Protecting Legitimate Expectations and Estoppel in English Law
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Introduction

This topic presents something of a difficulty in English contract law, but its real interest—both for the domestic English lawyer and for the comparative lawyer—lies in this difficulty. For at first sight there is a very short and simple answer to the question: ‘what part is played by the concepts of legitimate expectations and estoppel in the English law of contract?’: it is very limited. The judges do not commonly use the language of ‘legitimate expectations’ in the context of the private law of contract. It is not a phrase that appears in the index to most of the leading English contract law textbooks.\(^1\) And although ‘promissory estoppel’ and certain other forms of estoppel are placed firmly in the index to contract law, the relevant chapters of each of the books then make clear—as will be explained below—that it has a relatively limited role.

This is not, however, the end of the story. Once we have understood the role played by the (literal) concepts of legitimate expectations or estoppel in English law generally, and in the English law of contract in particular, we can see that the underlying principles or ideas behind these concepts can indeed be found in the law of contract, although under different names and using different language of description.

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\(^1\) The exception is J. Beatson, Anson’s Law of Contract (28th ed, Oxford, 2002), although the index reference is not to pages in the book discussing the general, private law of contract but to the operation of the principles of estoppel and legitimate expectation in public law. On this, see section 1(c) below.
1. ‘Legitimate expectations’ and ‘estoppel’ in general

(a) Estoppel: the core notion

As we shall see, there are several varieties of ‘estoppel’ in English law, and there is some debate as to whether all (or at least some of them) are species of the same genus, or should be regarded as so different in principle as to be wholly independent. But we can certainly begin by identifying a common underlying idea behind the varieties of estoppel, which is explained by the very choice of the word ‘estoppel’. This was explained by Lord Denning:

‘The word “estoppel” only means stopped. You will find it explained by Coke in his Commentaries on Littleton (19th ed, 1832), vol. II, s. 667, 352a. It was brought over by the Normans. They used the old French “estoupail.” That meant a bung or cork by which you stopped something from coming out. It was in common use in our courts when they carried on all their proceedings in Norman-French. Littleton writes in the law-French of his day (15th century) using the words “pur ceo que le baron est estoppe a dire,” meaning simply that the husband is stopped from saying something.

From that simple origin there has been built up over the centuries in our law a big house with many rooms. It is the house called Estoppel. In Coke's time it was a small house with only three rooms, namely, estoppel by matter of record, by matter in writing, and by matter in pais. But by our time we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatam, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: They are all under one roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying, “Estoppel is only a rule of evidence.” If you go into another room you will find a different notice, “Estoppel can give rise to a cause of action.” Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will also find in the others.’

This debate has a particular significance for the scope of the doctrine of promissory estoppel in the law of contract, by reference to the links it might have to the doctrine of proprietary estoppel in land law: see section 1(b), below.

(b) Estoppel: the varieties

In the passage just set out, Lord Denning gives a long list of different varieties of estoppel, and he notes that his list is not necessarily complete. The books name, explain and group different forms of estoppel in different ways. That need not concern us here, but we can notice briefly some of the principal forms of estoppel. This is necessary in order to obtain a proper perspective on the general question about the role of estoppel in the law of contract.

(i) Estoppel by record, or estoppel per rem judicatam: an issue which has been finally determined in proceedings to settle a dispute between parties cannot generally be raised again in subsequent proceedings between the same parties. This form of estoppel will not concern us further here.

(ii) Estoppel by deed: a statement of fact made by a party in a deed cannot be challenged by that party as against the other party to the deed: in effect, once a party has committed himself to an unequivocal statement of fact in a deed, the legal consequences for him must be determined on the basis that the fact is true (and evidence cannot be led to contradict the fact: he is estopped from denying the fact). A ‘deed’ is a formal document which can be used to make a unilateral (gratuitous) promise or a bilateral contract binding; and it is used also for other transactions such as the transfer of the legal title to property, and the creation of certain property interests such as leases.

This form of estoppel also covers the case where a party enters into a deed to grant rights to which he has himself no right—such as a person who purports to grant a lease of land to which he has no title. A ‘tenancy by estoppel’ arises; and once both parties have acted on the assumption that the deed created a tenancy, neither is allowed to deny to the other that their relationship has all the incidents of the lease. Their legal relationship is enforceable by each as if it were a properly granted tenancy (although third parties are not bound by the estoppel).

(iii) Estoppel by convention: where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other, but as long as the assumption is communicated by each to the other, then each is estopped from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. This form of estoppel is not designed to create new legal rights but can have that effect; for example where the

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5 Or, sometimes, between different parties, where the finding is one of fact as to the status of a person or thing that is relevant for that later litigation. The principle is based on the interest of finality in litigation, and the Court of Appeal has recently suggested that the name should be changed (e.g. ‘cause of action finality’) to reflect this: Specialist Group International Ltd v Deakin [2001] EWCA Civ 777 at [10]. ‘Cause of action estoppel’ and ‘issue estoppel’ are versions within this form of estoppel.

6 Republic of India v Indian Steamship Co Ltd (No 2) [1998] AC 878 at 913.
parties share (and act upon) a mistake as to the legal effect of the terms of a contract, then the mistaken effect (rather than the true legal effect) can be enforced.7

(iv) Estoppel by representation: a person who has made a representation to another, with the intention that the latter should act on it to his detriment and he does so act on it, is estopped from denying the content of his representation. This core idea has been the subject of significant development.

At first, the courts applied the principle only to representations of existing fact, and not to statements of intention, or promises.8 It was often described as a rule of evidence,9 by which a party who had made a representation of fact would not be permitted to lead evidence to contradict that fact in an action by or against the party to whom he had made the representation and who had relied on it—had changed his position in some way, on the faith of the representation, to his detriment. The estoppel is not itself the cause of action on which a claim is based, but it affects the outcome of a claim by fixing the factual basis of the claim as it was represented to be.

