Does Equity undermine Construction Contracts' risk?

A. INTRODUCTION

Construction industry participants negotiate risks under the *common-law* principles of contract which govern their bargain. However, risks are often unfairly allocated. When a party is left with losses they simply cannot bear, some seek Equity's assistance to overcome their contractual position.

The tension that arises by doing so, is that the contractual risk allocation may be undermined; which is what the parties had bargained for. This becomes particularly important where there are a series of cascading contracts between various participants in the contractual chain, who have agreed the allocation of risk to one another.

This paper explores this tension by considering a practical hypothetical scenario of a realistic construction project with which many readers will be familiar. The parties are A (a contractor), B (a subcontractor), and C (a client). A and B are the main players.

The common-law position is briefly discussed, as well as the principles of Equity. The *fusion* of common-law and Equity debate is analysed to confirm that no fusion has occurred. The important equitable remedies of *estoppel* and *penalties*, are then explored. The differing views of English and Australian Courts are then applied to the facts.

The equitable remedies demonstrate that sometimes Equity undermines contractual risks, because:

1. the *results* for A at common-law of denying B's claims based on time-bars, may be overcome by *promissory estoppel*; and

2. A's *entitlement* to liquidated damages ("LD's") may be overcome by the Equitable *penalties doctrine*.

Surprisingly, Equity, by acting *in personam,* can also act at an industry level, as a necessary supplementary gloss on the common-law to achieve a "fair outcome" that operates as a *safety valve* in our high-pressure industry.

B. COMMON-LAW

1. Construction contracts

Parties negotiate risks in construction contracts between one another.[1] Risk is often allocated to contractors who cannot bear, manage or price it[2]. For example, construction contracts include terms dealing with notices, time and variations, which are briefly discussed below.

[1] Julian Bailey, *Construction Law* (informa law from Routledge, 2011) Vol 3, Para 20.02, page 1294
[2] Australian Government, *Final report into Public Infrastructure* <http://www.pc.gov.au/projects/inquiry/infrastructure/report> page 485

Notices
Hudson identifies clauses which require a claimant (B) to provide *notice* of events that have occurred with extensive supporting details, to entitle them to claim additional payment or an extension of time (EOT) under a contract. These *notices* are often required very quickly.

Upon receipt, the respondent (A) considers the claim and its financial consequences, and may cancel the instruction, approve an EOT or authorise a variation[3]. A argues it must have this opportunity to make the assessment, and it also may need to be alerted to a claim, so that it can lodge a claim with its principal, C.

Time bars
Time bars arise when B does not provide the *notice*, or sufficient details thereof in time, which is often an extremely short period. Courts often interpret the notice requirements as conditions precedent to claim, and failure to give timely notice may deprive B of any remedy[4] preventing entitlement sometimes to significant claims.

EOT's and Liquidated damages ("LD's"
An EOT *notice* often requires significant details, which, when a delay has just occurred are not yet available, whilst the delay is still occurring. Nevertheless, the *notice* of a possible claim by B for delay, alerts A to an issue, about which it could possibly mitigate. In *Multiplex*,[5] *Birt*[6] and *McGee*[7] the Court upheld the time-bars.

If there is no timely *notice* and no EOT is granted, A can enforce *LD's*: *Turner*[8] in Australia, and *Hudson* suggested that the English Courts would take a similar view[9].

Accordingly, at common-law, a failure by B to provide timely notices, is likely to time-bar B's variation and EOT claims, and expose it to LD's.

Can Equity assist B, when the *contractual allocation of risk* is by agreement, and the role of Equity does not extend to rewriting contracts? To do so, would very much undermine the common-law, because the A could rightfully say – "That is not what we bargained for".

For example, in *Lumbers*[10]the High Court said, [79], *"…serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract"* and "*…Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."* [80]

However, B may argue that it seeks Equitable relief regarding A's *conduct* on which it relied during the contract, because the common-law *result* is unacceptable[11].

