In October and early November 1983, officers and agents of Waltons Stores (Interstate) Ltd. ("Waltons") were negotiating with Mr and Mrs Maher for the construction by the Mahers of store premises on land which they owned in Nowra to be leased to Waltons. Mr Roth of Dawson Waldron was the solicitor for Waltons and Mr Elvy of Morton & Harris was the solicitor for the Mahers. They adopted an unusual conveyancing procedure. A draft Deed of Agreement for Lease was to be drawn by the lessee's solicitor Mr Roth and, when the terms were agreed, an exchange of contracts was to be effected. Time was short. Waltons specified 15 January 1984 as the date by which the store building was to be available for fitting out and 5 February 1984 as the date by which the store building was to be completed. Waltons had sold their store premises in Nowra and were required to vacate those premises by mid-January 1984. The contract between Waltons and the Mahers needed to be concluded in time to allow Mr Maher to meet the specified dates for fitting out and completion. The work to be done by Mr Maher included the demolition of a substantial structure on the site before the erection of the store building could be commenced. On 7 November 1983, Mr Elvy told Mr Roth that "the agreement must be concluded within the next day or two otherwise it will be impossible for Maher to complete it". At that time, Mr Elvy was seeking some amendments to the draft Deed of Agreement for Lease. Although the amendments had been agreed as between the solicitors, Waltons had not then given its final approval. In addition, a schedule of finishes was required for annexure to the Deed. On 7 November, after Mr Elvy spoke to Mr Roth, Mr Roth wrote to Mr Elvy enclosing a redrafted Deed of Agreement for Lease which incorporated, to the extent necessary, all the amendments on which he and Mr Elvy had agreed. Mr Roth wrote:

"You should note that we have not yet obtained our client's specific instructions to each amendment requested, but we believe that approval will be forthcoming. We shall let you know tomorrow if any amendments are not agreed to.

We also believe that a Schedule of Finishes should be annexed to the Deed prior to exchange."
Mr Roth did not inform Mr Elvy, either “tomorrow” or at any later time, that the amendments had not been agreed to.

2. Mr Elvy accordingly had his clients execute the Deed and prepare and sign a schedule of finishes. He sent these documents to Mr Roth on 11 November under cover of this letter:

"We thank you for your letter of the 7th November and now return amended counterpart Deed of Agreement for Lease signed by our clients, by way of exchange. Would you kindly forward the original Deed executed by your client.

We enclose also Schedule of Finishes signed by our clients together with a copy thereof for approval and annexure to the Deed and two (2) copies of the floor plan for annexure to the copy lease annexed to the Deed, prior to exchange.

When returning the executed Deed you might forward to us a cheque in the sum of $2000.20 in order that we may attend to stamping of the Deed."

(It will be convenient hereafter to adopt the terminology of this letter, describing the document forwarded by Mr Elvy “by way of exchange” as the counterpart Deed and the document to be executed by Waltons as the original Deed). When Mr Elvy wrote this letter, he thought it was his responsibility to attend to the stamping of the original and counterpart Deeds. Subsequently he realized that that was Mr Roth’s responsibility. If Mr Elvy had been responsible for stamping the original and counterpart Deeds, presumably both would have been sent to him after Waltons had executed the original Deed; if Mr Roth had been responsible for stamping the original and counterpart Deeds, presumably Mr Elvy would have had to return the executed original Deed for stamping after it had been delivered to him by way of exchange. The implications of the conveyancing procedure adopted by the solicitors were the subject of an important finding by the learned trial judge to which reference will presently be made. Mr Elvy’s letter and the enclosures were received by Mr Roth on or about 14 November. Mr Roth did not deliver the original Deed executed by Waltons to Mr Elvy as he had requested. Waltons did not execute the Deed. Mr Elvy made no enquiry to find out when the executed original Deed would be delivered to him. Nor did Mr Roth return the counterpart Deed until it was sent accompanied by a letter dated 19 January 1984 which Mr Roth then wrote on his client’s instructions. (He had not communicated with Mr Elvy since 11 November 1983.) The letter of 19 January 1984 read:

"We refer to your letter of 11th November 1983 and regret to inform you that our client has instructed us that it does not intend to proceed with this transaction.

We apologise for any inconvenience caused, and return the Deed of Agreement for Lease and Schedule of Finishes signed by your clients. The copies of the floor plan are also enclosed."

The contents of this letter reached Mr Maher on 22 or 23 January 1984. By that time, Mr Maher had demolished the structure which had been standing on the site, had poured two-fifths of the concrete slab and had laid sixty to seventy per cent of the brickwork required to build a store in accordance with Waltons’ requirements. Mr Maher had put this work in hand shortly after he received Mr Elvy’s letter of advice dated 14 November 1983:

"We refer to the writer’s recent several attendances on Mr. Maher, and confirm that the amended Agreement for Lease duly executed by you both has been forwarded to the Lessee’s Solicitors for execution by the Lessor and exchange of Agreement.