Two other forms of estoppel, giving effect to a representation made by one party that has been relied on by the other party, have been developed.10 In the context of land law,11 proprietary estoppel is now a well-established doctrine. The general principle is that where one party (A) makes a representation or promise to another party (B) to the effect that B has or shall have an interest in, or right over, A’s property, or acquiesces in B’s mistaken belief that he has or shall have such an interest or right, then if A intends B to act in reliance on the representation, promise or mistaken belief, and B does so act in reliance, equity may intervene to prevent (estop) A from asserting his own strict legal rights to his property.12 The courts have developed a broad discretion to decide what remedy is appropriate to satisfy B’s rights arising by way of the estoppel. It might be the grant of the very interest in the property that B expected to receive.13 Or it might be only the reimbursement of the expenditure he incurred in reliance on the representation.14 Or it might be not exactly the equivalent of his expectation or his reliance but some other measure which the court judges to be most appropriate to do justice. Most recently the English courts have

8 Jordan v Money (1854) 5 HL Cas 185 at 214-215, 226-227.
9 Low v Bouverie [1891] 3 Ch 82 at 105, 112.
10 They are often referred to as forms of ‘equitable’ estoppel, because for their development in the 20th century the courts drew on older cases decided by the Courts of Equity (before the fusion of the old Common Law and Equity jurisdictions in 1875) or principles which can be attributed in the modern law to the continuing development of the old jurisprudence of the Courts of Equity.
11 This doctrine might also apply outside land law, but still within the law of property: Western Fish Products Ltd v Penwith DC [1981] 2 All ER 204 at 218. It is also very closely linked to other principles by which rights of property (real or personal) can sometimes be created without compliance with certain formality requirements: Re Basham [1986] 1 WLR 1498 at 1503-1504. See generally J. Cartwright, ‘Formality and Informality in Property and Contract’ in J. Getzler (ed), Rationalizing Property, Equity and Trusts (LexisNexis, London, 2003).
13 Pascoe v Turner [1979] 1 WLR 431 (transfer of full legal title to the property)
14 Dodsworth v Dodsworth (1973) 228 EG 1115 (reimbursement of money spent by brother and his wife on improvements to sister’s house which sister had led them to think they could live in for life).
tended to take the expectation as the starting-point, but to award less if the value of the expectation is disproportionate to the value of the detriment incurred.\footnote{Jennings v Rice [2003] 1 P & CR 100, where Robert Walker LJ noted at [54] that this was different from the general approach of the Australian courts which have preferred to compensate only the reliance loss within their own developments of estoppel.}

Promissory estoppel is a doctrine applied within English contract law, but it is of quite limited scope. English law normally requires a party to provide consideration in order to enforce an informal promise: something done or promised in return for, or as the price of, the promise, at the promisor’s express or implied request. It is not sufficient that the promisee has relied on the promise, even if the promisor intended him to rely on it, or could have foreseen that he would rely on it. A person is therefore not estopped from going back on his promise simply because the promisee has relied to his detriment. Although a promise, or representation, to give an interest in land can be given force under the doctrine of proprietary estoppel to the extent that the representee can sue to obtain a remedy (the estoppel is here a ‘sword’\footnote{Pascoe v Turner, above, note 13.}), outside the law of property estoppel does not create new rights, and in particular it is not a general alternative to the doctrine of consideration as being a condition for the legal enforceability of a promise.\footnote{Combe v Combe [1951] 2 KB 215.} In this, the role of promissory estoppel is much more limited in English contract law than in the law of the United States\footnote{American Law Institute, Restatement of the Law (2d), Contracts (1981), para 90.} or Australia,\footnote{Waltons Stores (Interstate) Ltd v Maher [1988] 164 CLR 387.} where it has been used to found a cause of action to remedy the non-performance of a promise unsupported by consideration. Instead, in English law, the doctrine of promissory estoppel can be used only as a ‘shield’: if one party to an existing contract has represented to the other that he will not insist on his strict legal rights under the contract, and the representee has altered his position in reliance on that representation, the representor will be estopped from insisting on the true contractual position, but has to accept his (reduced) contractual rights in the form in which he represented them—at least until he has given the representee the opportunity of altering back his position so as to be able to perform the contract according to its strict terms.\footnote{Ajayi v RT Briscoe (Nigeria) Ltd [1964] 1 WLR 1326 at 1330. See generally Chitty on Contracts, above, note 7, paras 3-085 to 3-105.} It is a means by which contractual rights can be suspended or (sometimes) permanently given up, but not by which new rights can be created.

In promissory estoppel the representor is estopped from enforcing the contract where it would be ‘inequitable’ or ‘unconscionable’ to do so because of the reliance by the representee on the representation. This language of ‘unconscionability’ also appears as the underlying rationale in the modern cases on proprietary estoppel. But it has not been generalised into a doctrine of unconscionability in English law, nor has it even been used as a common link to draw together promissory and proprietary estoppel—and other forms of estoppel—into a single overarching doctrine, as appears to be the case in Australia.\footnote{Waltons Stores (Interstate) Ltd v Maher, above, note 19; Chitty on Contracts, above, note 7, para 3-106.} Since there are contrary binding decisions of the Court of Appeal, it would take a decision of the House of Lords to make such a development—although it is certainly not out of the question that the House might be persuaded to take such a step.\footnote{Baird Textiles Holdings Ltd v Marks and Spencer plc [2002] 1 All ER (Comm) 737 at [55]: ‘there is no real prospect of the claim succeeding unless and until the law is developed, or
(c) ‘Legitimate expectations’ in English law

The ‘protection of legitimate expectations’ is not a doctrine of English private law. It is, however, a doctrine which is presently under development in public law. It is well established that if a public body has led an individual to believe that he will have a particular procedural right, over and above that generally required by the principles of fairness and natural justice, then he is said to have procedural legitimate expectations that can be protected. In recent years it has also become accepted that if a public body has led an individual to believe that he will receive a substantive benefit, then he may have substantive legitimate expectations that can sometimes be protected, although this area is not yet settled and presents some difficulties of principle. Even if the public body’s representations are within its power to make, the enforcement of the expectations created by them may fetter the public body’s discretion contrary to its proper functions in public law; although against that there is an argument about fairness of treatment of the particular individual. The protection of expectations raised by reliance on a representation made outside the power of the public body is even more problematic, because it might be held to be allowing the public body to exercise powers which were not authorised by Parliament.

There are close similarities between the public law doctrine of legitimate expectations and the private law doctrine of estoppel. The paradigm case of each doctrine involves a clear and unambiguous promise, undertaking or representation (in words or conduct) by one party which creates in the other an expectation or belief, and the justification for allowing the representee to hold the representor to his representation is that he has relied on it. However, there are significant differences, which make these separate doctrines no more than analogies. For example, in the public law context the courts have held that the justifications for enforcing the legitimate expectations may be a broader principle of fairness, and the prevention of the abuse of power by public bodies, and so they might not require detrimental reliance of the kind that would be required under the private law doctrine of estoppel. And, more generally, remedies awarded against public bodies must take into account different considerations from those in a purely private law case, such as the interests of the general public which the public body exists to promote, and the hierarchy of individual rights protected by the Human Rights Act 1998. Most recently, Lord Hoffmann said that the public law doctrine is sufficiently well established to be recognised as quite independent of estoppel: ‘public law has already

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24. P. Craig, Administrative Law, above, ch 19. The leading case which accepts a (defined) principle of substantive legitimate expectations is R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213.
27. R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2003] 1 WLR 348 at [34].
absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet’. 28

(d) Underlying general principles

The discussion above has shown that the English courts have declined to unite the public law doctrine of legitimate expectations with the private law doctrine of estoppel; and that (so far, at least) they have also declined to draw out a general principle from the different forms of estoppel that can itself be applied directly and independently in private law. But there are certainly some general principles that can be identified in these several doctrines, which can then be seen in operation in, or underlying, other specific rules or doctrines of English contract law. Lord Hoffmann’s statement in the previous paragraph referred to absorption into public law of the ‘moral values which underlie the private law concept of estoppel’. And it has been noted above that one link between estoppels (although not yet fully developed in English law) is that they bind the individual on the ground that it would be unconscionable for him to deny what he has represented or agreed.29 This ‘unconscionability’ arises from a combination of his representation and the reliance on it by the representee. And it is the reliance that crystallizes the right in the representee: this is what makes it inequitable for the representor to go back on that which he has led the representee to believe. These core notions of the creation of expectations, and the law’s intervention to protect the expectations by virtue of the other party’s acting on the basis that they will be fulfilled, can be seen to underlie other rules that operate within the English law of contract.