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[3] Atkin Chambers, *Hudson's Building and Engineering Contracts* (Sweet & Maxwell: Thomson Reuters, 12th ed, 2010), paragraphs 3-134 and 3-135, pages 527 and 528
[4] Ibid, page 527
[5] *State of Queensland v Multiplex Constructions Pty Ltd* [1997] QCA 447
[6] *Jennings Consruction Limited v QM Birt* [1987] 8NSWLR 18
[7] *WW Gear Construction Pty Ltd v McGee Group Ltd* [2010] EWHC 1460
[8] *Turner Corp v Austotel* (1994) 13 BCL 384
[9] Chambers, above n citing *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No.2)* [2007] EWHC 447
[10] *Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27
[11] Jeffery Hackney, *Understanding equity and trusts* (Fontana Press, 1987), page 25

In order to illustrate the operation of the common-law and Equity, an hypothetical below considers a contractor (A) and subcontractor (B) relationship.

2. *Hypothetical Scenario*

Subcontract

B (subcontractor) subcontracts with A (head contractor) to construct a road for C (a large mining company). The subcontract allowed A to issue instructions to B, including variations. B must carry out the variations, if it was within the scope of the subcontract.

B was required to provide A with notice if it considered an instruction to be a variation within 3 days, containing details supporting a claim (VAR). B was also required to provide A with a notice of delay requiring an extension of time with supporting details (EOT) within 2 days of first becoming aware of the delay. These notices were to contain the claims for costs and extensions of time.

In both instances, upon receipt of the notice/s, A was obliged to assess the variation and/or the extension of time, and grant them in whole or in part, or refuse them.

If the VAR notice was not given within time, B had no right to claim for a variation, and equally if no EOT notice was given, then B could not claim an EOT. These are *time-bars*.

B had to pay liquidated damages ("LD's) to A of $10,000 per day for each day it was late. The subcontract precluded waiver unless agreed by both parties in writing

Actions of the parties

C was concerned about expected adverse rainfall in a few months affecting its mining operations, so it instructed A to build another small bridge over a creek. A issued an instruction for B to do so.

B completed the bridge within 1 month, but with the consequence that it took an additional 3 months to complete the subcontract, because the direction adversely affected the originally planned allocation of labour, materials and plant during a critical period.

B did not provide either the VAR or EOT notice to A within time. It had previously been late with notices, and yet had been granted variations and EOT's by A.

When A's representative gave the bridge instruction, he instructed B proceed urgently and not to worry about the paperwork, as B would be "*looked after.*"

After completing the bridge, B claimed the VAR and EOT in its next monthly progress claim for $2,100,000 for the variation and 91 days EOT respectively. A rejected both claims, because the notices were not given within time. At the end of the project, A also deducted $900,000 LD's from B because the project was 3 months late.

The contract between A and C also had notice provisions and LD's, but A had complied with them, such that it had an EOT granted, was paid for the bridge variation, and was not liable for LD's, which was also $10,000 a day.

B seeks the assistance of Equity.

C. ISSUES THAT EMERGE

There are several issues in which Equity may intervene:

1. A's conduct in previously approving variations and EOT's when B's notices were late;
2. A's representation and conduct regarding the extra bridge;
3. To estop A from relying on the time-bars;
4. To allow the variation and EOT;
5. To consider the LD clause to be a penalty.

Before analysis, it is necessary to briefly explore what is meant by Equity, and whether Equity and the common-law have fused.

D. EQUITY

Equity has been devilishly difficult to define. *Asburner* described it as a word borrowed by law from morality, originating from Aristotle[12]. *Maitland's* best definition was, "Equity is now that body of rules administered by our English courts of justice which, were it not for the operation of the Judicature Acts, would only be administered by those courts which would be known as courts of Equity"[13].

Hackney[14] said Equity provided *discretionary justice in contrast to the inflexible monoliths of the common-law*,[15] with Equity prevailing.[16] *Alastair Hudson* explained Equity's mitigation of the common-law to prevent injustice, by saying "English Equity does this by examining the conscience of the individual defendant."[17]

However, there has been considerable debate as to whether the principles of Equity and the common-law have fused. If *fusion* has occurred, then arguably the common-law is not undermined by the operation of Equity, because there has been a fusion of both principles.

Pro-fusion

Burrows suggested that only small steps in his *monetary remedies for civil wrongs* category were needed to complete fusion[18]. However, he did not explain the *minor adjustment* needed to accommodate estoppel's intervention, and he recognised that fusion has not yet occurred.

