This paper undertakes a comparative analysis of the relationship between the law of estoppel and the enforcement of promises through the law of contract, investigating possible convergence and divergence in the law of the various common law jurisdictions such as the United Kingdom, Ireland, Australia, New Zealand, Hong Kong and Singapore.

Particularly in relation to proprietary estoppel, the law of equity has sought to downplay the potential overlap with the law of contract, tending to describe the basis for equitable intervention as the making of “representations” and the inducing of “expectations”, without referring directly to “promises”. Notwithstanding the different language traditionally employed by equity, the concept of promise appears to be central to the so-called “expectation” limb of proprietary estoppel. The courts have become more open in recent years in referring to promises in the estoppel context and may, in fact, be willing to take account of a wider range of promises when applying estoppel principles than when applying the conventional law of contract. In Thorner v Major [2009] UKHL 19, [57] Lord Walker argued that an estoppel remedy could follow from a promise that was not intended to form the basis of a contract, e.g. because it was subject to “unspoken and ill-defined qualifications” or was expressed in too uncertain terms. This was, he felt, because of the backward looking nature of estoppel, which “does not look forward into the future and guess what might happen” but rather “looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept”.

This paper considers the interesting questions are raised by this idea of an alternate method of dealing with the consequences of promises. The law of contract has a relatively sophisticated variety of devices that serve to restrict the circumstances in which a promise can trigger legal liability, including the concept of intention to create legal relations, frustration, mistake and misrepresentation, duress, undue influence, and the implication of terms. It is not yet clear how the issues addressed by these devices are to be dealt with in the law of estoppel. One possibility is that they may be accommodated, albeit in a rather more impressionistic manner than in the law of contract, through the invocation of the notion of unconscionability. Surveying the approach in the various common law jurisdictions, the paper looks for evidence that this is taking place and considers the possibility that this role – of replicating the sensitivity of the law of contract to possible reasons for the non-enforcement of a promise – could provide a convincing justification for the prominence of the controversial concept of unconscionability in estoppel discourse.