We note that you will commence work in accordance with the Agreement for Lease immediately as the work to be completed by you on the property is required to be completed on or by the 5th February 1984.

In the event that for any reason the Lessors work is not completed by the 31st March 1984, the Lessee may by notice in writing rescind the Agreement."
Following return of the exchanged Agreement we shall arrange for the same to be stamped."

3. Mr Elvy wrote this letter, as the text shows, without having received the original Deed executed by Waltons. In his evidence, Mr Maher said in reference to his solicitor's letter to him:

"In my thinking it confirmed that everything was proceeding correctly and on receipt of that I ordered the Kato Excavators to demolish the rather substantial building which was in very very good order."

The reason why Mr Maher commenced the work was his expectation that a binding agreement would be brought into existence. As he said:

"We took for granted they would complete their part of the bargain and we duly set all our efforts into motion to do the job for them, in the limited time that was available to us."

Mr Maher expected that execution and delivery of the original Deed would take place as a matter of course, as appears from the following passage of his evidence:

"Q. Would it be fair to say that after you received (Mr Elvy's) letter of 14th November, 1983, you assumed that execution by the lessor and exchange of agreement, would take place? A. Most definitely.

Q. You knew that it was important that execution by the lessor and exchange of agreement should take place, didn't you? A. Yes everything would have to be tied up.

Q. You were assuming that that would be done? A. Yes.

Q. If you had been told that exchange of the agreement might not take place, if Mr Elvy had told you that, would you have gone ahead and done the work? A. Would I have started the work?

Q. Yes. A. Of course I would not."

4. The evidence revealed why Waltons withdrew from the arrangement and why time had been allowed to pass before Mr Roth advised Mr Elvy of Waltons' decision. Mr Rose, a property consultant who was retained by Waltons, had given Mr Roth instructions "to go slow on the transaction". Mr Rose explained "that meant that we did not want to get ourselves into a legally binding position". The reason for these instructions lay in a marketing report which suggested a need for Waltons to change its retailing strategy in a number of country centres including Nowra. That report was under consideration by the directors of Waltons and, as no decision had been made on whether to proceed to lease the proposed building, Mr Rose "did not want anything done to jeopardize the potential contractual situation between Waltons and Mahers". He was seeking to keep the arrangements with the Mahers on foot until a decision was made by Waltons.

5. Waltons knew that Mr Maher was proceeding with the building. On 10 December 1983, the manager of the Waltons store in Nowra reported to his group manager that demolition work had commenced on the site. By 10 or 11 January 1984, Waltons' officers knew that Mr Maher was proceeding with construction. Nobody had told Mr Maher that Waltons had had a change of heart. Although Mr Gosling, who was the property manager for Waltons in New South Wales, gave evidence that he had doubts whether the building under construction was being built for Waltons, he admitted that he did not try to resolve those doubts. The only reasonable inference open on the evidence is that Waltons knew that Mr Maher was building the store in conformity with the terms of the Deed which he had executed.

6. After Waltons refused to proceed in the transaction, Mr and Mrs Maher commenced proceedings in the Supreme Court of New South Wales claiming:

"1. A declaration that there is in existence ... a valid and enforceable agreement for the taking of a Lease ... in
accordance with (the draft lease including the proposed amendments)

2. ...
3. An order for specific performance ...
4. Alternatively to 1-3 above ... damages for breach of agreement to take the said Lease."

23. Parties who are negotiating a contract may proceed in the expectation that the terms will be agreed and a contract made but, so long as both parties recognize that either party is at liberty to withdraw from the negotiations at any time before the contract is made, it cannot be unconscionable for one party to do so. Of course, the freedom to withdraw may be fettered or extinguished by agreement but, in the absence of agreement, either party ordinarily retains his freedom to withdraw. It is only if a party induces the other party to believe that he, the former party, is already bound and his freedom to withdraw has gone that it could be unconscionable for him subsequently to assert that he is legally free to withdraw.

24. It is essential to the existence of an equity created by estoppel that the party who induces the adoption of the assumption or expectation knows or intends that the party who adopts it will act or abstain from acting in reliance on the assumption or expectation: see per Lord Denning M.R. in Crabb v. Arun District Council, at p 188. When the adoption of an assumption or expectation is induced by the making of a promise, the knowledge or intention that the assumption or expectation will be acted upon may be easily inferred. But if a party encourages another to adhere to an assumption or expectation already formed or acquiesces in the making of an assumption or the entertainment of an expectation when he ought to object to the assumption or expectation - steps which are tantamount to inducing the other to adopt the assumption or expectation - the inference of knowledge or intention that the assumption or expectation will be acted on may be more difficult to draw.

