

PART VIII – ESTOPPEL

I INTRODUCTION

A *The Principle of Estoppel*

An estoppel is a principle that prevents a party from asserting a contrary position to that which has already been established.

An estoppel can create rights when non-contractual promises or representations are relied upon by a party to their detriment. It does so by obviating technical difficulties encountered when attempting to enforce agreements.

B *Types of Estoppel*

1 *Common law estoppel*

Common law estoppel operates in relation to representations or assumptions of *existing fact*. It is a rule of evidence.

This type of estoppel can only act as a shield, not a sword. That is, it is only a way to establish evidence and not a cause of action in itself. Common law estoppel *only* determines the facts by which a court will determine the dispute.

An example of the application of common law estoppel is in the representation that ‘the contract is signed’. Here, the party relying on this assumption may use common law estoppel to establish that the contract is signed for the purposes of another action in contract.

2 *Equitable estoppel*

Equitable estoppel operates in relation to representations or assumptions as to *future* conduct. Its scope of application is substantially wider, because it does not just determine evidence but can be a cause of action.

The effect of equitable estoppel is to prevent the representor from acting inconsistently with the assumption without taking steps to ensure that the departure does not cause harm to the relying party.

This type of estoppel can act as both a sword and a shield. It is a cause of action in itself, and can be used offensively.

Synonyms for equitable estoppel include promissory estoppel and proprietary estoppel. This type of estoppel is our focus.

An example of the application of equitable estoppel is in the representation that ‘I will sign the contract’. The party relying on this statement may bring an action on the basis of their detrimental reliance upon it.

3 *Estoppel by convention*

This is a common law principle that applies when parties to a contract use a particular state of affairs as the basis of their contractual relationship.

C *Circumstances of Application*

An estoppel can arise where one party leads another to assume that

- A contract was formed
- A verbal contract will be performed notwithstanding non-compliance with writing requirements
- A contractual provision has a particular meaning
- Particular conduct will not constitute breach of contract
- A particular excuse or vitiating factor will not be asserted
- A contract will not be terminated

In all these cases, the party suffers loss as a result of their reliance upon a particular semantic representation induced by the other party.

In short, anything someone says or makes representations about can be used as a basis for an estoppel argument. The effect of estoppel is to eliminate the need for writing in many cases.

Exam note: identify the relevant statements or conduct upon which the enforcing party relied.

D *History of Estoppel*

Originally, a promise or representation could only be binding by way of contract (*Jordan v Money*). There was a strict theoretical body of case law in support of this proposition; the courts were reluctant to impose an obligation without the formal elements of a contract being present, since it may reduce certainty or contravene the intentions of the parties.

In recognition of the inequity of certain outcomes in practice, two exceptions developed to this strict application of contractual theory:

1 *Proprietary estoppel*

- Only operates when the particular interest relates to land
- Representations must be about property, important, and expressly made in order to be capable of protection by an estoppel

2 *Promissory estoppel*

- Our focus; claims were pursued in the courts of equity
- This action prevented a party denying and acting contrary to a representation
- However, the remedy still had to be founded in another doctrine (eg, contract)

This gradual expansion of estoppel was characterised by an unwillingness to revoke established general principles (of strict contractual theory), and instead punctuated by the development of exceptions to the rules and strategies by which to avoid their application.

At this stage, promissory estoppel still did not cover reliance on promises as to future intention. However, *Waltons Stores (Interstate) v Maher* further expanded the ambit of estoppel to representations about future intention.

E Applications of Estoppel

Je Maintiendrai v Quaglia:

Facts

- A landlord promised to accept a reduced rent from the tenants
- The landlord attempted to resile from the promise and made a claim for rent in arrears

Issue

- Does an estoppel arise from the landlord's representation?

