Sharon Thompson's *Prenuptial Agreements and the Presumption of Free Choice* is an excellent addition to our collective understanding of the complex issues of policy and practice surrounding prenups. The combination of empirical and theoretical research allows Thompson to take an approach here which is both theoretically well grounded while also being of practical relevance. Recent years have seen a significant rise in the relevance given to the idea of "autonomy" by the English law in this area, without that idea being subject to any significant critique by those using it. Not only does this unengaged acceptance of autonomy as a driving force in relation to prenups raise a number of serious concerns on its own terms; it also obscures other important policy considerations such as the (inherent) imbalance of power between the parties and the (almost inevitable) gender dimension of that imbalance. This book shines an important light on these issues and should be required reading for all those working in this area, whether as researchers, policy-makers or practitioners.

Rob George
University College London

The Law of Proprietary Estoppel. By Ben McFarlane [Oxford: Oxford University Press, 2014. xxxiii + 688 pp. Hardback Â£165.00. ISBN 978-0-199-69958-2.]

This book embodies the results of the author's extensive work in the field over many years evidenced by the large number of papers he has had published that are cited in the footnotes. All in all, it is a formidable work of legal scholarship, and not just because of its length. There are, however, a number of typographical errors which escaped the eyes of the editor and proofreader. I will only mention the reference on p. 506 to Lord Tomlin as a member of the House of Lords in 1893.

The author has included in his topic estoppel by representation when it affects property rights. Although this is useful for comparative purposes, the reviewer considers that the topic should be confined, as it has been traditionally and in the case law, to the equitable causes of action for estoppel by standing by and estoppel by encouragement. The author prefers estoppel by acquiescence for the first, despite the risk of confusion with other equitable doctrines of the same name, and promise-based estoppel for the second, which name is yet to get a foothold in the case law. The equitable causes of action enforce property rights created informally by the party estopped. Estoppel by representation, despite its equitable origins in the seventeenth century, is not a cause of action, but limits the evidence available to the party estopped.

The author's decision to maintain the distinction between each of the three forms of estoppel that he includes in the topic, and between them and promissory estoppel (pp. 3, 12, 14, 21, and elsewhere throughout), is to be applauded. Also welcome is his rejection of a broad operation of unconscionability in estoppel by encouragement (pp. 325, 330–40, 497): "An unparticularised notion of unconscionability cannot provide a workable guide to the parties' rights" (pp. 14, 332, 338, 339–40, 421, 619). It cannot be an element in the cause of action (pp. 332–33) or "give practical guidance as to … the extent of [the equity]" (p. 421). Debatably, he favours a residual role for the concept (pp. 291, 331–52, 402, 432, 546) when considering the effect of vitiating factors (pp. 340–42), changes in the parties' circumstances (pp. 342–52) and the obligations of the promisor after a sale to a bona fide purchaser (p. 546).

The author considers the topic in its context of neighbouring doctrines such as promissory estoppel, estoppel by representation generally, constructive trusts, contract and restitution. This is a valuable feature because it not only illuminates the existing law on the central topic and its boundaries; it also facilitates future developments either in this form of estoppel or in one of those other doctrines.

The author reviews the case law in depth, reported and "unreported", and does not hesitate to criticise those decisions which do not align with his views. The "unreported" case law on this topic is substantial and greatly exceeds the reported. In this endeavour, the author has left no stone unturned, demonstrated by his reference (p. 405) to an unreported extempore decision of the reviewer in the New South Wales Court of Appeal in 2010. The large number of unreported decisions in that court points to an even larger number of unreported decisions at the trial level, and suggest still more cases that must have been settled. The volume of litigation in this jurisdiction based on estoppel by encouragement shows that this cause of action, brought to the profession's attention by *Chalmers v Pardoe* [1963] 1 W.L.R. 677 (PC) after a century of neglect, has enabled the courts to remedy many injustices.

One cannot help wondering whether the costs imposed on litigants, the profession and the courts by the recording, retention, searching and analysis of unreported decisions serves the public interest. Perhaps unreported decisions should be removed from websites and databases after 10 years, or the courts should refuse to allow such decisions to be cited after that time, to impose some limit on this form of legal archaeology. The problem of course is that important decisions are not always reported, such as the judgment of Hoffmann L.J. in *Walton v Walton* (14 April 1994) adopted by the House of Lords in *Thorner v Major* [2009] 1 W.L.R. 776.

The book will save the reader the task of tracking down the modern decisions, particularly the unreported. The author deals comprehensively with the many points on which the law is not settled, reviewing the arguments for and against, but leaving the reader in no doubt about his preferences. He deals with the effect of formal requirements on estoppels by encouragement (ch. 6), the impact of taxation (pp. 582, 598–606), the position of third parties (ch. 8) and the treatment of these estoppels in the conflict of laws (pp. 606–11).