2. The application of the general principles underlying ‘legitimate expectations’ and estoppel within English contract law

(a) The precontractual stage

English law does not recognise a general principle of precontractual liability. Many other legal systems would say that the relationship between the parties negotiating for a contract can—even before the contract is formed—become one in which one party acquires a duty to take some account of the other party’s interests, the duty arising either in tort or in an autonomous liability for culpa in contrahendo.30 English law takes a quite different view. The starting-point, at least, is that each party, in incurring any pre-contract expenditure, retains the risk of whether the contract will be concluded. Even where the negotiations have been long and detailed and are at an advanced stage, and even where the parties have expressly agreed to continue to negotiate in good faith with a view to reaching agreement, each is still free to withdraw. The strongest statement is that of Lord Ackner in Walford v Miles:31

‘the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in

28 R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2003] 1 WLR 348 at [35].
29 R (Reprotech (Pebsham) Ltd) v East Sussex County Council [2003] 1 WLR 348 at [33].
30 For a comparative study of this area, see the volume of the Trento project on The Common Core of European Private Law on Precontractual Liability (edited by J. Cartwright and M. Hesselink) (forthcoming).
negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms.’

There is therefore no general principle in English law that a negotiating party can be made to fulfil or otherwise compensate the other party’s disappointed expectations, even where he has caused those expectations and knows of the other party’s reliance. The relationship between negotiating parties is seen as inconsistent with such a principle.

However, this does not exclude all forms of redress during the precontractual stage. Lord Ackner’s statement refers to one exception: misrepresentation. Where one negotiating party gives false information to the other, by words or conduct, then if he was fraudulent (not holding an honest belief in the truth of the information) he is liable in the tort of deceit to compensate the other for the loss that he suffered by relying on it. And the party who is (or holds himself out to be) in a position to know the accuracy of the information may owe a duty to take reasonable care to the other to whom he provides the information, and therefore be liable in the tort of negligence if he failed to take care and the other party suffered loss in reliance on it. These actions in tort have the effect of protecting the reliance by a negotiating party on representations made by the other party—and, where they apply, the remedy of damages compensates only the value of the party’s reliance and not his failed expectation from the contract itself. But they are peculiar to the case of misrepresentation and, indeed, are just applications in the precontractual stage of the general liabilities in tort for fraudulent or negligent statements. Deliberate silence (without any active misrepresentation by words or conduct) does not constitute the tort of deceit. Nor is there authority in the English cases for a general duty of care in tort between negotiating parties, and such a general duty is not likely to be developed because it would cut across the courts’ reluctance to impose mutual duties between negotiating parties, as set out in Lord Ackner’s statement.

Misrepresentations can give rise to liability in damages in tort. But other representations—for example, assurances by one negotiating party that he will in due course go ahead with the contract—do not of themselves give rise to liability unless they take the form of a contractual promise. English law has not adopted the approach of the High Court of Australia, which has extended the doctrine of

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32 Derry v Peek (1889) 14 App Cas 337.
34 The damages can, however, cover consequent losses which consist in the claimant’s lost opportunity to make profits from the capital which has been tied up as a result of the tort: East v Maurer [1991] 1 WLR 461.
35 Peek v Garney (1873) LR 6 HL 377 at 391, 403.
36 There can be duties between negotiating parties where there is a particular relationship between them by reference to which the duties are imposed: for example, a solicitor negotiating with his own client for a contract which benefits the solicitor personally, because of the fiduciary duty between solicitor and client: cf Nocton v Lord Ashburton [1914] AC 932; J. Cartwright, Misrepresentation (Sweet & Maxwell, London, 2002), ch 11, esp. paras 11.36 to 11.40.
37 Such a general duty has been rejected explicitly by the Canadian and New Zealand courts: Martel Building Ltd v Canada (2000) 193 DLR (4th) 1; Onyx Group Ltd v Auckland City Council (2003) 11 TCLR 40.
38 If, however, the party at the time does not intend to go ahead, then he is misrepresenting his intention and is liable in the tort of deceit: Edgington v Fitzmaurice (1885) 29 Ch D 459.
promissory estoppel to impose liability in damages on the party seeking to withdraw from negotiations. In *Waltons Stores (Interstate) Ltd v Maher*39 there was not yet a concluded contract to grant the lease of property but the prospective tenant, who had sought to withdraw, had encouraged the landowner to continue to build the property when he had already decided not to take the lease. The Court held that the tenant was estopped from denying that he was bound to complete the lease, because it would be unconscionable for him to retreat from his implied promise to complete the contract: the remedy, however, was not enforcement of the contract, but damages in lieu of specific performance. This analysis is not yet possible in England below the level of the House of Lords.40

Nor does English law recognise a principle that an offer once made during the negotiations cannot be withdrawn without giving a reasonable opportunity for the offeree to consider it; nor even that an express promise to keep open an offer for a fixed period will be enforced (either through an award of ‘expectation’ or ‘reliance’ measure damages or an order to complete the contract) unless it is itself in the form of a contractually binding promise, such as an option contract. No tort is committed by withdrawing an offer, even at a late stage; and a party cannot be estopped from withdrawing it.

If the precontractual duty takes the form of a *contractual* obligation, however, English law will recognise and enforce it.41 So, for example, the parties may expressly enter into a contract to cover the allocation of risk of expenses incurred before the main contract is concluded; or an option contract which binds one party to enter into the main contract if the other so decides. But sometimes the courts will find an implied contractual promise during the negotiations which is designed to protect one party’s expectations. This has occurred in the case of invitations to tender. As a general rule an invitation to tender is not a contractual offer: it is the tenderer (bidder) who makes an offer which the person inviting tenders is free to consider and to decide which (if any) bid to accept.42 However, in *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*43 it was held that, where tenders had been solicited from selected parties, all of them known to the invitor, and where the invitation to tender prescribed a clear, orderly and familiar procedure, the invitation to tender was an offer to the extent that it promised to each tenderer that if he submitted a conforming tender it would be considered, or at least would be considered if other tenders are.