Reasoning

- The promise to accept reduced rent was not enforceable as a contract because the tenants did not provide consideration, so the tenants were forced to turn to an estoppel
 - Promissory estoppel was raised as the basis of a defence to the landlord's claim for rent
 - The landlords made the representation that rent would be reduced; P structured his business around that (in reliance upon the representation), and suffered loss as a result
- Promissory estoppel seeks to address the unfairness arising out of there being no contractual agreement due to the strict application of contractual principles (eg, consideration)
 - See *Hughes v Metropolitan Railway Co*: estoppel is concerned with *fairness*
- White J:
 - The requisite detriment is to be found in loss of an opportunity to rent another property or assign (sublet) the lease
 - However, having to pay of the money in arrears is *not* a detriment (since incurring the existing contractual obligation to pay does not make the tenant any worse off)
- King J:
 - Detriment is indicated by financial hardship
 - The plaintiff needs to show the dissipation of assets and/or inconvenience or unfairness
 - Here, having to pay the rent in arrears in one lump sum constitutes a significant financial burden (as compared with having to pay in instalments)
- Cox J (dissenting):
 - The plaintiff did not show detriment to have been suffered as a result of relying upon the defendant's representation

Decision

- An estoppel is established on the basis of the tenant's loss of the opportunity for financial gain suffered in consequence of reliance upon the assumption induced by the landlord's

- representation that the rent would be reduced
- The tenant does not need to pay the rent in arrears

Note also *Foakes v Beer*: accepting partial payment does not extinguish the full debt; the amount remaining is still in arrears. This means that the party seeking to establish the payment of the debt needs to show either contractual variance of the terms (supported by consideration), or found an estoppel in response to the other party's claim for the full amount.

II ELEMENTS OF ESTOPPEL

A Standard Elements

There is no definitive statement on the elements of estoppel. However, three elements clearly must be established:

1 Assumption

- This is the expectation of the plaintiff that the defendant will act in a certain way

2 Inducement

- This is a causal requirement; the reliance needs to be based upon an assumption or representation made by the other party

3 Detrimental reliance

- This is absolutely essential, and should be the starting point in any analysis
- The plaintiff must suffer some detriment as a result of his or her reliance upon the assumption induced by the other party

B Additional Elements

Arguably there are three additional requirements:

1 Reasonableness

2 Unconscionability

3 Departure or threatened departure

These elements are less important, since they will – assuming the standard requirements are met – almost always be satisfied (emphasise less).

An example of the application of these requirements in the context of unconscionable conduct by a lessee may be found in *Waltons Stores v Maher*.

Waltons Stores (Interstate) Ltd v Maher:Facts

- W negotiated to lease land from M
- M was required to demolish buildings and construct a new building to W's specifications
- These buildings had to be completed by 15 January 1984 (per W's request)
- When negotiations were essentially complete, W's solicitors sent M a copy of the lease which incorporated amendments requested by M
- W's solicitors told M's solicitors that they would inform them the *next day* if any of the amendments were unacceptable
- M heard no more from W's solicitor
- The lease was signed by M on 11 November
- W became uncertain as to whether it would want to enter into the lease with M
- W instructed its solicitors to 'go slow'
- W became aware that M destroying building on 10 December but still delayed signing
- Between 11 November and 10 December, W denied knowledge of the demolition (note, however, that 10 December, they could deny knowledge)
- In January, when construction of the new building was 40% complete, W informed M that W did not intend to proceed with the lease

Issue

- Could Maher recover for the costs of construction through an action in estoppel?