Lionel Smith discussed fusion being unfinished business in the US,[19] and not yet possible because s*ome of the differences between common-law and Equity were profound."*[20] *Henry Smith* identified that Equity was a *second order safety-valve*[21] and warned that the multi-factored

[12] Walter Ashburner, *Principles of Equity* (Butterworth, 1902), page 1
[13] Fredrick W Maitland, *Equity also the Forms of action at common law* (Cambridge University Press, 1910)
[14] Hackney, above n
[15] Ibid page 16
[16] Ibid page 18
[17] Alastair Hudson, *Equity and Trusts,* The Nature of equity (Routledge, 8th ed, 2015), chapter 1, paragraph 1.1.1, page 4, citing the *Earl of Oxford's case* (1615) 1 Ch Rep 1
[18] Andrew Burrows, '*We Do This At Common Law But That in Equity*' (2002) 22(1) *Oxford Journal of Legal Studies* 1, page 8
[19] Lionel Smith, '*Common Law and Equity in R3RUE*' (2011) 68 *Washington and Lee Law Review* page 1193
[20] Ibid, page 1187
[21] Henry E Smith, '*Fusing the Equitable function in Private Law*' in Kit Barker, Karen Fairweather and Ross Grantham (ed), *Private Law in the 21st Century* (Hart, 2016) page 4

tests being applied in the US, demonstrated that *fusion* was being carried too far in that jurisdiction.[22]

Anti-fusion

Hackney and *Alastair Hudson's* Equity overcomes common-law inflexibility or injustice. *Ashburner* referred to common-law and Equity and said, "*But the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters.*[23]"

The pro-fusion protagonists do not explain how Equity in providing flexible discretionary remedies to *overcome* the harshness of the common-law, or to *prevent the conscience* of the Court from being shocked[24], can have fused with the common-law.

No fusion

Maitland[25] said that law and Equity were not normally in *conflict*, and lived side-by-side. *Millett* said whilst commercial lawyers once resisted Equity's place in commerce because of the need for speed and certainty, now they embraced it[26]. Furthermore, *Mason*[27] suggested that Equity, with its standards of conscience and fairness and its discretionary nature, in contrast to the rigidity of the common-law, equips it to better meet the needs of a twentieth century democracy.

Equity acts *in personam* and *Hackney* recognised that whilst a common-law *result* remained intact, it just could not be enforced. If Equity intervened successfully[28], a party could be jailed until they performed the order of the Chancery. Equity has its touchstones of good faith and conscience, but really concentrates on preventing unconscionable benefits arising from bad faith[29].

For example, in *Cavendish,* Lord Hodge's explanation why the penalties doctrine should not be abolished, said [page 111]:

> *"262. First, there remain significant imbalances in negotiating power in the commercial world. Small businesses often contract with large commercial entities and have little say as to the terms of their contracts. Examples such as the relationship between a main contractor and a sub-contractor in the construction industry and that between a large retail chain and a small supplier spring to mind."* (Author's underlining).

The hypothetical facts exist in the "pressure cooker environment" of inappropriately allocated risks with endemic delays and cash-flow disputes. This results in significant sub-optimal outcomes for some stakeholders, in which having a *safety valve* to prevent an explosion is extremely useful.

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[22] Ibid
[23] Ashburner, above n , page 23
[24] *Cobbe v Yeoman's Row Management Pty Ltd & anor* [2008] 1 WLR 1752 Lord Walker [92] page 1788
[25] Maitland, above n page 1
[26] P.J. Millett, '*Equity's place in the law of commerce*' (1998) 114 (April) *Law Quarterly Review* 214 page 214
[27] Anthony Mason, '*The place of equity and equitable remedies in the contemporaty common law world*' (1994) 110(April) *Law Quarterly Review* 238 page 239
[28] Hackney, above n page 26
[29] Ibid, chapter 1, page 17

Common-law
Why then is the common-law undermined? The answer appears to be that the bargained commercial law risk allocation provides general certainty, and changing that risk profile undermines that certainty. After all, in *Cavendish*, Lords Neuberger and Sumption held that *the courts do not review the fairness of men's bargains either at law or in equity*[30].

Brief reference is now made to the principles of equitable estoppel, and the doctrine of penalties. This merely introduces both topics, whereas in the analysis, more in-depth consideration of the principles takes place.

