence of an intention to be legally bound: the restrictive requirements they suggest are seen to serve as a "good proxy for an intention to be legally bound."¹⁶¹ However, as is made clear in cases such as *Cobbe* and *Cyberchron*, courts do currently protect pre-contractual reliance even where A does not intend to be legally bound.¹⁶² The cautious nature of Schwartz and Scott's approach is surely linked to Scott's earlier argument, mentioned above, that negotiating parties often deliberately opt out of the sphere of legal enforcement by drafting incomplete agreements which cannot be contractually enforced. It impliedly assumes that, unless A has manifested an intention to be legally bound, liability for pre-contractual reliance will be inconsistent with the parties' desire for their relationship to be self-enforcing.

However, it is incorrect to assume that the parties' decision not to commit themselves to a legally binding agreement precludes any legal intervention.¹⁶³ It is true that, at this stage of negotiations, where the parties' relationship is based on trust rather than detached legal commitment, the law should not impose a duty on A to protect B's expectation. Nonetheless, the very space for trust which the parties seek to establish will be undermined if, in a case such as *Cyberchron*, *Cobbe*, or *Red Owl*, A is allowed to abuse that trust by failing to protect B's reasonable reliance on a belief, for which A is responsible, that a contract will be concluded. The proposal made in this paper therefore not only has a facilitative role in allowing A to commit himself to protecting B's reliance

¹⁶¹ *Ibid* at p.7.

¹⁶² In an attempt to reconcile their proposal with existing legal doctrine, Schwartz and Scott are obliged to marginalize such cases. Whilst they do not cite *Cyberchron*, they argue, at p.11, that *Hoffman v Red Owl Stores* 133 NW 2d 267 (1965) is doctrinally incorrect and has not been followed in its own or other jurisdictions. Whilst it is true that not all jurisdictions adopt the *Hoffman* approach, the analysis of Holmes *Restatement of Promissory Estoppel* (1996) 32 Willamette L Rev 265 shows that the approach underlying *Hoffman* is accepted in a number of states (he counts thirteen). Further, the case which Schwartz and Scott cite as proof that *Hoffman* is not followed even in Wisconsin (*Beer Capitol Distributing Inc v Guinness Bass Import Co* 290 F 3d 877 (7th Cir., 2002) is easily distinguishable from *Hoffman*, as A in that case merely enquired as to whether B would be able to perform a franchise contract, if granted.

¹⁶³ This point is forcefully made by Kimel, *From Promise to Contract* (2003) at pp. 140-141.

without the need for a fully binding contract but, unlike that advocated by Schwartz and Scott, also has a protective role in ensuring that B will not be made worse off by A's attempt to exploit the space for trust established by the lack of a binding contractual agreement.

E. Conclusion

In each of the three common law countries considered in this paper, attempts have been made to give some protection to pre-contractual reliance. From an economic perspective this should not be surprising, as it has been seen that there are strong arguments in favour of a default rule allowing such reliance, in certain circumstances, to be protected. In each of the three countries, different legal routes have been adopted. In England, the primary vehicle has been the quantum meruit claim, originally viewed as contractual but now seen as responding to unjust enrichment. However, as was seen in Part A, this approach has caused severe problems. It was argued instead that the overlooked doctrine of proprietary estoppel offers a more suitable solution, and should be expanded beyond its current arbitrary limits. This would bring English law more closely into line with that applied in Australia and some parts of the United States, where the need to protect B's detrimental reliance, rather than the need to reverse A's unjust enrichment, is identified as the prime concern. However, in developing its response to pre-contractual reliance, Australian law has yet to shake off the influence of estoppel by representation; similarly, as demonstrated by s.90, the position in the United States is clouded by the contractual origins of promissory estoppel. Perhaps the lesson from this is that common law systems are unduly reluctant to recognise causes of action which cannot easily be categorised as based on one of the three categories of contract, tort and unjust enrichment.

Nonetheless, a comparative approach can have advantages for each of the three countries. First, the English proprietary estoppel model makes clear the independence of a cause of action protecting detrimental reliance from both estoppel by representation and contract law. Secondly, the Australian and American experience shows that a cause of action protecting detrimental reliance can serve a valuable practical role. Further, the economic analysis developed chiefly in America can rebut concerns that a doctrine based

on protecting detrimental reliance will unduly deter parties from entering into, or making representations during, contractual negotiations.

The critical question for all three countries is what limits are to be set on an independent cause of action responding to pre-contractual reliance. The contours of a possible model have been sketched here, and shown to correspond in large part not only to the English law of proprietary estoppel, but also to the approach currently adopted in a number of American cases. Whilst work remains to be done on the detail of the model, it seems clear that a (cautious) comparative approach, coupled with a consideration of economic analysis, is likely to provide useful insights.

Another theme, emerging from the examination of American commentary, is that the larger question of contractual theory casts a shadow over the protection of pre-contractual reliance. Largely for pragmatic reasons, this paper has attempted to show that pre-contractual reliance can be protected without the need for a reform of the classical model of contract law. It is hoped that this paper has presented a compelling case for the law's response to contractual negotiations to be organized into three distinct stages. At the first, initial stage, there is a space in which B, if he wishes to rely on the prospect of a contract with A, does so at his own risk. Similarly, at this point, A can make promises or representations which, provided they are truthful when made, will not lead to any legal liability. This provides valuable signalling opportunities to both parties, either to show willing by undertaking work at their own cost, or to indicate their seriousness and reliability by making, and then choosing to perform, a promise even if no legal repercussions attach to a failure to perform it.¹⁶⁴ At the second stage, when negotiations between the parties have progressed and an agreement in principle has been reached, A by his conduct may lead B reasonably to believe that a contract will be concluded. By doing so, A comes under a liability to protect B's reliance on that belief. This liability has two roles: first, it provides a facility enabling A to encourage mutually beneficial reliance by B, without having to enter into either the planned contract or a collateral agreement to protect B's reliance. Secondly, it supports the possibilities for trust inherent in the negotiations by preventing A from abusing that trust. However, the fact that the parties

¹⁶⁴ For a discussion of the benefits of being free to make promises without incurring liability see e.g. Scott, *supra* n.160.

have not yet cleared all the hurdles imposed by classical contract law (the manifestation of an intention to be legally bound; offer and acceptance of a definite agreement; the provision of consideration) means that A is not under a general liability to protect B's expectations. That liability is only incurred in the third and final stage, in which a contract is concluded. At that point, the prevailing ethos is no longer trust, but rather the detachment which contract law allows,¹⁶⁵ in enabling B to know that, however his relationship with A, may develop, A will be bound to ensure that B is put in the position he will be in if the contract is performed.

¹⁶⁵ For an argument that this is detachment is the defining feature of contractual liability, see Kimel, *From Promise to Contract* (2003).