Reasoning

- There was no contract because the construction was not an execution of the lease
 - No communication of acceptance of M's offer
 - Unless parties agree, there can be no enforceable contract
- Mason CJ and Wilson J:
 - The following elements are identified as requirements for an estoppel action:
 - Assumption
 - Detrimental reliance
 - Unconscionability (the representor played such a part in the adoption of the assumption that it would be unfair or unjust to let him or her ignore it)
 - This is a similar requirement to inducement
 - On the facts:
 - M had made a reasonable assumption that the contract would be signed by W
 - The representation was that 'we will sign it soon' – W saw the demolition and knew that M was proceeding with the execution of the contract
 - This is sufficient to infer an assumption that a legal relationship did (or would) exist between the parties such that it would be unconscionable for W to ignore their obligations
 - M suffered detriment in demolishing the building and partially constructing the new one to W's specifications
 - W pressured M to have the new building complete by a certain date (15 January), and saw the demolition; making no attempt to back out from the negotiations prior to this (or even at this stage) is unconscionable
 - This analysis is similar to a common law contractual analysis; the common law contract is seen to be created by the estoppel
- Brennan J:
 - Estoppel is a separate cause of action parties do not need a contract, and the distinction is one of damages

- Elements of estoppel:
 - Assumption that a legal relationship exists or will exist
 - The assumption must relate to the existence of a legal relationship
 - There are, however, cases that are inconsistent with this
 - Eg, *W v G*
 - Inducement
 - Action in reliance
 - Knowledge of reliance or intention to induce reliance
 - Detriment arising from reliance if assumption not fulfilled
 - Failure to avoid detriment
- Possible assumptions on the facts:
 - The expectation that W would duly complete (equitable estoppel applies because it is about the future)
 - The assumption by M that W had duly completed the exchange (common law estoppel applies since this relates to the present)
 - The assumption by M that there was a binding contract in existence whether or not exchange had been completed (common law estoppel applies since, again, this relates to the present)
- Deane and Gaudron JJ:
 - An estoppel is granted based on common law estoppel (which applies to current facts)
 - Because M did not hear back within a day from W, there arose the assumption of a contract being signed
 - This assumption was induced by W, and detriment is suffered as a result
 - Thus, all the elements of common law estoppel are made out, and a contract is treated as having been formed
 - This is the traditional approach to equitable remedies (not a separate cause of action; evidentiary shield)

Decision

- Several different sets of requirements are put forward for an action in estoppel
- Where a common law estoppel is granted, assumption, inducement, and detrimental reliance are necessary (Deane and Gaudron JJ)
- Where an equitable estoppel remedy is granted, assumption, detrimental reliance, and unconscionability are required (Mason CJ and Wilson J); Brennan J outlines further requirements (knowledge of reliance, failure to avoid detriment, departure from assumption)

Notes

- The outcome suggests that contract law is still necessary:
 - Contract law still has a role to play in most transactions because it ensures the *certainty* of obligations
 - However, the High Court didn't seem to have any compunctions about creating expansive estoppel principles, even if contrary to contractual ones
 - Even so, the lack of certainty in estoppel means that contract still has a very large arena of application

C Assumption

An assumption may pertain to

- An existing or future legal relationship (Brennan J in *Waltons Stores*); or
- An existing or future legal interest (*Giumelli*)

The requirement that the assumption relate to a legal relationship or interest has been called into question (*W v G*).

1 Assumptions as to legal relationships

As was noted by Brennan J in *Waltons Stores*, an assumption as to the existence of a legal relationship must be either

- That a particular legal relationship *then* (at that time) existed between A and B; or
- That a particular legal relationship *would* (in the future) exist between them

The representation on the basis of which the assumption as to the existence of a legal relationship is made must have a definite or certain element to it (*Mobil v Wellcome*).

Mobil v Wellcome International:

Facts

- Mobil wanted to implement a tenure for performance scheme
- Mobil told its franchisees that it *wanted to* implement a proposal whereby those franchisees who achieved a score of 90% or better in any year would be granted an extra year's tenure (one for one proposal)
- At that time Mobil also informed franchisees that this may be difficult to achieve under the *Petroleum Retail Marketing Franchise Act 1980* (Cth)
- The franchisees were then informed that it may be that the only way to give extended tenure is to say that if performance targets were achieved over a six year period, they would be granted a nine-year renewal of their franchises (six for nine proposal)
- Mobil revoked the scheme after four years

Issue

- Was there an estoppel to prevent Mobil from discontinuing the scheme?

