SOME NEW (OLD) IDEAS ABOUT ESTOPPEL AND ELECTION

Unconscionability

Unconscionability as an element in any form of estoppel was not recognised in any of the landmark cases in the 19th century. It was not mentioned in Jorden v Money (1854) 5 HLC 185 dealing with estoppel by representation; in Ramsden v Dyson (1866) LR I HL 129 dealing with proprietary estoppel; or in Hughes v Metropolitan Railway Co (1877) 2 App Cas 439 dealing with promissory estoppel. It was and is the underlying principle supporting all forms of equitable estoppel, but its application has been subsumed in their constituent elements. As the High Court of Australia explained in Tanwar Enterprises Pty Ltd v Cauchi (2003) 217 CLR 315, 324-6 breaches of trust and of fiduciary duty evidence unconscionable conduct, but such questions are decided on well known principles without reference to unconscionability.This is also true of equitable estoppel.

However in Crabb v Arun DC [1976] Ch 179,195,198 CA, a proprietary estoppel by encouragement case, Scarman LJ said that the court had to find unconscionability as a fact. This got the ball rolling and for a time such findings became fashionable here and in Australia. The reaction began with The Indian Grace (No 2) [1998] AC 878, 913 where Lord Steyn, giving the principal speech, identified the constituent elements of an estoppel by convention without referring to unconscionability. Then in Cobbe v Yeoman's Row Management Ltd [2008] 1 WLR 1752, 1768 Lord Scott, giving the principal speech, accepted concurrent findings below of unconscionable conduct but rejected the claim for a proprietary estoppel. The late Professor Birks described findings of unconscionability, where the constituent elements of an estoppel had been established, as ‘the fifth wheel on the coach’. Lord Walker referred to this in in Cobbe at 1788 and continued:

> “…Birks was there criticising the use of unconscionability to describe a state of mind. Here [in proprietary estoppel] it is being used…as an objective value judgment on behaviour regardless of the state of mind of the individual in question.”

This not only deprives unconscionability of all meaning, it still leaves it as the fifth wheel on the coach. Lord Scott said at 1762:

> “…unconscionability of conduct may well lead to a remedy but…proprietary estoppel

cannot be the route to it unless the ingredients for a proprietary estoppel are present."

The following year in Thorner v Major [2009] 1WLR 776 the House enforced a proprietary estoppel by encouragement without finding that the conduct of the deceased had been unconscionable. Lord Scott at 781; Lord Walker at 786, 791; and Lord Neuberger at 798 identified the constituent elements of a proprietary estoppel without mentioning unconscionability. The latter added at 804:

> "Concentrating on the perceived morality of the parties' behaviour can lead to an unacceptable…uncertainty of outcome."

In Fisher v Brooker [2009] 1 WLR 1764,1780 Lord Neuberger, delivering the principal speech, referred to unconscionability more than once , but did not include it among the elements of a proprietary estoppel.

The justice of holding a representor/promisor to an estoppel is determined by law and depends on his responsibility for the representee's/promisee's change of position. The test is objective as the House held in Thorner where Lord Hoffmann said at 779:

> "…the Court of Appeal departed from their…objective examination of the meaning which [the deceased's] words and acts would reasonably have conveyed and required proof of his subjective understanding."

The objective nature of the enquiry was also emphasised by Lord Scott at 782; Lord Walker at 795; and by Lord Neuberger at 799.

This accords with the analysis of Dixon J in Grundt v Great Boulder Proprietary Gold Mines Ltd (1938) 59 CLR 641, 674-6 which has been approved by the Court of Appeal on at least 8 occasions and recently by the Privy Council in Prime Sight Ltd v Lavarella [2014] AC 436, 444, 448-9. The references are collected in the second edition of my book on p 4. The test is objective, focussed on the reasonable reaction of the representee/promisee to the representation/promise, and not on the thought processes of the representor/promisor. In Craine v Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305, 327 Isaacs J said:

> "[T]he law of estoppel looks chiefly at the situation of the person relying on the estoppel; next as a consequence of the first, the knowledge of the person sought to be estopped is immaterial…"

His judgment was expressly approved in The Mihalios Xilas [1979] 1 WLR 1018,1034 by Lord

Scarman, and indirectly by the other Law Lords who approved (at 1024,1028,1032) the judgment of Kerr J [1978] 1 WLR 1257,1266 who cited this judgment. The objective value judgment on behaviour which Lord Walker called for is therefore meaningless. It must be applied to the conduct of the representor/promisor but his representation/promise is harmless unless and until reasonably acted on and may have been made honestly and in good faith.