Solutions can also sometimes be found for the precontractual phase in the law of restitution (unjust enrichment). In principle, the focus here is not the protection of one party’s expectations, or his reliance on them. However, some cases which are usually classified within restitution are in substance doing exactly that. For example,

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40 *Combe v Combe* [1951] 2 KB 215; *Baird Textiles Holdings Ltd v Marks and Spencer plc* [2002] 1 All ER (Comm) 737; above, text to note 22.
41 It must, however, fulfil the normal requirements of a contract: including consideration (if not executed as a deed); and being sufficiently certain as to its terms. Lord Ackner’s objection in *Walford v Miles*, above, to a contract to negotiate in good faith was put on two grounds: in addition to contradicting the inherently adversarial relationship of negotiating parties, it is also not sufficiently certain for a court to know whether a proper reason exists for breaking off negotiations.
42 *Spencer v Harding* (1870) LR 5 CP 561.
43 [1990] 1 WLR 1195. This is quite a narrow decision; the judges emphasised the small class of intended bidders, selected by the invitor, as a significant feature in implying the offer to consider the bids. And the remedy is only useful if the bid would have satisfied the conditions for acceptance if it had been properly considered; otherwise there is no loss consequent upon the breach of the (implied) contract to consider the tender.
one party who incurs expenditure in advance of the contract being concluded, but
without there being any (pre-)contract providing for reimbursement by the other party,
might sometimes have a claim in restitution for the expenditure where the other party
has requested the other party to incur it. The fact of the defendant’s request is treated
within the law of restitution as showing that it provided a benefit to him which
justifies the imposition of a duty to repay the benefit. For example, in William Lacey
(Hounslow) Ltd v Davis44 Barry J held that a builder could recover for work done after
he had been told that his tender was the lowest and that he could expect to receive the
contract. But the claim was not in contract but implied or quasi-contract (or, in
modern terms, restitution).

In short, therefore, although English law does not recognise a general
underlying principle of precontractual liability, nor a general rule that one party must
fulfil or otherwise compensate the expectations created in the other party during
negotiations which do not come to fruition in a completed contract, there are a range
of circumstances in which the courts have given some legal effect to such
expectations through the law of contract, tort and restitution.

(b) Forming the contract: finding the agreement

There are two respects in which the rules of English law for the formation of the
contract are designed to give effect to a principle of protecting the parties’
expectations. In effect, they are rules of interpretation of the communications between
the negotiating parties, when one is asking whether a contract was formed, and (if so)
on what terms. The first is the use of an objective test in order to identify the
agreement between the parties sufficient to form a contract; the second (perhaps less
obvious) is in the application of the rules of offer and acceptance in order to establish
the agreement.

(i) The objective test of agreement

English law is generally said to determine whether the parties have agreed by the use
of an objective test, rather than a subjective test. Of course, where the parties are in
subjective agreement about the terms of the contract, the court will normally easily
find a contract on those agreed terms.45 But where the parties are not in subjective
agreement, the courts can still in certain circumstances find a contract, thereby
overriding the mistake of one of the parties. This objective approach to contract
formation has even been identified as based on the desire to protect the reasonable
expectations of the party whose interpretation and understanding is held to have been
correct:46

‘English law generally adopts an objective theory of contract formation. That
means that in practice our law generally ignores the subjective expectations
and the unexpressed mental reservations of the parties. Instead the governing
criterion is the reasonable expectations of honest men.’

44 [1957] 2 All ER 712. See also British Steel Corp v Cleveland Bridge and Engineering Co Ltd
[1984] 1 All ER 504.
45 Some writers have proposed a wholly objective test which could override even the shared
subjective intentions of both parties, but this has not generally been followed: compare
It has also been said to rest on the same principles as estoppel:47

‘if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in Freeman v Cooke.48 If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.’

Whether, however, this is really an illustration of estoppel is doubtful: the courts do not require detrimental reliance, beyond his entering into the contract, for one party to be able to hold the other to his (reasonable) interpretation of it. It may be better viewed as simply a rule of interpretation of language, but a rule which is based on an underlying principle similar to that in estoppel: one party is bound in law to the consequences of that which he has led the other party reasonably to believe.49

(ii) Protecting expectations through the rules of offer and acceptance

Some of the rules applied by the English courts to determine whether there is an offer and an acceptance appear to be based on such things as commercial convenience and standard business practice.50 But others appear to have the purpose or effect of protecting the reasonable expectations of one of the negotiating parties.

For example, an offer is withdrawn only if the withdrawal is actually communicated to the offeree51 or at least if the offeree knows from a third-party source that the offeror no longer wishes to contract.52 In effect, this allows a party who holds an offer to accept it as long as he does so without actual knowledge that it is not still intended to be open—the rule protects the offeree’s reliance on the offer. And at least in the case of some non-instantaneous forms of communication, an acceptance may be effective to conclude the contract at the moment that it is sent, rather than only when it reaches the offeror (often referred to the ‘postal rule’). This ‘rule’ applies only where it is reasonable to use the postal service to send the acceptance.53 In substance, this has the effect of protecting the offeree who reasonably believes himself to be still entitled to accept by post—and then to act (for example, in further dealings with third parties) on the basis that he has a concluded contract without waiting for further communication from the offeror. And, in the case

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47 Smith v Hughes (1871) LR 6 QB 597 at 607.
48 (1848) 2 Ex 654 (a case dealing with estoppel by representation). For a more recent explicit use of estoppel to analyse and apply the test of formation of the contract, see The Hannah Blumenthal [1983] 1 AC 854 at 914 (Lord Brandon).
51 Byrne v Van Tienhoven (1880) 5 CPD 344.
52 Dickinson v Dodds (1876) 2 Ch D 463.
of other forms of communication, when determining the time at which it takes effect the courts will sometimes ask at what time the party seeking to rely on the fact that the communication has been made could reasonably have expected it would be received. For example, the time at which a telex or fax sent to a business address will take effect will depend on when the sender could reasonably have expected it to be read—so if it is outside business hours, it would normally take effect only at the opening of business the next day, but if it arrived within business hours it would take effect even if the receiving party failed to read it.  