Reasoning

- There is no contract between Mobil and the franchisees because the representation was not certain; there was no offer
- Because no firm commitment was made by Mobil (they only said that they 'wanted to' implement the scheme, not that they would be able to), there is no assumption by the franchisees that Mobil would implement the scheme
 - Estoppel will not protect where statements were 'unqualified' and 'unspecific' because it is not reasonable to rely on them
- Even if there was an assumption by the franchisees, there was no detriment
 - This is because the action they took in reliance on the alleged assumption was to improve the appearance of their stores and their level of customer service, which – far from detrimental – are beneficial to their business

Decision

- There is no estoppel because no assumption could be reasonably made on the basis of vague and unqualified statements made at a conference

Notes

- The court assessed the merits of the assumption made by the dealers from Mobil's

perspective – the statements they made were vague and unspecific, and so could not give rise to an assumption

- This was appropriate, because it maintains the principle that the terms of an offer should be interpreted objectively (and in accordance with standards of reasonableness) and not purely from the perspective of the offeree
- If the alleged offer was analysed from the perspective of the franchisees, and not that of a reasonable person, it would distract the focus of the enquiry from the statement itself to its effect on the alleged offeree, which is unwanted (since it is inconsistent with the objective approach taken in other areas)

2 Assumptions as to legal interest

The High Court of Australia has also stated that assumptions relating to existing or future legal interests are sufficient to ground an equitable estoppel (*Guimelli v Giumelli*).

D Inducement

The assumption adopted by the relying party must have been induced (ie, encouraged) by the conduct of the representor. This requirement may be likened to a causation requirement.

- An express promise is not necessary (*Waltons Stores*)
- The reasonableness of relying on the representation can be incorporated into the analysis at this point

This is the link between the representation and reliance upon it by the plaintiff.

E Detrimental Reliance

The relying party must have altered their position such that they would suffer detriment if the representor could renege on the promise.

The detriment must be significant (*Verwayen*) or substantial (*Je Maintiendrai*). The circumstances of the parties will influence analysis. That is, the particular party must be examined (consider, eg, whether a lump sum payment is a detriment).

Detriment can take many forms including:

- Wasted expenditure of money (*Waltons Stores*)
- Wasted time or energy
- Inactivity (loss of opportunity)
- Bearing and raising children (*W v G*)
- having to pay an amount all at once rather than by instalment (*Je Maintiendrai*)

E Reasonableness

This requirement involves two separate questions:

- Firstly, whether the relying party acted reasonably in adopting the relevant assumption; and

- Secondly, whether the relying party acted reasonably in taking the relevant detrimental action on faith of the assumption

In determining whether the assumption and subsequent reliance thereupon were reasonable, consider the

- Nature of the assumption
 - Ie, realistic and not ludicrous assumptions are more likely to be reasonable
- Conduct engaged in by the representor
 - Ie, express statements more reasonably give rise to an assumption than questionable inferences from conduct
- Identity of representor
 - Ie, it is more reasonable to rely upon large institutions and governments
- Relationship between the parties
 - Ie, established dealings over a period of time may make it more reasonable to rely upon an assumption induced by present conduct

F *Unconscionable Conduct*

All forms of estoppel provide for a party who induces another to make an assumption to be estopped from departing from that assumption if it would be unconscionable to do so.

However, just what unconscionable conduct comprises is unclear. *Verwayen* indicates that

conduct which is unconscionable will commonly involve the use of or insistence upon legal entitlement to take advantage of another's epical vulnerability of misadventure in a way that is unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing. (Per Deane J)

Unconscionability attracts the jurisdiction of the court and shapes the remedy (per Brennan J in *Waltons Stores*). Arguably it is (or could become) a separate requirement.

This 'requirement' raises questions about the knowledge or intention of the representor. For example, do they need to intend to act unconscionably or merely produce an unfair result? Does it matter that they are within their legal right to behave in the way they did? One important feature of equitable estoppel actions is that parties must come to the court with 'clean hands'. If the representor has not behaved unconscionably, it may not be necessary for a court to intervene.

