

CASE NOTE
WALTONS STORES (INTERSTATE) LTD V MAHER

When will a defendant be forced by a court to make good a non-contractual representation? Or to put it in the words of Mason C.J. and Wilson J. "... enforcing directly ... a non-contractual promise on which the representee has relied to his detriment"?¹ This was the situation that confronted the High Court of Australia in *Waltons Stores (Interstate) Ltd v. Maher*.²

This issue was raised in *Waltons* to answer the question of when, in the course of negotiations antecedent to contract which contract never in fact comes into being, will *a party be estopped from denying the existence of a binding agreement*. The issue was again raised before the New South Wales Court of Appeal in *Silovi Pty Ltd v. Barbaro & Ors*,³ which held a party bound by a concluded agreement, notwithstanding that that agreement was void or unenforceable, by application of the decision of the High Court in *Waltons* case. It must be emphasised that the contract by estoppel is but one instance of the general principle of the *enforcement of a voluntary promise* upheld in *Waltons v. Maher*.

The facts of the *Waltons* case are as follows. Waltons had conducted negotiations with Mr & Mrs Maher for a lease over land owned by the Mahers. Waltons proposed that the existing building be demolished and replaced by a building, to be built by the Mahers in accordance with Waltons specifications, which land and building Waltons would take up under the proposed lease. Waltons had stated that if a lease were agreed upon it would need to take occupation on the 15 January 1984. The critical telephone conversation occurred between the solicitor acting for the Mahers and the solicitor for Waltons on 7 November 1983. There the Maher's solicitor informed Walton's solicitor that it would be unable to complete construction, before the target date unless it were to begin demolition immediately, and that it would need a decision on the proposed amendments to the lease before it would begin such demolition. Maher's solicitor requested agreement "within the next day or two". Walton's solicitor replied that he had not obtained instructions as to the amendments from his client, but that he would inform the Maher's solicitor "tomorrow" if Waltons did not agree to the amendments. No objections were conveyed to the Mahers. So four days later the Maher's solicitor sent on the amended lease proposal, executed for their

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1 *Waltons Stores (Interstate) Ltd v. Maher* (1988) 76 ALR 513, 521.

2 *Ibid.*

3 (1988) NSWConvR 55-315.

part, to Walton's solicitor. Waltons for its part never executed the proposed agreement. It was not until 19 January 1984 that Waltons solicitor returned the document unsigned, and accompanied by a letter stating that they did not intend to proceed. However in the interim, between the telephone call and the letter of withdrawal, the Maher's had demolished the old building and had part erected the new building according to Walton's specifications.

Upon Waltons refusal to proceed the Mahers commenced an action in the Supreme Court of NSW for a declaration that a binding contract existed, specific performance or alternatively damages. They succeeded at first instance, and Waltons appeal was rejected both by the NSW Court of Appeal and the High Court.

On the finding of the facts by Mason C.J., Wilson and Brennan JJ. the principle of equitable estoppel was called upon. The parties had reached agreement in principle but 'subject to contract'. That is, the parties had specified a formal method, namely the exchange of contracts, as a pre-condition to the creation of a binding contract. The Mahers had then been lead to assume that exchange of contracts *would* take place as a formality. It was the statement by Walton's solicitor that he would communicate any refusal, and his omission to do so, that had induced the Mahers to believe that the amendments were acceptable and so to adopt this assumption. It follows that a *representation of future conduct* was at issue and so the question was one of equitable estoppel and not common law estoppel.

The joint judgment of Mason C.J. and Wilson J. and the judgment of Brennan J., enunciated a fundamental restatement of the principles of equitable estoppel. They distinguished it from common law estoppel, which operates on a representation of fact: *Jorden v. Money*.⁴ Equitable estoppel operates on a representation of future conduct: *Legione v. Hately*.⁵ Importantly, their Honours stated that promissory estoppel, proprietary estoppel and estoppel by acquiescence are not definitionally distinct categories, rather they are merely illustrative instances of the one general principle.⁶ That is, the single principle of equitable estoppel.

The single unifying principle being that a "departure from the basic assumptions underlying the transaction between the parties . . . [is] . . . unconscionable".⁷ That being the adoption of the unifying factor increasingly recognised in Australian equitable decisions.

In a fundamental change to previous orthodoxy their Honours accepted the argument of Professor P. Jackson⁸ that it is not logical to state that

4 (1854) 5 HLC 185.

