

## PART IV – ESTOPPEL

### I *Varieties of Estoppel*

#### A *Common Law Estoppels*

There are three main forms of common law estoppel:

- 1 **Estoppel by deed**  
Prevents a party from denying an allegation of fact;
- 2 **Estoppel by judgment**  
Parties to litigation are prevented from denying anything decided between them in an earlier judgment; and
- 3 **Estoppel *in pais***  
Comprising three subset classes of common law estoppel:
  - (a) **Common law estoppel** (assumption from acts) (despite the name, a subset of common law estoppels);
  - (b) **Estoppel by representation** (a representation of existing, but not future, fact) (exists at both common law and in equity: see *Jordan v Money* [1843] All ER 350); and
  - (c) **Estoppel by convention.**

These categories overlap to some extent.

#### B *Equitable Estoppels*

There are also three kinds of equitable estoppel:

- 1 **Promissory estoppel**  
Holds a party to a promise or representation about non-enforcement of legal rights;
- 2 **Proprietary estoppel**  
Provides a cause of action to remedy conduct or assumptions about property; and
- 3 **Equitable estoppel**  
Since *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, fuses together proprietary and promissory estoppel.

These are now considered in turn.

#### 1 *Promissory estoppel*

Promissory estoppels relate to a promise made in the present about the future. This is most common when a party to a pre-existing legal relationship gives some assurance (makes a representation) that rights available to them under that relationship will not be enforced, thereby

causing the other party to act in reliance on that assurance. If these three factors are satisfied, the first party can be estopped from reverting to the original position:

- Existing legal relationship between A and B;
- A represents to B that A's rights will not be enforced;
- Inducing reliance by B.

See, eg, *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130; *Legione v Hatley*.

## 2 Proprietary estoppel

Proprietary estoppel operates with respect to conduct or assumptions about proprietary interests. It includes a form of estoppel known as the 'equity of acquiescence', which can arise where:

- A encourages B to believe that B will have an interest in property (or acquiesces knowingly to B's assumption);
- B acts to his own detriment because of A's representation or acquiescence.

The remedy *might* require A to make good the representation to B. However, this is not necessarily the result.

Proprietary estoppel is a sword, not just a shield. That is to say, it does not simply have a defensive quality (as by preventing the defendant from pleading a certain position), but actually provides a positive cause of action (offensive component) to a plaintiff seeking redress.

There is some overlap between promissory and proprietary estoppel in that representations about property may also be made in the context of an existing legal relationship.

The archetypal proprietary estoppel case concerns a situation where the owner of land requests or allows another person to expend money on the land in the expectation that he or she will be allowed to stay. Acquiescence by the owner raises an equity in the representee's favour. The court will decide in each case the way in which the equity is to be satisfied.

Proprietary estoppel developed in English courts of equity through the decisions of *Ramsden v Dyson*, *Dillwyn v Llewelyn* and others. The doctrine was restated in a modern context by *Inwards v Baker*.

### ***Inwards v Baker* (1965) UK:**

#### Facts

- In 1931, father tells Jack that he can build a bungalow on his land and he can stay as long as he likes
- Being the depression, and not having money to build elsewhere, Jack accepts his father's offer and stays on the land
- Jack spends time, money and labour on the land, hiring people to help him construct the house
- In 1951, his father dies, leaving everything to his common law wife, Mrs Inwards
- The will had been made in the 1920s but not altered to reflect the father's new promise
- Mrs Inwards and her two children visit Jack regularly in his bungalow, but by the early 1960s they have a falling out and he is asked to vacate the land
- It being a personal relationship, there is no contract and no formalities have been

complied with

- There is no part performance (because Jack's conduct is not unequivocally referable to the existence of the agreement)

#### Issue

- Is Jack entitled to possession of the land?