Generally, it will be unconscionable for a representor, A, to depart from a promise, representation, or conduct, which causes B to detrimentally rely upon an assumption formed as a result, if:

- A induced B to make the assumption;
- It was reasonable for B to make the assumption; and
- B has reasonable relied on the assumption, such that departure from it would be detrimental to B

In other words, the standard requirements (in addition to an assessment of reasonableness) are sufficient to give rise to an inference of unconscionability such that a court of equity may step in to rectify loss suffered B.

G *Departure*

So long as the assumption continues to be regarded by the parties as true, the question of estoppel does not arise, since the parties honour their agreement.

Support for this requirement may be found per White J in *Maintiendrai*.

This requirement is unlikely to be difficult to establish, since it is departure from the assumption which causes the injustice and results in an action being brought. Without it, there can be no estoppel.

III REMEDIES

A *The Unification of Estoppel*

It has been argued that there is no need to distinguish between the various forms of estoppel. This view has not yet been accepted by a majority of the High Court. To some extent, this issue is problematic and unresolved.

- Judgments supporting unified doctrine:
 - Deane J in *Walton Stores and Verwayen*
 - The individual doctrines should be abolished and replaced with an independent cause of action
 - Mason CJ in *Verwayen*
 - The purpose of each doctrine is the same; namely, to overcome detrimental reliance
 - There is thus no need to separate what are essentially similar
 - '[T]he consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules...'
- Judgments supporting the existence of separate doctrines:
 - Brennan J in *Walton Stores*
 - Gaudron J in *Walton Stores*
 - McHugh J in *Verwayen*

Which type of damages award is favoured depends partly on the view of estoppel that is taken. How its ultimate purpose is perceived will determine the outcome it is capable of effecting:

- 1 *Enforcing* certain types of promises (mitigates towards expectation loss; holds the representor to their promise)
- 2 *Preventing* unconscionable conduct (mitigates towards the equitable solution; awarding expectation loss may be the best way to admonish unconscionable conduct); or
- 3 *Protecting* against harm resulting from reliance on the conduct of others (mitigates towards reliance loss; absolves detriment suffered in consequence of reliance)

B *Equitable Remedies*

The effect of establishing equitable estoppel is to raise an 'equity' in favour of the relying party. The courts aim to identify 'the *minimum equity* to do justice to the plaintiff' (*Crabb v Arun* per Lord Scarwin).

Essentially, this means that the courts will not put a party into a position any better than that which they would have occupied had they had not relied on their assumption. Expectation loss (what would have happened if the representor had acted in accordance with the assumption) is not compensated.

The courts have also indicated that there must be proportionality between the detriment and the remedy imposed (per Mason CJ in *Verwayen*). The focus is on the remedy; unconscionable conduct needs to be prevented or overcome by providing a remedy to nullify the loss.

C *The Difference between Expectation and Reliance Loss*

Expectation loss is different from reliance loss. Mason CJ in *Verwayen* noted there are two distinct types of detriment:

- Detriment which results from the denial of the correctness of the assumption upon which the plaintiff has relied (expectation loss); and
- Detriment which the plaintiff has suffered as a result of his or her reliance on the correctness of the assumption (reliance loss).

Courts of equity aim to compensate for the second type of detriment. That is, they aim to compensate for costs incurred as a result of reliance.

For example, in *Walton Stores*, the two types of loss may be identified:

- Maher's expectation loss was the rent they expected to receive from W during the term of the anticipated lease; and
 - This is a loss from the promise not being fulfilled
 - These were benefits that would have existed had the promise been enforceable
- Maher's reliance loss was the wasted expenditure incurred in demolishing the existing building and partially constructing the building required by W.
 - These are costs incurred in reliance on the promise being in force

An estoppel can operate to prevent a party contradicting an assumption pertaining to a state of legal affairs (*Verwayen*). In *Verwayen*, the Court seems willing to adopt an approach bordering on expectation loss, but tension between the two measurements of damages features prominently in the decision.