(c) Forming the contract: the force of the promise; consideration and promissory estoppel

English law does not see a contract as simply an agreement: a party is not bound by virtue of the force of his will alone, or his declaration of will. In the case of an informal contract, a party is bound to his promise; but only where the other party has provided consideration for the promise. This means that the promisee must have done something, or promised something, in return for the promise at the promisor’s express or implied request. A contract is therefore a bargain; the promise is enforceable because the promisee has earned the right to enforce it by (as it were) paying the price for its enforcement by providing something in return. The details of the doctrine of consideration need not concern us here, beyond noting that it gives a particular framework to the English law of contract, and provides a justification for the enforcement of contracts which relates to the theme of this paper. If the English lawyer is asked what creates legitimate expectations and what justifies the law’s intervention to fulfil them, he will think first of the role of promises within the law of contract, and the doctrine of consideration. Expectations are created by the promise. As we have seen in the previous paragraphs, they are ‘legitimate’ in one sense by being the expectations that the promisee on reasonable grounds has in fact been led to believe he can rely upon. But they are also made ‘legitimate’ in a narrower and more technical sense by the fact that he has provided consideration. By doing that which the promisor asked, he deserves the protection of the law to enable his expectations to be fulfilled. A promise without consideration can be withdrawn: the making of a promise does not itself in law restrict the freedom of the promisor to withdraw it, even if it might (in fact) have created the expectation in the promisee that the promise will be kept. Morality of promise-keeping is different from the legal enforcement of promises. For the law to become involved in making a party keep his promises, and to provide legal sanctions if he does not fulfil the expectations he created—that is, for the expectations to be ‘legitimate’ in the technical sense of the word—more is required. And that is what is provided by the doctrine of consideration.

54 Cf The Brimnes [1975] QB 929, not a case on formation but one which is often cited as demonstrating the general principle.
55 A party can give legal effect to his will alone, without the requirement of consideration being provided in return, by putting his promise in the form of a deed: sections 1(b)(ii), above; 2(d), below. But this is not then within the scope of the general law of contract as discussed in this paper.
56 For a detailed account, see Chitty on Contracts, above, note 7, ch 3.
57 Oxford English Dictionary, ‘legitimate’, a., 2.e.: ‘valid or acceptable; justifiable, reasonable’.
58 Oxford English Dictionary, ‘legitimate’, a., 2.d.: ‘conformable to law or rule; sanctioned or authorized by law or right; lawful; proper’. 
It should be noted that the ‘bargain’ need not have equivalence in the value of exchange: as long as the promisee has done something at the promisor’s request, and as long as it is not wholly illusory, the courts will not inquire into what value it had to the promisor.\(^5^9\) This reinforces the argument here: we are looking for a justification for the promisee’s legal right to the protection of his expectations. It is based simply in the fact that he has done what the promisor asked of him. We shall see later that the remedy that follows in English law from non-performance of a contractually binding promise is generally designed to fulfil the expectations. It is important to realise that the consideration is the justification for the legal enforcement of the expectations created by the promise: it is not the measure of enforcement. It is often said that consideration involves the promisee doing something which is to his detriment, or to the promisor’s benefit (or, in most cases, it is both detriment and benefit).\(^6^0\) But identifying the value of the detriment to the promisor does not identify the value of his rights to enforcement: his rights are to the expectations. And the consideration can be a promise of something in return, as well as the doing of an act in return. A contract can be formed by the exchange of promises, each party’s promise being the consideration for the other’s. In the case of such an executory contract, it is not necessary (as in the context of estoppel) to go further and find that the party enforcing the promise has suffered some detriment, or acted in some way to change his position in reliance on the promise, beyond the giving of his promise in return.\(^6^1\)

It has already been noted\(^6^2\) that English law has not developed a general doctrine of promissory estoppel by which a promise, not supported by consideration, can be enforced by virtue of the promisee’s reliance on it. Promissory estoppel is used within contract to allow for the variation of existing contractual rights, but not for the creation of new rights to the enforcement of the promise, nor to the compensation of the detriment incurred on the basis that the promise would be kept.

\(\textit{d) Formalities for contracts}\)

A contract is not normally required to be in writing, or to be evidenced in writing, in order to be valid or to be enforceable. However, by statute a contract for the sale or other disposition of an interest in land must be in writing;\(^6^3\) and a guarantee cannot be enforced without a memorandum signed by the guarantor or his authorised agent.\(^6^4\) In addition, if the parties put their contract in the form of a deed,\(^6^5\) the deed must comply with certain formality requirements in order to be valid.\(^6^6\) In recent years the courts have considered whether each of these formality requirements is absolute—and, in particular, whether a party can be estopped from relying on the statutory requirements.

60. Currie v Misa (1875) LR 10 Ex 153 at 162.
62. Above, section 1(b).
63. Law of Property (Miscellaneous Provisions) Act 1989, s 2. The form is a condition of the formation of the contract.
64. Statute of Frauds 1677, s 4. The form is a condition of enforceability, not of formation.
65. Section 1(b)(ii), and note 55, above.
In relation to contracts for the sale of land, the Court of Appeal in *Yaxley v Gotts* held that a person who was promised an interest in a building if he undertook work on the building could be granted the interest (or, at least, an interest which protected his expectation) under the doctrine of proprietary estoppel, in spite of the fact that the promise was not contained in a contract which complied with the statutory formality. Beldam LJ said:

‘The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it. This was not a provision aimed at prohibiting or outlawing agreements of a specific kind, though it had the effect of making agreements which did not comply with the required formalities void. This by itself is insufficient to raise such a significant public interest that an estoppel would be excluded.’

In this case, the court was able to hold that the statute by its own language, as well as by its context as evidenced by the background to its enactment, indicated that to give effect to an informal agreement through the doctrine of proprietary estoppel would not necessarily undermine the policy requiring written contracts for the sale of land. In a later case, the Court of Appeal applied dicta in *Yaxley v Gotts* to hold that the statutory requirements for the formality required of a deed were also not absolute, in the sense that a party who had not in fact executed a document as a deed in compliance with the section could be estopped from denying it. The document in the case was expressed to be a deed, and was signed and delivered by the defendants. But the defect of formality came in its witnessing: it was attested, but by someone who signed as witness after the defendants had signed but not (as required by the Act) in their presence. The Court of Appeal held that the delivery of the document constituted an unambiguous representation of fact that it was a deed, and the claimant had acted in reliance on that fact (and on the deed having validly created the obligations it purported to contain). Following *Yaxley*, they considered the policy behind the Act, and the Law Commission Report which had proposed it, and concluded that estoppel could be permitted to avoid some, but not all, of the formality requirements. Pill LJ said:

‘there was no statutory intention to exclude the operation of an estoppel in all circumstances or in circumstances such as the present. The perceived need for formality in the case of a deed requires a signature and a document cannot be a deed in the absence of a signature. I can detect no social policy which requires the person attesting the signature to be present when the document is signed.’