E. ESTOPPEL

There is estoppel at common-law, particularly estoppel by representation[31], but that is not relevant to our analysis, because we are dealing with Equity's remedies.

Equitable estoppel, comprising proprietary and promissory estoppel, has variable meanings with no unitary principle describing it.[32] The High Court tried to discern one in *Waltons*[33] and *Verwayen*[34]*;* but in *Giumelli v Giumelli* (1999) 196 CLR 101, at [7] the Court declined to find one.

Interestingly, in England, Lord Scott [17] in *Cobbe* held that estoppel was also not founded on an un-particularised assertion of unconscionability.

In contrast, Brennan J in *Waltons*[35] at [15] said, "*Equitable estoppel…is a source of legal obligation….. arising on an actual state of affairs. An equitable estoppel is binding in conscience on the party estopped, and it is to be satisfied by that party doing or abstaining from doing something in order to prevent detriment to the party raising the estoppel which that party would otherwise suffer by having acted or abstained from acting in reliance on the assumption or expectation which he has been induced to adopt. Perhaps equitable estoppel is more accurately described as an equity created by estoppel.*"

For present purposes, however, Lord Denning's long-standing description provides a good definition for both jurisdictions as a **shield**: "*Estoppel is a principle of justice and of equity. It comes to this: when a man by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.*"[36]

There is, however, divergence between Australia and England as to whether it is also **a cause of action (**a "sword"). In Australia it can be a sword[37], although the NSW Court of Appeal

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[30] *Cavendish Square Holding BV (Appellant) v Talal El Makdessi (Respondent)* [2015] UKSC 67 with Lord Carnwarth agreeing, page 7
[31] John McGeee QC, *Snell's Equity 33rd edition,* Part 3 Equitable Protection - Chapter 12 - Estoppel (Sweet & Maxwell, 2004), paragraph 12-005
[32] Ibid paragraphs 12-008 and 12-009
[33] *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387
[34] *Commonwealth v Verwayen [1990] HCA 39; (1990) 170 CLR 394,*
[35] *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387
[36] *Moorgate Mercantile Co Ltd v Twitchings* [1976] 1 QB 225 CA, 241
[37] *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387, *Anaconda Nickel Ltd v Edensor Nominees Pty Ltd & Ors [2004] VSCA 167, Commonwealth v Verwayen [1990] HCA 39; (1990) 170 CLR 394, Crown Melbourne Limited v Cosmopolitan (Vic) Pty Ltd [2016] HCA 26*

seems to have a different view[38], whereas in England, it is not the case, and is only a shield[39].

This difference is demonstrated in the analysis below, but interestingly, the result using the Australian sword is no different.

It is useful to summarise Brennan J's estoppel's principles[40] for clarity, as follows:

1. If A makes a representation to B;
2. Intending for B to rely on it; and
3. It is reasonable for B to rely on it; and
4. B does rely on it; and
5. Acts to his detriment,

then A will be estopped/prevented from resiling from his representation.

F. PENALTIES DOCTRINE

There is a significant divergence of judicial opinion about whether Equity can assist B in the circumstances. The English courts have held that Equity has no role to play in the *penalties doctrine* which is now one of common-law[41].

In *Cavendish* at [13] Lords Neuberger, Sumption and Carnworth held that "*This principle is worth restating at the outset of any analysis of the penalty rule, because it explains much about the way in which it has developed. There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity.*

Furthermore, in England the doctrine is held to apply only for breach of contract, whereas in Australia, it can apply to circumstances where there is not a breach of contract. *Andrews*[42] unanimously affirmed that it was a principle of Equity [63] and extended the penalties doctrine to cases where there was no breach of contract [78]

Cavendish declined to follow *Andrews.* At [42], 3 Law Lords held that, "*Any decision of the High Court of Australia has strong persuasive force in this court. But we cannot accept that English law should take the same path, quite apart from its inconsistency with established and unchallenged House of Lords authority."*

In *Paciocco*[43], French CJ returned serve [9] by saying, "*The common-law in Australia is the common-law of Australia"*, but held out an olive branch in [10] saying, "*Differences have emerged from time to time between the common-law of Australia and that of the United Kingdom in a number of areas. Those differences have not heralded the coming of winters of mutual exceptionalism. All of the common-law jurisdictions are rich sources of comparative law whose traditions are worthy of the highest respect, particularly those of the United Kingdom as the first source."*