Commonwealth v Verwayen:

Facts

- V claimed damages from the Commonwealth for injuries resulting from the collision of two naval vessels engaged in a combat exercise
- V did not institute proceedings for about 20 years because he assumed he was not owed a duty of care (because he was injured during combat training)
- A High Court decision in 1982 cast doubt on that assumption and as a result V

- commenced tort proceedings (negligence)
- Owing to government policy, the Commonwealth:
 - Did not plead a defence available under the *Limitations of Actions Act 1958* (Vic)
 - Did not deny that a duty of care was owed to Verwayen
- In 1986 the Commonwealth changed its policy and sought to amend its defence to plead the relevant defences
- V argued the Commonwealth was prevented from doing so because:
 - It had waived its right to rely on the defences; and
 - It was estopped from pleading the defences

Issue

- Could the Commonwealth be estopped from contradicting the assumption it induced that it would not rely upon the relevant defences?

Reasoning

- The two defences that the Commonwealth sought to plead were as follows:
 - Combat exercise defence: if injuries were sustained during war or practice exercise, the Commonwealth owes no duty of care in tort
 - Statute of Limitations defence: the cut-off point for negligence claims is 6 years, after which all claims are statute-barred
- Mason CJ: assumptions as to a state of purely legal (rather than factual) affairs can still be the subject of an estoppel action
- Possible outcomes:
 - Commonwealth not allowed to amend its defence
 - Stopping the amendment defence completely (expectation loss – V can recover damages from the Commonwealth for his injuries)
 - Commonwealth is allowed to amend its defence
 - Allowing amendment and only compensating for legal fees, inconvenience, and emotional degradation (reliance loss – V receives damages for detriment sustained)
- A majority of four judges held in favour of V:
 - Dawson and Deane JJ:
 - An estoppel was made out
 - The proceedings were initiated in reliance upon Commonwealth policy
 - Other factors (anxiety, inconvenience) mitigated for an award of more damages than just legal fees
 - The Court has to give effect to the promise as a means of obviating the loss
 - This is the minimum way to overcome the detriment suffered by V
 - Deane J:
 - Questions whether reliance damages are the appropriate measure
 - It is important consider all the circumstances
 - The Court needs to be convinced by the promisor that the promise should not be enforced (unless unfair)
 - Gaudron and Hayne JJ:
 - The Commonwealth had waived its right to rely on the defences
- Mason CJ:
 - The Court should not enforce the government's promise, since it is not legally binding
 - Estoppel should only permit recovery for reliance loss

- On the facts, reliance loss consists of V's legal costs and the inconvenience of bringing an action
- The Commonwealth should be permitted to amend its defence, but V should be compensated for his detriment
- The breaking of a promise is not, of itself, necessarily unconscionable, so equity will not remedy consequential loss just because the position has been altered; 'something more than a broken promise is required'

Decision

- Majority: give effect to the Commonwealth's promise, allowing recovery that borders on expectation loss; V can proceed with the action and the government is barred from pleading the relevant defences, allowing V to recover full damages in tort
- Minority: only reliance loss is compensable; on the facts, damages should only be for the costs relating to the legal action, and not the damages expected by V under the assumption

Exam note: identify the reliance loss; note that the promise isn't enforced, but consider the alternative starting point of Deane J; also mention the distinction between expectation and reliance loss (as applied to the facts).

Giumelli is another case in which expectation loss is compensated in an estoppel action.