5 (1983) 152 CLR 406, 432; thus, the limitation in *Jorden v. Money* note 4 *supra* that the representation must be as to an existing fact and not as to future conduct, was distinguished as applying only to the case of common law estoppel: see note 2 *supra*, 519.

6 Note 1 *supra*, 523 *per* Mason C.J. and Wilson J., 536 *per* Brennan J., and 565-6 *per* Gaudron J.; note 3 *supra*.

7 Note 1 *supra*, 525.

8 P. Jackson, "Estoppel as a Sword" (1965) 81 LQR 223, 242.

proprietary estoppel could be used as a sword while promissory estoppel could only be used as a shield. Thus it was held that equitable estoppel can constitute a *cause of action in itself*, and is not only a defensive equity. It follows that estoppel could be called upon even in the *absence of a pre-existing legal relationship*, between the promisor and the promisee, and the subject of the promise need not be the non-enforcement of a strict contractual right. Accordingly, it was appropriate to use an estoppel as the basis for a *positive action* to recover *damages*.

Their Honours recognised that this could be seen as circumventing the doctrine of consideration, and generally "cut across the principles of the law of contract".⁹ Their answer to this, however, is to chose a unity in the doctrine of estoppel, and reject arbitrary distinctions.¹⁰

Mason C.J. and Wilson J. defined the principle of equitable estoppel as follows:

Equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has (by words or conduct) 'played such a part in the adoption of the assumption' . . . that it would be unconscionable conduct on the part of that other party to ignore the assumption.¹¹

However, failure to fulfill a promise does not of itself amount to 'unconscionable' conduct. Similarly the mere exercise of a legal right not to exchange contracts cannot of itself be said to be unconscionable conduct on the part of the defendant.¹² Rather the following additional elements must be made out: (1) creation or encouragement, by action or inaction of the party estopped, of an assumption in the promisee. That assumption can be that a contract will come into existence or a promise will be performed, and is not limited to an assumption that the promisor will not enforce a strict legal right. (2) The promisee must act in *reliance* on that assumption. (3) That action being to the *detriment* of the promisee. (4) The promisor must *know* of the promisee's action to his detriment. These defining elements prevent "unconscionable conduct", and thereby equitable estoppel, being used as "a charter for idiosyncratic concepts of justice and fairness".¹³

It is only when these elements are made out (as here) that a party will be estopped from exercising his *liberty to withdraw* from the negotiations, or in other words forced to make good his representation.¹⁴

Finally, the lack of a written note or memorandum of the agreement was raised as a section 54A Conveyancing Act 1919 (NSW) defence to Maher's claim. This was rejected because the promisor (Waltons) was estopped from denying the existence of a contract which was legally binding and so estopped

9 Note 1 *supra*, 521 *per* Mason C.J. and Wilson J.

10 *Id.*, 538-540 *per* Brennan J.

11 *Id.*, 524.

12 *Id.*, 525.

13 *Legione v. Hatley* (1983) 57 ALJR 292, 301 *per* Mason C.J.

14 Note 1 *supra*, 525.

from relying on s. 54A.¹⁵ This decision then creates an alternative to the part performance exception to s. 54A.¹⁶

Brennan J. acted on a similar finding of facts, and his judgment repeats the key elements identified by Mason C.J. and Wilson J.¹⁷ His Honour, however, placed emphasis on the understanding between the parties, that is, both parties must understand that they are not free to withdraw.¹⁸ Similarly, Mason C.J. and Wilson J. emphasized that the parties believed that exchange of contracts was only a *formality*.¹⁹ These comments may yet prove to be a limiting factor on the decision.

Brennan J. held that the plaintiff's action was not brought upon a contract but on the basis of "an equity created by estoppel".²⁰ This, at least analytically, better explains the positive enforcement in this case, with again the central element being unconscionability. That is, a plaintiff cannot seek the assistance of a court of equity in aid of his rights if he does not have an 'equity'.²¹ One of two types of 'equity' may be created. A 'personal equity' was found to exist in *Walton's* case. On the other hand, in *Silovi Pty Ltd v. Barbaro & Ors*,²² where the promisor was also the holder of the property the subject of the promise, an interest in the property was created. That is, the promisee successfully established that the equity thus created was binding not only upon the promisor, but in reality created an interest in the property.²³ Accordingly at general law, in this later category a purchaser of the legal title taking with notice of the equity created by the estoppel is bound by that equity.²⁴ By contrast, under the Torrens system the title of the registered proprietor is defeasible for fraud only where the purchaser takes not merely with notice of the equity, but having agreed to be bound by that equity.²⁵

Deane J. took a different view of the facts to Mason C.J., Wilson and Brennan J.J.. He instead accepted that the Mahers assumption was that a binding contract *had* in fact been concluded; notwithstanding that there was no actual physical exchange. Thus a representation of fact was at issue. Given these facts it was necessary to his Honour's decision, only that he adopt the orthodox view by placing the situation under the head of common law estoppel (representation of existing fact). However his Honour's express

¹⁵ *Id.*, 526 *per* Mason C.J. and Wilson J., 555 *per* Deane J., 570 *per* Gaudron J.