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[38] *Saleh v Romanous* [2010] NSWCA 274, *DHJPM Pty Ltd v Blackthorn Resources Limited* [2011] NSWCA 348
[39] *Thorner v Major* [2009] UKHL 18
[40] *Waltons Stores (Interstate) v Maher* (1988) 164 CLR 387
[41] *Cavendish Square Holding BV (Appellant) v Talal El Makdessi (Respondent)* [2015] UKSC 67
[42] *Andrews v ANZ* [2012] HCA 30
[43] *Paciocco v Australia and New Zealand Banking Group Limited* [2016] HCA 28

In *Paccioca,* the High Court did not have to reconsider *Andrews*, because *Paccioca* was a breach of contract case, but the Court reviewed and agreed with its reasoning in *Andrews*.

G. APPLYING THE ESTOPPEL THEORIES AND PENALTIES DOCTRINE

The application of estoppel theories to the hypothetical scenario now considers:

1. A's conduct in previously approving variations and EOT's when B's notices were late. This focus is on A's *previous conduct.*
2. A's representation and conduct regarding the extra bridge. This focuses on A's *bridge representation.*
3. To estop A from relying on the time-bars. This focus is on the *remedy*, based on the *estoppel as a shield* which is presently shared by all jurisdictions;
4. To allow the variation and EOT. This focus is on a wider remedy, which requires recognition of a *cause of action – the sword*, which is probably allowed in Australia but not in England.
5. To consider the *LD clause to be a penalty*.

In *Verwayen,* Mason CJ categorised a variety of estoppels as all, "*intended to serve the same fundamental purpose of protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted*."

a) A's *previous conduct*

At common-law, the contract requires waiver to be confirmed by both parties in writing, and this has not occurred. Therefore, at common-law, A has not waived its rights for timely notices, and B would need to look to Equity to find a waiver[44]?

A person's words or conduct may be a representation.[45] However, A had merely chosen to assess previous late claims. There appears no representation of fact in A's conduct. Whilst B had a past benefit of A's assessment of its late claims, B could not say it adjusted its conduct in reliance on the representation. It is not clear how many occasions this conduct occurred.
In any event, A's previous conduct is unlikely to raise an Equity. In *Baird,*[46] the Vice Chancellor and Judge LJ could not find an equity raised in favour of Baird despite its years in supplying garments to Marks & Spencer. Mance LJ at [96] found that the parties were aware of the significance of not contracting to do so, which was a risk, and he was not prepared to allow Equity to alter Baird's risk.

Therefore, B is likely to fail to raise an Equity on A's previous conduct. However, it may argue that it relied upon A's conduct, coupled with the *bridge representation* to raise an Equity, which is now discussed.

b) A's *bridge representation and possible estoppel*

No consideration was provided by B in carrying out the work as B was obliged in any event to carry out variations. B's failure to provide the notices means it is not entitled to the claimed variations or EOT's.

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[44] *WJ Alan & Co v el Nasr (Export)* [1972] 2QB 189, 212-3 per Denning MR
[45] *Pickard v Sears* (1837) 6 Ad & El 469, page 474 Lord Denman, cited in George Spencer Bower, *The Law relating to Estoppel by Representation* (Tottel publishing, 2007), para III.3.1 page 44
[46] *Baird Textile Holdings Limited v Marks & Spencer plc* [2001] EWCA Civ 274

Can B estop A from relying upon the time bars? In this context, B only needs the *estoppel to operate as a shield*, so it has both English and Australian equitable principles at its disposal.

Legione[47], provided that promissory estoppel extends to representations (or promises) as to future conduct [p 432]. A's *bridge representation* referred specifically to that variation, and said that B would be "looked after." Could this be coupled with the earlier waiver of the notice requirements? The representation is looked at objectively: *Thorner* [17] Lord Scott and [60] Lord Walker.