Unfortunately, the author's mastery of the topic occasionally leads him to maintain views contrary to authority at the highest level. Thus he asserts that *Holiday Inns Inc. v Broadhead* (1974) 232 E.G. 951 was based on proprietary estoppel (pp. 78, 89, 443, 457, 532, 541, 542, 584) despite Lord Scott stating in *Cobbe v Yeoman's Row Management Ltd.* [2008] 1 W.L.R. 1752, 1766, 1770, with the approval of Lord Hoffmann (p. 1754), Lord Walker (p. 1785), Lord Brown and Lord Mance (p. 1789), that "correctly analysed" it was based on a *Pallant v Morgan* [1953] Ch. 43 constructive trust. The author sees in the promissory component of estoppel by encouragement, and the few cases in which courts have enforced such an estoppel by a purely personal order (pp. 516, 517, 520, 521, 523, 527, 546–47), the basis of a new "equity" conferring a personal remedy on a promisee who relied on a serious promise, unrelated to property, to his detriment. The proposal is well argued, and recently attracted the support of Sir Phillip Sales in their joint paper "Promises, Detriment, and Liability: Lessons from Proprietary Estoppel" (2015) 131 L.Q.R. 610. The problem is that, in *Cobbe*, an ideal vehicle for such a development, it did not occur to counsel or the Law Lords that such a development might be possible. The House did award a personal remedy, but in restitution. Moreover, in that case and in *Thorner*, the House emphasised the proprietary element of proprietary estoppel. The occasional award of what may appear to be purely personal relief provides scant support for a personal remedy divorced from any proprietary element.

Another debatable opinion of the author is his statement that the equitable doctrine of making a representation good became defunct during the second half of the nineteenth century (pp. 9, 450–52). The author has something of a blind spot here because, as noted in another place, the doctrine of making good the representation was applied by Stirling J. in *Mills v Fox* (1887) 37 Ch.D. 153 and has never been repudiated by the courts. It was referred to by Lord Cranworth L.C. in *Jorden v Money* (1854) 5 H.L.C. 185, 210, 215; by Lord Kingsdown in *Ramsden v Dyson* (1866) L.R. 1 H.L. 129, 170; by Lord Selborne in *Citizens Bank of Louisiana v National Bank of New Orleans* (1873) L.R. 6 H.L. 352, 360 and *Brownlie v Campbell* (1880) 5 App. Cas. 925, 936; by Lord Herschell in *Derry v Peek* (1889) 14 App. Cas. 337, 360; by Lord Hobhouse in *Fatimatulnissa Begum v Soonder Das* (1900) L.R. 27 Ind. App. 103, 108; by Lord Macnaghten in *George Whitechurch Ltd v Cavanagh* [1902] A.C. 117, 130; and by Lord Haldane L.C. in *Nocton v Lord Ashburton* [1914] A.C. 932, 952. An equitable doctrine does not become defunct because it is not invoked by counsel, and estoppel by encouragement was still available despite a century of neglect after *Ramsden v Dyson* in 1866 until *Inwards v Baker* [1965] 2 Q.B. 29 (CA).

The author notes the difficulty in some cases of quantifying the detriment of the promisee (pp. 435–36, 477, 481) and concludes, contrary to his general position, that in such cases "a court may … prefer to give effect to a proprietary estoppel by compelling [the promisor] to comply with his promise" (p. 435). He does not rely in this context on the analysis of Nettle J.A., as he then was, in *Donis v Donis* (2007) 19 V.R. 577, 588–89, since approved in *Sidhu v Van Dyke* (2014) 251 C.L.R. 505: "Here the detriment suffered is of a kind and extent that involves life changing decisions with irreversible consequences of a profoundly personal nature … beyond the measure of money."

In both those cases, the promisee's expectation was enforced. He does cite *Donis* but in other contexts. The author relies on the lapse of the doctrine of making good the representation to support his thesis that relief in an estoppel by encouragement case should normally be framed to prevent the promisee suffering the detriment that would result if the promisor could repudiate his promise (pp. 431, 432, 442, 468).

He considers the English and Australian decisions dealing with the measure of relief, including those where the promisee's expectation was enforced (p. 445). He states that "the law has been steadily moving away from the view that [the] equity will necessarily or even presumptively match the content of the promise" (p. 421). However, later (p. 570) he writes: "Where A's duty to B relates to particular land, the default position is that A's duty will be specifically enforced … [This] is of particular importance in proprietary estoppel." The author should deal with this apparent contradiction in the next edition. For similar reasons, he favours the positive principle that relief should be proportionate to the promisee's detriment, rather than the negative principle adopted in some English cases and in Australia that it should not be disproportionate (pp. 467–68).

The reader will have been surprised by the extent to which the law on this important topic remains uncertain. This book should have an important role in the work of the courts in solving these questions.

The Honourable K.R. Handley
A former Judge of the New South Wales Court of Appeal