The estoppel exists before it is repudiated, and even if it is never repudiated as Strauss QC held in Webster v Ashcroft [2012] 1 WLR 1309. An equitable interest under an estoppel by encouragement based on a testamentary promise did not vest until the death of the promisor so as to pass to the promisee, but vested in the promisors's lifetime so as to pass to the promisee's trustee in bankruptcy. A proprietary estoppel is part of the law of property, it is not primarily a remedy for equitable wrongdoing.

Statements as to the future

Until recent decades Jorden v Money (1854) 5 HLC 185 was understood as establishing that a representation could only support an estoppel if it related to an existing fact. A prediction or promise would not do. This was no technicality. A representation is literally a re-presentation, a description in words of something said to exist in fact. During the 1980's two members of the High Court of Australia challenged the orthodox view, but in Sidhu v Van Dyke (2014) 251 CLR 505, the plurality cited Jorden v Money with evident approval. Although not overtly challenged here the principle was reaffirmed by Toulson LJ in United Arab Emirates v Allen [2012] 1 WLR 3419, 3427 CA. However judges here and in Australia continue to use representation loosely to refer to promissory statements as to the future with the risk of inadvertently extending estoppel by representation and promissory estoppel to positive promises.

Subject to contract

The ability of an estoppel to trump a "subject to contract" clause became an issue in Attorney-General of Hong Kong v Humphreys Estate (Queens Gardens) Ltd [1987] AC 114,127-8 (Hong Kong Land) where Lord Templeman said:

> "It is possible, but unlikely, that in circumstances at present unforeseeable,

> a party to a document expressed to be 'subject to contract' would be able to satisfy the court …that some form of estoppel had arisen to prevent both parties from refusing to proceed."

The 'subject to contract' clause prevailed in that case despite substantial performance of the in principle agreement by both parties. There was no estoppel because the acts of performance occurred before final agreement had been reached on the terms of the contract. The possibility envisaged by Lord Templeman was mentioned by Lord Scott in Cobbe [2008] 1 WLR at 1768 who said:

> "A subject-to-contract reservation…in the course of negotiations…could be withdrawn… expressly or by implication."

He did not suggest that this was not likely to happen. In similar situations estoppels have displaced a subject to contract clause. In The Botnica [2007] 1 Lloyds Rep 37, 49 the parties reached agreement on the terms of a charterparty subject to signing formal documents. The defendant did not sign but both parties proceeded to perform the agreed terms. Aikens J held that the defendant, by deciding to proceed, had "waived" the clause and was bound by the contract. This was not a waiver by election between alternative rights, but a representation which led to an estoppel by conduct.

In RTS Flexible Systems Ltd v Molkerei Alois Muller Gmbh & Co AG [2010] 1 WLR 731,783-4 SC the parties had agreed, "subject to contract", on the essential terms of a contract to design and build some machinery. Without formalising their contract they proceeded to perform the essential terms. Lord Clarke, giving the judgment of the Court, held that the parties had "waived" the "subject to contract" clause and were bound. The waiver was the result of an estoppel by conduct, not an election between alternative rights. These cases show that an estoppel can trump a "subject to contract" clause where acts of performance occur after agreement has been reached on the essential terms.

Subject to s 2(1) and (5) of the Law of Property (Miscellaneous Provisions) Act 1989, there is no reason why the same principles should not apply in cases involving interests in land. Section 2(1) avoids contracts for the sale or disposition of such interests unless they are in one signed

document which incorporates all the terms which have been expressly agreed. Subsection (5) exempts constructive trusts. Lord Scott said in Cobbe at 1769:

> "The question arises…whether a complete agreement…that does not comply with the section 2 prescribed formalities…can become enforceable via the route of proprietary estoppel…My present view…is that proprietary estoppel cannot be prayed in aid to render enforceable an agreement that statute has declared to be void."