25. The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.

26. If this object is kept steadily in mind, the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed. A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise. When these elements are present, equitable estoppel almost wears the appearance of contract, for the action or inaction of the promisee looks like consideration for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting. Lord Westbury in Dillwyn v. Llewelyn, at p 521 (p 1286), assimilated the relationship arising from equitable estoppel to the relationship arising in contract:

" if A. puts B. in possession of a piece of land, and tells him, 'I give it to you that you may build a house on it,' and B. on the strength of that promise, with the knowledge of A., expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made."

Similarly, Lord Kingsdown in Ramsden v. Dyson, at p 170, virtually equated the equitable obligation with the obligation arising from contract:

" If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

And in The New South Wales Trotting Club Ltd. v. The Council of the Municipality of the Glebe (1937) 37 SR (NSW) 288, Jordan C.J. said (at p 308) that:
"if a person lays out money in improving land which he knows to belong to another, and does so, to the knowledge of the other, on the faith of an express or implied promise from that other that he is to have some interest in the land, a Court of Equity, so far as it can, will compel the other to give effect to the promise. It is pointed out in Canadian Pacific Railway Co. v. The King ((1931) AC 414, at p 428), that this type of case depends on contract express or implied."

27. But there are differences between a contract and an equity created by estoppel. A contractual obligation is created by the agreement of the parties; an equity created by estoppel may be imposed irrespective of any agreement by the party bound. A contractual obligation must be supported by consideration; an equity created by estoppel need not be supported by what is, strictly speaking, consideration. The measure of a contractual obligation depends on the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.

28. In Combe v. Combe Denning L.J. limited the application of promissory estoppel, as he expounded the doctrine, to ensure that it did not displace the doctrine of consideration. His Lordship's solution of the problem was to hold that the promise should not itself be a cause of action, but merely the foundation of a defensive equity. He said (at p 220):

"Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind."

29. The remedy offered by promissory estoppel has been limited to preventing the enforcement of existing legal rights. In Crabb v. Arun District Council Lord Denning M.R. said, at p 188, that if a person -

"by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights - knowing or intending that the other will act on that belief - and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied."

If the object of the principle were to make a promise binding in equity, the need to preserve the doctrine of consideration would require a limitation to be placed on the remedy. But there is a logical difficulty in limiting the principle so that it applies only to promises to suspend or extinguish existing rights. If a promise by A not to enforce an existing right against B is to confer an equitable right on B to compel fulfilment of the promise, why should B be denied the same protection in similar circumstances if the promise is intended to create in B a new legal right against A? There is no logical distinction to be drawn between a change in legal relationships effected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one. Why should an equity of the kind to which Combe v. Combe refers be regarded as a shield but not a sword? The want of logic in the limitation on the remedy is well exposed in Mr David Jackson's essay "Estoppel as a Sword" in (1965) 81 Law Quarterly Review 84,223 at pp 241-243.

30. Moreover, unless the cases of proprietary estoppel are attributed to a different equity from that which explains the cases of promissory estoppel, the enforcement of promises to create new proprietary rights cannot be reconciled with a limitation on the enforcement of other promises. If it be unconscionable for an owner of property in certain circumstances to fail to fulfil a non-contractual promise that he will convey an interest in the property to another, is there any reason in principle why it is not unconscionable in similar circumstances for a person to fail to fulfil a non-contractual promise that he will confer a non-proprietary legal right on another? It does not accord with principle to hold that equity, in seeking to avoid detriment occasioned by unconscionable conduct, can give relief in some cases but not in others.

31. If the object of the principle of equitable estoppel in its application to promises were regarded as their enforcement rather than the prevention of detriment flowing from reliance on promises, the courts would be constrained to limit the application of the principles of equitable estoppel in order to avoid the investing of a non-contractual promise with the legal effect of a contractual promise. In Ajayi v. R.T. Briscoe (Nigeria) Limited, the Privy Council sought to qualify the enforceability of a non-contractual promise in this way (at p 1330; p 559):

"The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the
promise only becomes final and irrevocable if the promisee cannot resume his position."

32. The qualifications proposed bring the principle closer to a principle the object of which is to avoid detriment occasioned by non-fulfilment of the promise. But the better solution of the problem is reached by identifying the unconscionable conduct which gives rise to the equity as the leaving of another to suffer detriment occasioned by the conduct of the party against whom the equity is raised. Then the object of the principle can be seen to be the avoidance of that detriment and the satisfaction of the equity calls for the enforcement of a promise only as a means of avoiding the detriment and only to the extent necessary to achieve that object. So regarded, equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side-wind. Equitable estoppel complements the tortious remedies of damages for negligent mis-statement or fraud and enhances the remedies available to a party who acts or abstains from acting in reliance on what another induces him to believe.

[...]

Referring Principles:

IV.8.1 - Principle of pre-contractual liability