67 [2000] Ch 162.
68 Above, section 1(b)(iv).
69 The Court relied on s 2(5), which provides that the section does not affect ‘the creation or operation of … constructive trusts’; and the Law Commission’s report which proposed the provision, Law Com No 164 *Formalities for Contracts for Sale etc of Land* (1987), which at pp 8-20 discussed estoppel as a means of giving effect to an agreement which would not comply with the formality.
71 At [30].
Most recently the House of Lords\(^{72}\) has considered whether estoppel can be used to avoid the requirement that a contract of guarantee be evidenced in writing. The House held that there was no estoppel on the facts, but a majority of their Lordships appears to have assumed that there could in an appropriate case be such an estoppel.\(^{73}\)

These cases show that where a party seeks to enforce a contract which does not comply with a statutory requirement of form for its validity or for its enforcement, the courts consider the policy behind the statute to see whether it should be applied strictly, or whether the fact that one party has been led by the other party to believe that the contract is in fact valid, and has relied on that belief, should give him a right as against the other party to enforce the contract. The doctrine of estoppel is used to prevent the party who created the belief that the contract was valid from taking advantage of the statutory rule.

(e) ‘Defects of consent’

English law has not developed an overarching theory of defects of consent. Legal systems which focus on the will of the party, or his consent, as a justification for the enforcement of the contract, naturally focus their attention on the validity of the consent and generally group together matters such as mistake, fraud and duress as vitiating the consent and therefore the contract. This does not mean that English law does not recognise that such factors can vitiate the contract. But the approach of English law is different; and it again fits with the particular approach taken to the finding the binding agreement in the contract.

English law does not give a large role to mistake. We have already seen that a mistake of one party about the terms of the contract itself can be overridden by the fact that the other party reasonably believed that the mistaken party was agreeing to his terms. Rather than focusing on the mistake of the party as a reason for his escaping the contract, English law tends to view the matter more (or, at least, as much) from the point of view of the other party who would lose the contract if the mistake were allowed to be operative. And this sets the general approach to the English law view of the vitiating factors. In all of this, one is piecing together a theory of the vitiating factors, and their underlying principles and unifying characteristics, which the courts do not usually discuss: mistake, misrepresentation, duress and undue influence are generally treated separately, according to their own separate rules.\(^{74}\) But one can see that the reluctance of English law to allow a subjective mistake to render the contract void is balanced by the fact that, if the mistake was caused by the other party—that is, by a misrepresentation, even made innocently, which induces the mistake—then the reluctance disappears. The fact that one party has caused the other’s defect of consent makes all the difference. For then it is right that he should not be entitled to insist on the performance of the contract, but should risk the other party’s exercising his right to the contract being set aside. Similarly, duress involves a form of misconduct (the application of illegitimate pressure) by one party against the other—and this justifies


\(^{73}\) This was explicitly left undecided by Lord Hoffmann and Lord Clyde.

\(^{74}\) Apart from duress and undue influence, which are seen as related, they are not placed in the same chapters (or, sometimes, even in adjacent chapters) of the English contract textbooks. For a detailed discussion of the links and underlying principles, see J. Cartwright, Unequal Bargaining (Oxford, 1991); and for a comparative discussion of English and French law, see J. Cartwright, ‘Defects of Consent and Security of Contract: French and English Law Compared’ in P. Birks & A. Pretto (eds), Themes in Comparative Law in Honour of Bernard Rudden (Oxford, 2002), p 153.
the latter having the right to avoid the contract.\textsuperscript{75} English law does not allow misrepresentation, duress or undue influence applied to one contracting party by a third party to affect the validity of the contract unless the other contracting party was in some way responsible for it, or knew of it (or, sometimes, at least ought to have known of it) when he took advantage of it by agreeing to the contract.\textsuperscript{76} Insanity and intoxication are treated similarly in English law. Although one can say that a person’s capacity to contract is affected by a mental disability, or the fact that he was so under the influence of drink or drugs that he could not give consent, these are not treated as absolute bars to the validity of the contract. Only if the other party knew of the insanity or the intoxication can the contract be set aside against him.\textsuperscript{77} Here again the law takes a position which protects the party who did not know that there was a lack of full and free consent by the other party: in effect, it is protecting his legitimate (reasonable) understanding and expectations.

\textbf{(f) Agency}

One area where the doctrine of estoppel can be seen to operate is that of agency.

If a person holds himself out to a third party\textsuperscript{78} as acting as another’s agent, but in fact has no authority to do so, he may impliedly warrant to the third party that he has the necessary authority—thus rendering him directly and personally liable to the third party for breach of contract by virtue of the fact that he has no such authority.\textsuperscript{79} The ‘principal’ in such a case is able to ratify the unauthorised act of the ‘agent’ and thereby perfect the agency (and the contractual rights and duties that then follow as between the principal and the third party); but if he does not do so, and if the ‘agent’ had no apparent authority (see below), the third party has a claim in contract against the ‘agent’ for the losses that flow from his misrepresentation of authority, and from the contract itself by reason of the fact that does not in law bind the ‘principal’.

However, it is also possible for a principal to be himself liable to the third party with whom an agent dealt without authority, where the principal made an express or implied representation to the third party that the agent did have the necessary authority; and the third party relied on it. The agent has ‘apparent’, or ‘ostensible’ authority, rather than actual authority. The principal cannot deny that the agent had sufficient authority and therefore in effect becomes bound by a contract which he did not authorise. This is commonly put in the language of estoppel.\textsuperscript{80}

\textsuperscript{75} Undue influence also involves a form of wrongdoing: \textit{Royal Bank of Scotland v Etridge (No 2) [2002] 2 AC 773} at [13], although this is not uncontroversial: P. Birks and N. Y. Chin, in J. Beatson and D. Friedmann (eds), \textit{Good Faith and Fault in Contract Law} (Clarendon, Oxford, 1995), p 57.

\textsuperscript{76} \textit{Royal Bank of Scotland v Etridge (No 2)}, above, note 75, esp at [40].

\textsuperscript{77} \textit{Imperial Loan Co Ltd v Stone [1892] 1 QB 599}; \textit{Hart v O’Connor [1985] AC 1000}. Some forms of disability and incapacity are however treated more strictly, such as the capacity of a minor to enter into a contract: \textit{Chitty on Contracts}, above, note 7, ch 8. Here the policy of protection of the party deemed not to have full legal capacity overrides the policy of protection of the other (innocent) contracting party.

\textsuperscript{78} This is not a ‘third party’ in the sense used in the doctrine of privity, or under the Contracts (Rights of Third Parties) Act 1999, below; but a third party in the sense of being neither the principal nor agent under the contract of agency. In discussing the law of agency, it usual to talk of the persons with whom the agent deals (whether with or without the authority of the principal to do so) as third parties. See generally \textit{Chitty on Contracts}, above, note 7, ch 31.

\textsuperscript{79} \textit{Collen v Wright} (1857) 8 E & B 647. He may also be liable the tort of deceit if he did not honestly believe that he had the authority that he represented.