He did not explain how, as he had suggested earlier, s 2(1) could accomodate an estoppel which displaced a subject-to-contract clause in a signed document which otherwise contained the agreed terms. Presumably he assumed that the parties would be estopped from denying that the clause had been rescinded leaving a signed document containing the surviving terms. It is suggested that there is no legal difficulty with an estoppel operating in this way. The other possible exception is in subs(5) for constructive trusts. This was considered by Walker LJ in Yaxley v Gotts [2000] Ch 162,180 CA who said:

> "To give [s 2(5)]…its natural meaning…would allow a limited exception…for those cases in which a supposed bargain has been so fully performed by one side, and the general circumstances…are such that it would be inequitable to disregard the claimant's expectation, and insufficient to grant him no more than a restitutionary remedy."

This has overtones of the doctrine of part performance abolished by s 2(1). Walker LJ held that there was an informal agreement between the parties caught by s 2(1) but saved by subs (5). Clarke and Beldam LJJ held that there was no such agreement but the appellant was bound by a proprietary estoppel by standing which was not caught by s 2(1). Clarke LJ however said (at 181) that he entirely agreed with Walker LJ's conclusion that substantial performance of an informal contract could generate a constructive trust. This would allow agreements with a subject-to-contract reservation to be enforced by an estoppel in circumstances comparable to those in the other cases referred to. Australia cannot contribute to this debate because we have stayed with part performance. In Thorner v Major [2009] 1 WLR at 804 Lord Neuberger, said that s 2(1) did not apply to a proprietary estoppel with no contractual element, and with respect this must be so.

Promissory Estoppel

The promissory estoppels enforced in Hughes v Metropolitan Railway Co (1877) 2 App Cas 439 and Birmingham & District Land Co v London & North Western Rail Co (1888) 40 ChD 268 CA were negative in substance. They were consistent with Jorden v Money (1854) 5 HLC

185 which could not have been overlooked. Lord Selborne who sat in Hughes had been leading counsel for Money. The promise enforced in Bank Negara Indonesia v Haolim [1973] 1 MLJ 3 PC was also negative in substance. The Privy Council, for reasons given by Lord Wilber force, enforced a promissory estoppel against a landlord who had promised its tenant that it would not give him a notice to quit while he continued to practise his profession. The negative operation of a promissory estoppel was recognised until Crabb [1976] Ch 179, 187-8 where Lord Denning indiscriminately mixed proprietary estoppel by encouragement and promissory estoppel cases. Scarman LJ said at 193:

> "I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance."

This decision and the confusion it generated, here and in Australia, enabled positive effect to be given to non-contractual promises. However the negative effect of promissory estoppels was reaffirmed by Lord Goff, giving the principal speech in The Kanchenjunga [1990] 1 Lloyds Rep 399, 399 HL. Then in Baird Textiles Holdings Ltd v Marks & Spencer plc [2002] 1 All ER (Comm) 737 the Court of Appeal rejected a personal and positive equitable estoppel in a commercial relationship. In Australia intermediate appellate courts have rejected attempts to use promissory estoppel to enforce incomplete commercial bargains. The cases are collected in my note in (2016) 90 ALJ 625.

The negative operation of a promissory estoppel was reaffirmed by the New South Wales Court of Appeal in Saleh v Romanous (2010) 79 NSWLR 458. A vendor induced a purchaser to sign a relevantly unconditional contract for the sale of land which, when aggregated with adjoining land owned by the vendor's brother, had significant development potential. The vendor promised not to enforce the contract and to refund the deposit if the brother refused to join in the development. The brother was not interested but the vendor sought to enforce the contract. The trial judge found a positive estoppel and ordered rescission and the return of the deposit.

The Court of Appeal held that the vendor's promise was negative in substance and created a

promissory estoppel which was outside the rule that a collateral contract must be consistent with the principal contract. We held that the purchaser's equity trumped the vendor's legal rights under the contract with its"entire contract" clause. However the promissory estoppel could not support the judge's positive orders and we ordered the return of the deposit under the local equivalent of s 49(2) of the Law of Property Act 1925. The High Court of Australia refused the vendor special leave. That remains the last word in Australia on the essentially negative operation of a promissory estoppel.