In *Crown*, [35], "looked after at renewal time" was considered too vague for a reasonable person to consider they were being granted another lease. However, in *Waltons* Brennan J said [21], "*But, if the party raising the estoppel is induced by the other party's promise to adopt an assumption or expectation, the promise must be intended by the promisor and understood by the promisee to affect their legal relations.…"*

B must demonstrate that it acted upon B's promise and *Sidhu*[48] [61] requires B to prove detrimental reliance upon A's promises. B needs to demonstrate the 3 elements of A's representation or assurance, its reliance and detriment: Lord Scott [15] in *Thorner*. Alternatively, B must demonstrate Brennan's relevant elements in *Waltons* [34] of:

1. A inducing B to adopt an expectation;
2. B acting in reliance;
3. A knew/intended B would do so;
4. B's action/inaction will cause detriment if A does not fulfil the expectation;
5. A fails to avoid B's detriment.

Legione [p435-6] require that promissory estoppel needs the representation to be clear and unambiguous, which is supported by Lord Scott in *Thorner* [18]. However, Lord Walker at [56] said it must be clear enough, but sufficient clarity was hugely dependent on context. *Crown* [35] held that the words used may be open to different constructions and must mislead a reasonable person, and must be acted upon [39].

In *Cobbe*[49] Lord Walker [65] noted that it is "not enough to hope or, even to have a confident expectation, that the person who has given assurances will eventually do the proper thing", particularly in a commercial context [66]. This was supported in *Thorner*[50] where Lord Neuberger at [96] echoed that in commercial matters, highly experienced parties are aware of their legal positions, and could protect themselves.

Whilst this is a commercial project, A's *bridge representation*, which quite clearly said not to worry about the paperwork could only have been intended to be relied upon by B: [21] *Waltons*. It was not merely a confident expectation, because being *looked after* in the context of its earlier conduct, could objectively be considered reasonable for B to rely upon it and not put the notices in quickly. Objectively, A must have intended B to act this way, and by then refusing the claims, A caused B's detriment.

Accordingly, A could be estopped from relying on the time bars, thereby allowing B to still lodge those claims. Whether or not A approves them is outside the scope of the paper.

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[47] *Legione v Hateley* [1983] HCA 11
[48] *Sidhu v van Dyke* [2014] HCA 19
[49] *Cobbe v Yeoman's Row Management Pty Ltd & anor* [2008] 1 WLR 1752
[50] *Thorner v Major* [2009] UKHL 18

However, in *Crown,* Keane J, although not supported by the other Justices, added a caution at [143] and again at [147] that the representation must be sufficiently clear as to satisfy a variation to a contract for an estoppel to operate, otherwise estoppel would reduce the law to incoherence.

Even applying this more rigorous test, A's representation had that sufficient clarity.

As a word of caution, *Handley*[51] suggested that promissory estoppel cannot be an answer to time-bar defences which accrued before the promise was made, because the promisee no longer had an enforceable right. He was severely critical of the reasoning of the High Court in *Waltons* where 4 Justices found an expanded promissory estoppel.[52] *Handley* was an Appeal Justice in *Saleh*[53] and *DHJPM*[54] in which the NSW Court of Appeal restricted promissory estoppel in which His Honour held in *Saleh* at [74] that, *"A promissory estoppel is a restraint on the enforcement of rights, and thus, unlike a proprietary estoppel, it must be negative in substance."*

However, in *Crown*[55], the High Court referred to Handley's text, and to *Waltons* without finding it was wrongly decided. Accordingly, despite Handley's criticisms, *Waltons* remains good law in Australia and provides for promissory estoppel to be a cause of action. Furthermore, *Robertson*[56]effectively demonstrated that *Handley's* restraint of rights model could not stand in the face of *Waltons* and other Victorian decisions.

c) <u>*B's Cause of action*</u>

Here B would be trying to go further than having A merely consider its variations and EOT claims, but rather using estoppel as a sword to have the variations and EOT's **approved**, without the step of having A consider them. English and Australian authorities now diverge, because *Waltons* and *Verwayen* allow this cause of action, but England would not, because it is not a proprietary estoppel case.

<u>Measure of Relief</u>

In *Waltons* Brennan J citing Dixon J in *Grundt*[57] and equitable estoppel's purpose is to avoid B's detriment <u>if A time-bars its claims</u>. In *Verwayen* Deane J at [17] noted that:
"*There could be circumstances in which the potential damage to an allegedly estopped party was disproportionately greater than any detriment which would be sustained by the other party to an extent that good conscience could not reasonably be seen as precluding a departure from the assumed state of affairs if adequate compensation were made or offered by the allegedly estopped party for any detriment sustained by the other party*."