\textsuperscript{80} \textit{Armagas Ltd v Mundogas SA [1986] AC 717} at 777 (Lord Keith of Kinkel).
‘Ostensible authority comes about where the principal, by words or conduct, has represented that the agent has the requisite actual authority, and the party dealing with the agent has entered into a contract with him in reliance on that representation. The principal in these circumstances is estopped from denying that actual authority existed.’

The effect of this estoppel is to protect the third party’s expectations: he can enforce the contract fully against the principal by virtue of his reliance on his representation of the agent’s authority. The same principles apply to those dealing with a partner.  

**(g) Third party rights**

Before the enactment of the Contracts (Rights of Third Parties) Act 1999 there was no general principle under which a third party to a contract could enforce a term in a contract that sought to confer a benefit on him, even where the term was intended by the contracting parties to be enforceable by him. The 1999 Act, however, has introduced a general exception to this rule of privity of contract, and so a third party who is expressly identified in the contract (by name, class or description) may now have a direct right against the promisor to enforce a promise which was expressly or impliedly intended by the contracting parties to be enforced by him.

For our present purposes, however, the important provision is section 2 of the Act, which deals with the question whether the contracting parties can vary or rescind the contract so as to change or remove the third party’s benefit or his right to enforce it. When they create the right for the third party in the contract, the parties may also reserve expressly the right to vary or rescind it. But, if they do not, then they may not do so without the third party’s consent if:

1. The third party has communicated his assent to the term to the promisor,
2. The promisor is aware that the third party has relied on the term, or
3. The promisor can reasonably be expected to have foreseen that the third party would rely on the term and the third party has in fact relied on it.’

The second and third conditions here are using the third party’s reliance on the term (and the fact that the reliance is either known to the promisor, or was reasonably foreseeable by him) as a reason to make the third party’s right secure. And, of course, he can rely on the term only if he is aware of it. So this is an example of English law

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81 Partnership Act 1890, s 5: ‘Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner’. A person who holds himself out as a partner is liable to anyone who gives credit to the partnership on the faith of that representation: s. 14. The doctrine of ‘holding out’ is a branch of the doctrine of estoppel: *Re Fraser* [1892] 2 QB 633 at 637.

82 *Tweedle v Atkinson* (1861) 1 B & S 393. Solutions were found to deal with certain problems which followed from this rule, but these were piecemeal: see generally *Chitty on Contracts*, above, note 7, ch 18.

83 Contracts (Rights of Third Parties) Act 1999, s 2(1).
using the reliance by a person on his expectation of receiving a benefit from a contract as the reason that his expectation is protected. It is similar to the underlying principles of estoppel, as discussed earlier in this paper, although it applies only in the particular context covered by the Act. In using the third party’s reliance as a ground to protect the expectations created by a promise for which he himself provided no consideration, the Act has made no change to the basic rule which requires consideration to make a promise itself binding.  

(h) Interpreting the contract

We have already seen that, where there is disagreement between the parties about whether they reached agreement, and what the terms of the contract are, the question is generally solved by an application of an objective test viewed from the position of each of the parties—and so a party is entitled to hold the other to have agreed to the terms of the contract as he understood them if the other party so conducted himself that he could reasonably have done so, and in fact did so. That approach is generally applicable in a case where the contract is formed by communications (written or oral) between the parties, where it is necessary to interpret those several communications.

Where, however, the contract is concluded in writing, a different approach is appropriate: once the parties have committed themselves to the written document, then it is the document that is the embodiment of their agreement and is therefore subject to interpretation. The courts have traditionally favoured an approach to interpretation of written contracts and other legal documents which relies on the objective, ordinary meaning of the words used in the document. There has been a reluctance to admit evidence outside the written document itself in order to interpret the document, although extrinsic evidence may be admitted in cases of ambiguity, or where a word is used in a technical sense, or where the ordinary, literal meaning would give rise to an absurd result, although for the last thirty five years it has been clear that a contract must not be interpreted in isolation from the ‘matrix of facts’ in which it was set. However, in a series of recent cases the House of Lords has become even more open to the contextual interpretation of contracts and other documents. In part, this appears to be a desire to ensure that the words used can be given a meaning which would be the objectively sensible interpretation to parties placed as the particular parties were—more objective, perhaps, than the rules of interpretation of offers and acceptances discussed above, yet focussing quite closely on an approach that should give effect to understanding of the document held by the reasonable party in the circumstances. In one of these recent cases Lord Hoffmann said:

‘Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which

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84 In a case covered by the 1999 Act, there will be consideration for the promise which is being enforced by the third party, but it is provided by the promisee.
87 *Prent v Simmonds* [1971] 1 WLR 1381 at 1384.
they were at the time of the contract…. The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties … it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.’

Again, therefore, the approach of English law is not to seek to find the subjective, common intentions of the parties, but that which their outward expression conveyed to a reasonable person, with the parties’ own understandings of the context—and this will have the effect of protecting a party whose understanding is reasonable, against one who finds himself bound by his signature to a document which he had not understood or had not himself interpreted reasonably.89

English law also has another remedy—rectification—to deal with the case where a written contract does not give effect to the parties’ agreement. Sometimes a contract can be rectified (that is, ordered by the court to be re-worded into the terms which remove the mistake) where its written form does not fulfil the parties’ shared agreement. And it can even be rectified in a case where the parties were not in agreement about the terms, and the written document reflects the terms intended by one of the parties, where it is ‘unconscionable’ for him to insist on the contract as written. This ‘unconscionability’ arises where the party knew that the other was mistaken; or diverted his attention and intended him to make the mistake, and suspected that he was mistaken.90 When this is read alongside the general approach to the interpretation of written contracts, we might say that the written contract is binding in its interpretation as it would reasonably have appeared to a someone in the party’s position—thus protecting the reasonable understandings of parties to a contract; but if a party has obtained that document, in his own favour, on the basis of his ‘unconscionable’ conduct, then he loses the right to that protection, and the protection is instead given to the other party who was himself reasonable and was taken advantage of. This analysis fits well with much of the general approach to the formation of a contract, and dealings between parties leading up to the time of formation, discussed above.

(i) Remedies for breach of contract

It is in the remedies for breach of contract that one finds the clearest overt policy in favour of the protection of expectations in English contract law. But this is what might be expected in most legal systems’ rules of contract law, and the nuances of English law have to be borne in mind. Although the remedies for breach show that English law favours the protection of the expectation, it normally interprets the expectation in economic terms, rather than in terms of literal performance. And the full economic

89 A party’s signature to a contract is also given particular significance in the context of unfair contract terms. When a document containing contractual terms is signed, the party signing it is bound not only to the contract itself, but to all of the terms, even those that were unusual and unexpected, and whether he has read the terms or not—unless the signature was obtained by the other party’s fraud or misrepresentation: L’Estrange v F. Graucob Ltd [1934] 2 KB 394; Curtis v Chemical Cleaning and Dyeing Co [1951] 1 KB 805. This also appears to be based on the idea that one party is entitled to assume that the other party’s signature shows assent—except where he has himself been responsible for improperly obtaining the signature. Of course, such terms, if they form part of the contract, are then subject to the usual statutory controls on unfair terms.

expectation is sometimes not protected by the remedies because it is tempered by principles which allow the party in breach to be heard to say that the claimant does not fully deserve it.