Giumelli v Giumelli:

Facts

- R and his parents were partners in a family orchard business
- R lived in a house he had built on one of the properties owned by his parents
- R's parents promised that if he stayed on the property, it would be subdivided and a portion including the house and an orchard (the promised lot) would be transferred to him
- On faith of that promise R gave up an opportunity to pursue a different career (reliance loss) and continued to work on the property
- The relationship between R and his parents broke down when he married a woman of whom his parents disapproved and his parents refused to complete the transfer
- R's brother S then moved onto the property with his family and made substantial improvements to the promised property

Issue

- Can R's parents be estopped from transferring the property to S, and, if so, what is to be the measure of R's damages?

Reasoning

- Possible outcomes:
 - Force the land to be transferred or provide a dollar equivalent of the value of the land (expectation loss)
 - Examine education and probable career and award dollar value of lost work (reliance loss)
- R was induced by express statements made by his parents; he relied on these statements and passed up opportunities to work elsewhere in order to develop the

<p>property; his detriment was the loss of the right to work</p> <ul style="list-style-type: none"> ○ An estoppel arises in favour of R because all the elements are met <ul style="list-style-type: none"> • Remedy: <ul style="list-style-type: none"> ○ An expectation-based approach is adopted ○ The only way to determine the damages is to provide the value of the land ○ (Aside: is this the easy way out? Remedies are unclear in estoppel as a result of this decision) <p><u>Decision</u></p> <ul style="list-style-type: none"> • R's parents are estopped from altering their position, and R receives damages for the value of the house (expectation loss) in compensation for this alteration <p><u>Notes</u></p> <ul style="list-style-type: none"> • The doctrine of consideration is arguably undermined • R did not provide consideration for his parents' promise to transfer the land, yet he was still able to receive the same outcome as if an enforceable contract were present

D *Interaction with Contract Law*

Estoppel plays a secondary role to the traditional rules of contract formation. Apply these traditional rules first; then consider estoppel.

It is arguable that estoppel can provide a separate cause of action to a party suffering loss in reasonable reliance upon an assumption reasonably founded as a result of departure by another party from the assumption induced by that other party.

- Since *Walton Stores* there has been increased recognition that estoppel can 'set the scene' for another cause of action
- However, note Deane J's express statement in *Walton Stores* that estoppel 'does not of itself constitute an independent cause of action'

W v G allows an estoppel to be used offensively, as a cause of action. Here, expectation loss is provided in compensation for an unconscionable departure from a promise unsupported by consideration, in a familial context.

W v G:

Facts

- W and G lived together in a lesbian relationship for several years
- During the relationship W conceived and gave birth to two children through a process of artificial insemination in which G assisted
- W and G later separated
- W instituted proceedings seeking, inter alia, child support from G for the costs of raising the child

Issue

- Can an estoppel arise in support of W's reliance upon the assumption that G would help care for the child?

Reasoning

- The elements of estoppel are made out:
 - Assumption – W assumed that G would assist in caring for the child, including associated costs
 - Inducement – G’s assistance in the insemination led W to believe, reasonably, that care would be provided
 - Detrimental reliance – by continuing with the insemination, W suffered what the Court categorises (controversially) as the detriment of having a child (and the associated expense of caring)
 - The Court does not, however, consider the benefits of having a child
 - Reasonableness – G’s frequent flights to see W are indicative of a reasonable expectation that support will be provided
- The detriment suffered by the plaintiff, W, was the additional expense that she would not have incurred had G not altered her position of caring for the child
 - If this expense were obviated, the compensation would be for expectation loss
 - Reliance loss: costs of IVF, flights to the clinic (by relying on the assumption, W incurred these immediate detriments)
 - Expectation loss: half the costs of caring for the child (if G did not depart from her representation that she would care for the child, W would only be responsible for half of the child’s expenses)
 - This approach is useful in situations where detriment is unclear: is there an immediate expense that wouldn’t have been there if the representor had acted in accordance with the assumption they induced the representee to make?
- The Court projects the costs of raising a child, and award half this cost to W in lieu of G acting in accordance with the assumption that she would cover the other half of the costs
 - This award compensates expectation loss
- The approach here adopted is inconsistent with observations made by Deane J in *Verwayen*
 - Estoppel cannot be a source of rights so as to create an independent action
 - Dicta: ‘estoppel by conduct does not of itself constitute an independent cause of action’
 - The effect of *W v G* seems to be that estoppel can provide grounds for relief where no other causes of action are available
- Unlike the approach adopted in *Mobil v Wellcome* (where an assumption cannot be reasonably founded on vague and unqualified statements), the present case involves a different class of relationship: familial, as opposed to commercial; it appears that a lesser standard of specificity is required to be able to reasonably rely on a representation than is required in a commercial context