Promissory estoppels based on oral collateral promises were enforced against landlords in City & Westminster Properties (1934) Ltd v Mudd [1959] Ch 129,145-7 and Brikom Investments Ltd v Carr [1979] QB 467 CA. Section 2(1) should not affect such cases or a case like Saleh v Romanous because the collateral promises were not terms of the contract.

At common law a collateral promise by a landlord that he would not require a periodical tenant to vacate until an uncertain future event was void as repugnant to the grant: Doe dem Warner v Brown (1803) 8 East 165,168. However such a promise was enforceable in equity by a promissory estoppel. The earliest known example is Dossee v Doe dem East India Company (1860) 1 LT (NS) 345 where the Board, which included Lord Chelmsford and Lord Justices Knight-Bruce and Turner, held that the agreement created a tenancy at will at law, despite a condition preventing the company seeking possession until an uncertain future event. The tenant's appeal failed but Sir Lawrence Peel, giving the advice of the Board, said at 348:

> "Yet the instrument was binding …as an agreement, and a court of equity would have protected the appellants against any attempt to dispossess them contrary to its stipulations… [the company] could have been instantly restrained from proceeding by a court of equity."

The dismissal was expressed to be without prejudice to the tenants' rights in equity. We now recognise that the equity was a promissory estoppel similar to that upheld in Bank Negara in 1973. The point was overlooked by all concerned in Mexfield Housing Co-Operative Ltd v Berrisford [2012] 1 AC 955. Clause 6 of the agreement, which on its face created a monthly tenancy, provided that the landlord would only seek possession if rent was in arrears or the tenant ceased to be a member of the Association. The Co-Operative gave the tenant a notice to quit

without relying on cl 6. The Supreme Court, although obviously anxious to protect the tenant, was not prepared to overrule Doe dem Warner v Browne. Instead it applied some highly technical land law and held that the instrument created a 90 year lease terminable on the death of the tenant or under cl 6. In a note (2013) 129 LQR 10 I suggested that the Supreme Court would have enforced a promissory estoppel if had been offered Bank Negara .

Estoppel by encouragement: measure of relief

In Ramsden v Dyson (1866) LR 1 HL 129 Lord Kingsdown, in dissent on the facts, considered that an estoppel by encouragement had been established on principles which differed from those considered relevant by the majority on their view of the facts. His statement of principle has proved extremely influential. He said (at 170) that:

> "…if a man under an expectation created or encouraged by the landlord, that he shall have a certain interest…[acts to his detriment] a Court of equity will compel the landlord to give effect to such promise or expectation."

This principle, which has never been confined to landlords, was not questioned until Crabb. It was referred to by the Privy Council in Chalmers v Pardoe [1963] 1 WLR 677, 681-2; and in Hong Kong Land [1987] AC at 121. In the meantime in Plimmer v The Mayor of Wellington (1884) 9 App Cas 699 Sir Arthur Hobhouse said at 713:

> "…the equity …need not fail merely on the ground that the interest to be secured has not been expressly indicated."

The encouragement in that case took the form of a request to Plimmer to extend his wharf over Wellington Harbour and erect a warehouse. His expectation had to be inferred and, as Sir Arthur Hobhouse said at 714:

> "…the court must look at the circumstances…to decided in what way [the equity] can be satisfied."

However in Crabb [1976] Ch 179, 198 CA, where the expectation related to a defined right of way, Scarman LJ held that the measure of relief was "the minimum equity to do justice to the plaintiff" but enforced the right of way in full. He added (at 199) that "the courts have to determine not only the extent of the equity, but also the conditions necessary to satisfy it." This view became fashionable. It was referred to in Yaxley [2000] Ch at 175 CA; Gillett v Holt [2002] Ch 210, 235 CA;

and Jennings v Rice [2003] P & CR 100,110,113 CA and was applied by the Privy Council in Henry v Henry [2010] 1 All ER 988,1002. However the promisee's prima facie entitlement to the expectation continued to be recognised: Sledmore v Dalby (1996) 72 P & CR 196, 203 CA; and Jennings v Rice [2003] 1 P & CR 100, 114 CA. In Re Basham [1986] 1 WLR 1498,1510, which has frequently been approved, Nugee QC said:

> "…the equity is to have made good, so far as may fairly be done between the parties, the expectation encouraged."