¹⁶ *Id.*, 558 *per* Deane J.

¹⁷ *Id.*, 542.

¹⁸ *Id.*, 538.

¹⁹ *Id.*, 525; see also *id.*, 523 *per* Mason C.J. and Wilson J., stating that ordinarily the recipient will appreciate that he cannot safely rely on a gratuitous promise absent formal documentation.

²⁰ *Id.*, 532.

²¹ R. Meagher, W. Gummow and J. Leane, *Equity — Doctrines and Remedies* (2 ed. 1984) 111.

²² Note 3 *supra*.

²³ *Silovi Pty Ltd v. Barbaro & Ors*, *ibid*; note 1 *supra*, 535-536.

²⁴ Note 21 *supra*, 113.

²⁵ *Loke Yew v. Port Swettenham Rubber Co. Limited* [1913] AC 491; see also note 3 *supra*, 389-391.

reason for decision took a broad view, rejecting a distinction between common law estoppel and equitable estoppel.²⁶ Deane J. held that there is but one category, "estoppel by conduct", the principles of which apply equally to both a representation as to future conduct and to a representation of an existing fact (and arguably representations of law²⁷). His Honour thus went one step further than Mason C.J. and Wilson J.²⁸

Deane J. highlighted the relevance of "simple standards of honesty and fair dealing"²⁹ which underlie the common law as well as the equitable, doctrines of estoppel by conduct.³⁰ It follows from these 'standards' that words used by solicitors or their clients extraneous to normal conveyancing practice, or in the course of negotiations towards any commercial contract, should be carefully chosen, lest they return in subsequent litigation to haunt their speaker. The governing principle, in summary then, stops departure from a representation or an induced assumption (a representation by silence) of an existing or future fact when the party estopped has knowingly and silently stood by and watched the other party act to his detriment.³¹

In Deane J.'s view the estoppel does not itself create a cause of action against the party estopped,³² but instead establishes a factual foundation for a cause of action under an assumed contract which the defendant is estopped from denying.³³

Gaudron J. also dismissed the appeal. Her Honour characterised the application of the law in a unique way, characterising the Mahers claim as one based upon common law estoppel (representation of existing fact) as distinct from equitable estoppel (representation of rights).

If the test thus laid down by the High Court in *Walton's* case is met and a contract is established by the estoppel, the remedy will be as for contract. Damages, if awarded, will be assessed on the contractual basis that they are to put the plaintiff in the same position as he would have been had the representation been true.³⁴ Damages were accordingly awarded in *Walton's*

26 Note 1 *supra*, 559.

27 *Id.*, 560 *per* Deane J.; note 3 *supra*.

28 *Id.*, 523.

29 *Id.*, 553.

30 *Id.*, 557.

31 *Id.*, 553.

32 *Id.*, 554.

33 It is important to also note that even if the elements of equitable estoppel are not made out, the facts may at least constitute an admission by conduct in a civil case. For example, *Permewan v. Ippolito* (1965) 83 WN (Pt.1) (NSW) 90 held that a defendant's conduct in not objecting to being described in several receipts as a lessee, constituted an admission that there existed a landlord-tenant relationship.

34 This is different to the tort basis of the assessment of damages (to put the plaintiff in the same position as he would have been had the representation not been made: *Gates v. The City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1) which is applied to a claim for negligent misrepresentation or for breach of s. 52 Trade Practices Act, 1974. The different basis is the reason that an action upon estoppel (contract basis) is to be preferred to an action upon negligent misrepresentation or s. 52 (tort basis).

case. If damages are an inadequate remedy specific performance may be granted. This would be achieved by an order that the representor grant a contract in the terms represented, and then comply with his obligations thereunder: *Silovi Pty Ltd v. Barbaro & Ors.*³⁵

³⁵ Note 3 *supra*, 391.