(i) Specific performance is not the primary remedy

English law does not regard a court order for performance (‘specific performance’) as the primary remedy for actual or threatened breach of contract. There are historical reasons for the preference of damages over specific performance as the primary remedy, but the courts have maintained it in the modern law and appear to see this ordering of remedies as a matter of principle. The expectation created by the contract is not seen as the right to performance of the obligations in such clear terms as in some other legal systems. The courts will sometimes order performance; but the general rule is that they will not do so unless damages would not be an adequate remedy in the circumstances. A party can expect to receive the economic equivalent of performance (see below); but unless an award of damages cannot give him that, he cannot demand actual performance from the court. Where, however, damages would not adequately compensate his disappointed expectations, and as long as there are no other objections to an award of specific performance (such as impossibility, or the fact that it involves the enforcement of a personal service obligation), the court may make an order. A common case is where there is a contract for the sale of a unique commodity for which an award of damages does not enable the disappointed claimant to go into the market to buy a substitute.

One area in which the court will in effect order performance, however, is where the contract provided for a specific price to be paid. The right to the payment of the price once it has been earned by the claimant under the terms of the contract is not subject to the court’s discretion; nor is it subject to any of the arguments which might enable a defendant to resist the full payment of expectation measure damages (see below). There can be no problem of foreseeability, because the price was provided by the terms of the contract (and therefore there is no relevant rule of remoteness, which applies only to damages); nor is it a defence to a claim for payment of the price that the claimant should have mitigated his loss. If the contract gives him the right to payment of a specific sum, then in general he is entitled to that, to fulfil that expectation.

91 On specific performance generally, see Chitty on Contracts, above, note 7, ch 27.
92 Specific performance was a remedy developed by the Courts of Equity, before the fusion of the Common Law and Equity jurisdictions in 1875, to deal with cases where the common law remedy of damages was inadequate.
93 There have been some suggestions from academic writers in recent years that the courts have become more disposed to exercising their discretion to order performance of contractual obligations; and in particular that the traditional rule has been relaxed to a rule that specific performance will be awarded if it would be the more appropriate remedy. However, the most recent discussion of the remedy by the House of Lords, in Co-operative Insurance Society Ltd v Argyll Stores Ltd [1998] AC 1, does not support this.
94 An exception is where the agreed sum is characterised as a penalty: not the price, however high (the courts will not enquire into the adequacy of consideration); nor an attempt to value in advance the likely loss in the event of breach (a liquidated damages clause); but a clause designed to pressurize the defendant not to breach the contract: Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79.
(ii) Damages protect the claimant’s expectation, not his reliance

Sometimes a court will award as the measure of damages the expenditure incurred by the claimant in performing the contract, rather than the value of his disappointed expectation. But it must be understood that damages to cover the wasted expenditure (sometimes called his ‘reliance’ loss) is not the normal measure, nor a measure to which the claimant is entitled if he so chooses. It is only awarded in cases where the claimant cannot prove his expectation or, at least, where if he claims the wasted expenditure, the defendant cannot show that he is claiming more than his expectation. In effect, therefore, the wasted expenditure claim is only a substitute for the expectation, and is used to give the claimant the benefit of the doubt that the contract would at least have broken even (i.e., he would at least have recouped his expenditure).

(iii) The valuation of the expectation is made in economic terms

The remedy is designed to protect the claimant’s economic expectation. This means that the courts generally take into account only those losses which had an economic value. Non-economic losses are not normally included, unless the contract was one which had as a major or important object the provision of a non-economic benefit—such as a holiday contract, or a contract where the parties had expressly made the provision of non-economic benefits part of the bargain.

(iv) But the whole of the failed economic expectation may not be awarded

Although the courts seek to compensate the claimant’s failed expectation in economic terms, they will sometimes not award it in full, because of other countervailing policies. Under the rule of remoteness of damage, the defendant is liable only for the claimant’s losses which are of a kind that the defendant could have had in contemplation at the time of the contract. This reflects the idea that the economic risk to which the defendant is subject (and therefore the scope of the claimant’s legitimate expectation) is fixed at the time of the contract. However, the claimant is also expected to mitigate his loss: to take such steps as a reasonable person would take to seek to reduce the loss flowing from the defendant’s breach. This does not appear to be based on any underlying idea that the claimant’s expectations were themselves limited in this way: it is more a question of deciding what is reasonable to allow him to recover when the breach has occurred. In this sense, the loss flowing from a breach of contract is not seen as being itself fully and automatically comprised within

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96 How the expectation should be valued in economic terms can sometimes give rise to difficulties which need not be considered here. See, e.g., Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344 (breach of contract in not digging out a new swimming pool to contracted depth: was the lost expectation the difference in value between the pool as built, and the pool as it should have been built? or the cost of curing the defect? or the loss of the (consumer) claimant’s ‘amenity’ in not having the pool as he ordered it?).
97 Farley v Skinner [2002] 2 AC 732 (contract for surveyor to check property for noise, as well as to undertake the usual structural survey: £10,000 awarded for the lack of peace and tranquillity caused by aircraft noise).
98 The Heron II [1969] 1 AC 350 at 385-386.
the expectation that was created by the contract. A sum of money that is promised, must be paid. But where the question is as to how to value the failure of an obligation of performance, the courts begin to re-assess the circumstances as they stand at the time of breach and take the respective positions of both parties more fully into account.

3. Conclusions

This survey has shown that, although English law does not have a private law doctrine of ‘legitimate expectations’, and although the doctrine of estoppel is separate from the law of contract, takes many forms, but does not in principle allow the creation of new obligations, nevertheless the principles and ideas which underlie these doctrines can be found within the law of contract. The law protects explicitly the expectations of the contracting parties, and generally uses the doctrine of consideration to determine whether the expectations are ‘legitimate’—in the sense of being recognised and enforced by law. The remedies for breach of contract are designed to protect these expectations (although normally in money, rather than by enforced performance). Elsewhere in the law of contract, however, we have seen that one party to the contract, or a third party, may be protected where he has reasonably relied on the other party’s representation that he would have the benefit of obligations—and thus one can find the protection of ‘legitimate’ expectations—in the sense of their being reasonable—on a basis which is analogous to, or sometimes even explicitly based on, doctrines of estoppel.

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