The minimum equity principle was only mentioned in Thorner v Major [2009] 1 WLR 776, 792 among the issues identified by the Court of Appeal. In Giumelli v Giumelli (1999) 196 CLR 101,120,125 the plurality rejected the minimum equity principle which would have limited relief to the reversal of the plaintiff's detriment. They declined to enforce the expectation specifically, but awarded its value charged on the land. It was followed in Sidhu (2014) 251 CLR at 530 where the plurality said:

> "The relief which is necessary is usually that which reflects the value of the promise."

In Delaforce v Simpson-Cooke (2010) 78 NSWLR 483 CA, which was approved in Sidhu I said at 497:

> "Where the expectation was defined with certainty by the party estopped that is where the court must start. There is no other principled starting point."

In Henry [2010] 1 All ER 988 the Board upheld a proprietary estoppel by encouragement based on an informal promise (at 993) to leave the promisor's interest to the promisee by will. Detriment was found in that performance of the conditions imposed by the promisor (at 1001) deprived the promisee of the opportunity of a better life elsewhere. This was not outweighed by the benefits he received from occupation of the property and an equity arose in his favour (at 1001). However the Board only awarded half the promised share as "the minimum equity required to do justice" to the claimant. They seem to have treated his claim as one in restitution and set off the benefits he received from occupation of the property. Sir Jonathan Parker said at 1002:

> "Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application."

There is no support in earlier case law for a positive proposition of this width. It was not mentioned

in Thorner. In Gillett v Holt [2001] Ch 210 CA the court did not overtly reduce the appellant's equity to reflect the wages and other benefits he received during his employment by the respondent. In Jennings v Rice [2003] 1 P & CR at 114 Walker LJ referred to a more limited principle:

> "[Where the promise] is in reasonably clear terms the court's natural response is to fulfil the claimant's expectations. But if a claimant's expectations are uncertain or extravagant or out of all proportion to the detriment which the claimant has suffered, the Court can and should recognise that the claimant's equity should be satisfied in another(and generally more limited) way."

In Delaforce at 494-5, where the court declined to follow Henry, I said:

> "…there is no positive requirement for a plaintiff to prove that the relief sought is proportionate. The principle, a negative one, is that enforcement of the expectation must not be disproportionate."

Henry, an appeal from St Lucia, seems infected, if I may say so, with notions of palm tree justice.

In Cobbe [2008] 1 WLR at 1762 Lord Scott quoted with approval the following statement by Deane J in Muschinski v Dodds (1985) 160 CLR 573, 615-6 which he said was applicable to proprietary estoppel:

> "The fact that the constructive trust remains predominately remedial does not mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles…[P]roperty rights fall to be governed by principles of law and not by some mixture of judicial discretion, subjective views about which party ought to win, and the formless void of individual moral opinion."

Testamentary promises

One question which is yet to come before the courts for decision is the effect of supervening necessity on the enforceability of voluntary testamentary promises. In Thorner this was raised as a theoretical objection to the validity of all such promises, but the House of Lords declined to decide the hypothetical question. However Lord Scott, Lord Walker and Lord Neuberger offered some tentative dicta. Lord Scott said: [2009] 1 WLR at 783-4:

> "Inherent in every case in which a representation (promise?) is the basis of a proprietary estoppel is that…the circumstances of the representor may change."

Lord Walker (at 794) adopted the statement of Hoffmann LJ in an unreported decision that such promises "are often subject to unspoken and ill defined qualifications." One of these is surely that the promise relates to the destination of property when the promisor can no longer use it or benefit from it. In Delaforce, having made that point, I said: (2010) 79 NSWLR at 729:

> "If and when the enforceability of such a promise does arise in the lifetime of the promisor faced, in compelling circumstances,with the need to resort to the capital value of the property, the doctrine of frustration may be thought relevant."