Decision

- An estoppel is made out and expectation loss will be compensated with a payment of \$150 000 to W, payable in monthly instalments to provide half the costs of raising the child

However, in a commercial context, the courts have indicated that estoppel may not be available to create new rights not already provided under an enforceable contract (*Austotel v Franklins*).

IV HYPOTHETICAL SCENARIOS

A Exercise 3

The following structure should be used in a hypothetical exam answer:

- Assumption
 - That Luke won't enforce clause 31
- Inducement
 - Luke's statement is express, and in clear and uncontroversial language (unlike *Mobil Oil*); he expressly induces Tanya's assumption
- Detrimental reliance
 - Only really an issue in cases where P doesn't change their conduct as a result of the assumption (eg, giving a gift to a party)
 - Here, the detriment is twofold:
 - Lost opportunity to look for another lease; and
 - The time delay of moving into the house
- Standard elements conclusion
 - It seems clear that Luke would be stopped from enforcing clause 31
- Reasonableness
 - Luke might try to raise some secondary arguments
- Unconscionable conduct
 - Luke was trying to get more money; departure from his representation is, in all the circumstances, unconscionable
- Departure
 - Rarely in issue where an assumption is made out and loss is suffered
- Remedy
 - Expectation loss: 5 year lease – let Tanya stay for that period
 - Reliance lost: cost of setting up the store
 - Technically, courts say they award based on reliance loss – Tanya cannot expect to stay
 - But: *Walton Stores* (per Deane J), *Giumelli*, and *W v G* seem to indicate that an expectation-based approach is sometimes adopted

B Exercise 5

- Jo wants to enforce the promise that

Possible causes of action:

- A contract does not exist
 - Insufficient consideration was provided, since an existing legal duty was owed
 - But: the promise was made to a third party (the bank), so fresh obligations may have been incurred
- Estoppel
 - Assumption
 - That the bank will assume responsibility for the payment of existing and incurred construction costs
 - Inducement
 - The bank's express statement
 - Detrimental reliance
 - The loss of \$600 000
 - But: contractually obliged to complete anyway

- Even so, Jake breached the contract first
 - However, Jo lost the option of cutting her losses
- Reasonableness
 - Not really a requirement, but still reasonable to assume that, based on the bank's statement, the representation was correct
 - The second part of this requirement, that the reliance (upon the assumption reasonably made) also be reasonable entails that the relying party needs to accept some responsibility
- Unconscionable conduct:
 - The bank's attempt to recover its loss at her expense is, in all the circumstances, unconscionable
- Departure
 - The bank departed from the expectation it induced (that no money would be recovered)
- Remedy
 - Expectation loss: \$800 000
 - Identify inconsistent determination
 - Quote relevant judgments
 - Reliance loss: \$600 000
 - Only out of pocket \$600 000
 - Also consider opportunity costs
 - Note that assessment of reliance loss is very easy in this case
- Restitution
 - Jo could also make a claim in restitution
 - The value of the property increased by \$1 000 000
 - The bank's investment accrued by this amount as a result of Jo's performance
 - At the same time, Jo suffered considerable loss (\$600 000)
 - The bank has been unjustly enriched
 - This could be remedied by payment of compensation to Jo (amount [???)

Definition: .

Exam note:

A v B:

Facts

-

Issue

-

Reasoning

-

Decision

-

Notes

-