In *ACN*[58] the Court held in the context of estoppel, detriment is what results from acts or inaction in reliance on the assumption rather than from the breach of promise or departure from the assumption per se.

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[51] KR Handley, *Estoppel by Conduct and Election* (Thomson: Sweet & Maxwell, 2006), paragraph 13-036 page 219
[52] Ibid, paragraphs 13-037 to 13-041
[53] *Saleh v Romanous* [2010] NSWCA 274
[54] *DHJPM Pty Ltd v Blackthorn Resources Limited* [2011] NSWCA 348
[55] *Crown Melbourne Limited v Cosmopolitan (Vic) Pty Ltd* [2016] HCA 26
[56] Andrew Robertson, 'Three models of promissory estoppel' (2013) 7 *Journal of Equity* 226
[57] *Grundt v Great Boulder Pty Gold Mines Ltd* [1937] HCA 58.
[58] *ACN 074 971 109 (AS TRUSTEE FOR THE ARGOT UNIT TRUST) & Anor v THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED (ACN 004 020 437)* [2008] VSCA 247

Accordingly, Equity is only likely to compel A to consider the claims out of time, because that is the extent of B's detriment. To go further and grant B the variation and EOT's claimed (without A's review) would be elevating the remedy to a contractual right, for which it had not bargained. In good conscience, this would be giving B something disproportionately greater, than the detriment it suffered.

Keane J [153] in *Crown* held, "*…observance of this limit on the operation of estoppel in equity ensures that it is not allowed to operate to underwrite unrealistic expectations or wishful thinking. Such an operation would be especially pernicious in a commercial context; but even in a non-commercial context estoppel should not be allowed to operate as an instrument of injustice."*

In this hypothetical, therefore B's remedy remains only a shield, so that the English and Australian authorities can support its claim.

d) LD's clause as a penalty

Given that this paper deals with Equity in commercial law, the common-law principles in *Dunlop*[59] and later English cases do not assist B. Moreover, Lord Dunedin's 3rd category (pages 86-87) considers it a question of construction about the "*penalty*" sum at the time of entry into the contract. This would mean, A could receive a windfall at B's expense, because C's not levying LD's on A, would be an irrelevant consideration as to whether the LD's are a penalty.

The Australian approach in Equity can consider this fact in fashioning a remedy.
B's failure to give notice, which is not a breach of contract, resulted in B's consequential breach of contract of being late. It was therefore liable for LD's.

However, it may attract the equitable doctrine of penalties, because B's secondary obligation to compensate for its breach of contract, renders it liable to pay a sum in excess of the amount, which would fully compensate A for the loss sustained by A. Here A suffered no LD loss, such that levying LD's may be considered unconscionable.

In England, it appears that the application of the common-law doctrine would result in B being liable for LD's of $900,000, and Equity could not intervene.

Had A been liable to LD's from C, because of B's failure to provide the notices; in Australia, there would be a significant contest about the extent of any remedy to B. A could rightfully argue that (apart from a duty to mitigate its loss) that its LD's liability was caused by B.

Applying Deane J at [17] in *Verwayen,* and Keane J's observations at [153] in *Crown* about estoppel in Equity, albeit to a penalties issue; there is a real prospect that B would fail to obtain an Equitable remedy, because this would allow a departure from the state of affairs, which would cause A to suffer a disproportionate damage. The common-law position is therefore not likely to be disturbed.

H. CONCLUSIONS

Equity therefore can undermine the common-law, and A's conduct displaces its strong common-law position. This allows Equity to estop time-bars, but only as a shield, and to prevent A from levying LD's; but only where A was not itself subject to LD's.

[59] *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd [1915] AC 79, 86-8*

Nevertheless, such limited undermining to A and B's contractual rights takes place, *in personam*. However, this also acts as a safety valve to industry participants, ameliorating the unfair risk allocation in the industry.

However, Equity's intervention can have an adverse effect on A, who may have bargained risks with B, because it has accepted risks from C, which it wishes to shed. That is for another day!

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