This could only be as an analogy. I then referred to the analysis of Lord Radcliffe in Davis Contractors Ltd v Fareham UDC [1956] AC 696, 729 where the implied term theory of frustration was rejected. He said:

> "Frustration occurs when the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract…It is not this that I promised to do."

Professor Hohfeld's analysis of the different legal rights

We commonly use "right" and "legal right" to describe different entitlements recognised by law. We speak of a claimant's right conferred by a cause of action, a landlord's right of re-entry, the right of free speech, a defendant's right to rely on a time bar and so on. Yet it is obvious that these rights are not the same. The use of "right" to describe different legal relationships is a recipe for loose thinking and error. Over a hundred years ago Professor Hohfeld of Stanford University identified four different legal relationships within the broad category of legal rights in "Some Fundamental Legal Conceptions as applied in Judicial Reasoning": (1913) 23 Yale Law Journal 16.

His bi-lateral legal relationships were right - duty; no right - liberty(or privilege); power (to change legal rights and duties)- liability; disability (no such power) - immunity. His analysis has been referred to on a number of occasions by the High Court of Australia. The citations are collected on p 241 of the second edition of my book. His analysis of the power- liability relationship is at pp 44-54.

Hohfeld's analysis is not just of academic interest. The no-right - liberty relationship comes into focus when a claimant's positive right becomes time barred by statute or equity. Courts have frequently referred to the defendant's entitlement in such a case as a right, as Lord Brightman did in Yew Bon Tew v Kendaram Bas Mara [1983] 1 AC 553, 565. In Maxwell v Murphy (1957) 96 CLR 261, 267, 268, 269, 283, 284 the High Court of Australia described the bar as an immunity which seems more accurate. It is obviously not a positive right such as the claimant possessed before the time bar accrued.

Hohfeld's analysis is also relevant when considering the enforceability of a voluntary promise to a claimant who never had a cause of action. He needs a positive right against the defendant and a promissory estoppel will not do. This has been recognised. In Beesly v Hallwood Estates Ltd [1960] 1 WLR 549, 561 Buckley J said that a promissory estoppel "cannot…be invoked to render enforceable a right which would otherwise be unenforceable." An interesting use of "right" to refer to what he had described at 560 as a situation where the plaintiff "did not at any relevant time have any right which she could have enforced".

The position is the same where the claimant's cause of action was time barred when the promise was made. A promissory estoppel which can normally be terminated on reasonable notice would simply restore the promisee to his former position when he was already out of time and he would have difficulty in establishing a detrimental change of position. This was recognised by Mustil J in The Leila [1985] 2 Lloyds Rep 172,178 who said:

> "I do not see how…subsequent events could create an equity…which could… resurrect a claim which had already become defunct."

Lord Neuberger MR made the same point in Law Society v Sephton [2005] QB 1013,1048 CA:

> "I do not see how the [promissory] estoppel could have the effect of reviving a cause of action that was already time barred."

Yet an estoppel by representation can have this effect as the Privy Council held in Ambu Nair v Kelu Nair (1933) LR 60 Ind App 266, 271. In 1912 the holder of two mortgages sued on the second joining the mortgagors and the assignee of the equity of redemption who was not personally liable for the debts. A decree was made for sale subject to the earlier mortgage. The assignee paid off the second mortgage and sued to redeem the first but was met with a limitation defence. The Board, which included Lord Blanesburgh and Lord Macmillan, upheld the order for redemption. The mortgagee's exercise of rights under the first mortgage in the earlier suit was a representation that it remained in force and could be redeemed. The House of Lords also held in The Indian Grace [1993] AC 410 that an estoppel by convention can answer a defence of res judicata.

<u>Election as a choice between rights</u>

The best general statement of the doctrine of election between rights known to me is that by Stephen J in Sargent v ASL Developments Ltd (1974) 131 CLR 634, 641:

> "The doctrine of election between two inconsistent legal rights is well established…The doctrine only applies if the rights are inconsistent…[B]ecause they are inconsistent neither may be enjoyed without the extinction of the other and that…confers upon the elector the benefit of enjoying the [former], a benefit denied to him as long as both remain in existence."

Judges have used many descriptions for the legal entitlement of an elector. They have referred to the right of re-entry: Croft v Lumley (1858) 6 HLC 672, 675 per Bramwell B; Matthews v Smallwood [1910] 1 Ch 777, 786 per Parker J; the right to elect: Clough v London & North Western Railway Co (1871) LR 7 Ex 26, 34-5 Ex Ch per Mellor J and Elders Trustee & Executor Co Ltd v Common wealth Homes & Investment Co Ltd (1941) 65 CLR 603, 617, 618 per curiam; or the right to treat the contract as rescinded: Lep Air Services Ltd v Rolloswin Investments Ltd [1973] AC 331, 349 per Lord Diplock.

Others have recognised that "right" is not sufficiently accurate. In Scarf v Jardine (1882) 7 App Cas 345, 360 Lord Blackburn said that it was "a remedy", as did Lord Cross in Lakshmijit v Sherani [1974] AC 605, 616, and Lord Diplock in The Mihalios Xilas [1979] 1 WLR 1018,1024. In Lakshmijit at 616 Lord Cross also said that it was an option. In The Mihalios Xilas [1978] 1 WLR 1257,1287-8 Geoffrey Lane LJ, whose judgment was approved on appeal, said it was a power. In the House of Lords [1979] 1 WLR at 1034-5 Lord Scarman said it was alternative courses of action. In Johnson v Agnew [1980] AC 367, 398-9 Lord Wilberforce said it was a power. In The Leonidas D [1985] 1 WLR 925, 928 CA Goff LJ said it was "a contracttual right in the nature of a power," but changed his mind in The Kanchenjunga [1990] 1 Lloyds Rep 391, 398 HL saying that it was "a right" to choose. The many descriptions on offer suggests that there is a problem.

Hohfeld and the judges who thought that power was the appropriate characterisation were correct. The descriptions used by other judges failed to bring out the essential character of the relevant legal entitlement. We are familiar with powers of appointment and mortgagees' powers of sale which enable the holders to change the legal rights and duties of themselves and others. An election also operates in this way and we should recognise that it involves the exercise of a power.

Mr Justice Stephen was not alone when he referred in Sargent to election as a choice between existing rights, a choice which involved the enjoyment of one and the extinction of the other. Eminent English judges have also described election in this way. In United Australia Ltd v Barclays Bank Ltd [1941] AC 1, 30 Lord Atkin spoke of an elector being "entitled to one of two inconsistent rights." In Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd [1971] AC 850, 883 Lord Diplock said that an election arises "when a person is entitled to alternative rights inconsistent with one another."

Hohfeld's analysis enables us to see that the power of an elector is not to choose between inconsistent rights which co-exist, but to choose between existing rights and a new set which can be created by an exercise of the power. This explains why an elector, who waits too long, without exercising the power, leaves the existing rights in place. It also best describes what happens when a landlord forfeits the lease. This terminates the rights and duties of landlord and tenant defined by the lease and creates the rights and duties of owner and trespasser defined by the general law. Those bundles of rights and duties never co-exist. An occupier is never both tenant and trespasser at the same time.

Recognising that an election involves the exercise of a power also explains why a summary dismissal, termination for breach, or rescission for misrepresentation can be justified if the necessary facts existed although not known to the elector intending to exercise his power for other reasons e.g. Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 ChD 339, 356-7, 364 CA; Shepherd v Felt & Textiles of Australia Ltd (1931) 45 CLR 359. It also helps explain why the exercise of rights under a lease or contract, such as the receipt of rent by a landlord who was not aware of the necessary facts, is not an election. The receipt recognised the continued existence of the lease and the landlord's right to the rent but the power was not exercised because he did not intend to waive the forfeiture and was not aware of the necessary facts.

The author's analysis, based on Hohfeld, of an election as the exercise of a power to change the legal rights of himself and another was adopted by the Full Federal Court in The Comandate

[2008] 1 Lloyds Rep 119,128-9.

The Honourable K R Handley QC.

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