#### Reasoning

- The Court reviews estoppel case law (*Ramsden v Dyson* and *Dillwyn v Llewelyn*) and enunciates the following principle
- Where the owner of the land requests or allows another
  - To expend money on the land
  - In the expectation that they will be allowed to stay
  - This raises an equity
  - That the court will satisfy in a manner suitable to the facts of the case
- Jack has an 'equity'
  - This is not the same as an 'equitable interest' (see below Part V)
  - The late Mr Baker's conscience is bound by the agreement he made with Jack
  - The minimum to fulfil that promise is a life estate
  - However, the sphere of enforceability of this life estate is narrower than its full equitable or legal counterpart: it cannot be devised
  - But it can be enforced against third parties with notice
- Inwards and her children are bound
  - They have inherited the land impressed with the obligation in equity
  - This is because they take with notice; and
  - They are volunteers rather than purchasers taking with consideration

#### Decision

- Jack was encouraged to expend money and had an expectation of obtaining a proprietary interest, giving rise to an equity capable of enforcement by the court as a life estate
- Third parties are also bound, but only where they have notice of the tenant in possession (ie, they know about the equity)
- Effectively, Jack has a licence to remain on the land
- However, the licence is also coupled with an equity
- The equity is protected and must be satisfied by the courts

*Inwards v Baker* illustrates that, to satisfy the equity, a court may grant something less than a full equitable or legal interest. Whether that interest is enforceable against a third party depends on whether that party:

- Is a purchaser;
- Is a volunteer;
- Has notice; or
- Takes without notice.

However, *Crabbe v Arun District Council* illustrates, expectations may sometimes be given effect to if this is the minimum equity to do justice. In *Crabbe*, the council was estopped from departing from the assumption it induced with the effect that the terms of an oral agreement were enforced in the absence of part performance or compliance with any formalities.

**Crabbe v Arun District Council (1976) UK:**Facts

- Crabbe makes use of an easement to access the public highway from his property via a council access road (Access Point B)
- He intends to subdivide the land, such that he will lose his only other access point, and meets with a council representative with a view to securing access to Access Point A
- The council is aware of his need to obtain a new easement
- However, there is no written agreement creating the interest
- Crabbe sells the subdivided plot but does not reserve access to Access Point A (because the council leads him to believe that he will have access to Access Point B by fencing the road, but leaving gaps outside both Access Points)
- The council completes and closes the fence, shutting out both Access Points and leaving Crabbe landlocked; they then try to charge Crabbe 3000 pounds for an easement
- There is no contract (written notes insufficient, no concluded agreement) or deed

Issue

- Can Crabbe enforce the easement by way of a proprietary estoppel?

Reasoning

- Although no agreement or actual promise, the conduct by the council led Crabbe to believe that he would have the access point
- Crabbe sold off the landlocked part without reserving a right of way over the front lot
  - This raised the equity
- How must the equity be satisfied?
  - Minimum necessary to do justice? or
  - To alleviate the detriment?
    - Repay income lost due to being landlocked?
- Cf remedies for oral agreement and part performance
  - Oral agreement: evidence of part performance allows existence of valid oral agreement but does not enforce its terms (expectation damages)
  - Part performance can often be pleaded on the same set of facts as an estoppel
  - The remedy for estoppel may be more flexible, but is often less than proprietary
  - Oral agreement/part performance are more likely to be proprietary in remedy but are harder to establish

Decision

- The council is estopped from resiling from the assumption it induced (that Crabbe could have the new easement)
- Effectively, this is a proprietary remedy: the minimum equity to do justice is to give Crabbe what he thought he was getting (the easement)
- In this way, the remedy fulfils the expectation
- This amounts to enforcing an otherwise voluntary promise (which is normally impossible)
- Crabbe doesn't have to pay the 3000 pounds (especially because of the delay)

Though it may sometimes embody non-proprietary characteristics, the equity of acquiescence is a proprietary right enforceable against successors in title (*ER Ives Investments v High*).

**ER Ives Investments v High (1967) UK:**Facts

- Ives' successor agrees to grant a right of way to High in return for an encroachment
- The right of way is not formally created and not registered
- Ives later refuses to recognise the right of way

Reasoning

- The equity of acquiescence is enforceable against successors in title because it is a proprietary right

If it would be unconscionable for the acquiescing party to enforce their legal rights, the minimum equity to do justice may be to transfer those rights to the party acting in reliance (as in *Pascoe v Turner*).

**Pascoe v Turner (1979) UK:**Facts

- Mr Pascoe is involved in a *de facto* relationship with Turner
- The house is in his name
- They later separate; he permits her to stay on in the house, and allowed her to believe that the property was hers and spend money on renovations &c
- He now seeks to remove her and regain possession

Decision

- It would be unconscionable for Mr Pascoe to encourage her to put her money into his house when he knew he was never going to transfer it to her
- The minimum equity to do justice is here to compel him to transfer the house to her

3 *Equitable Estoppel*

Equitable estoppel describes the judicial fusion of proprietary and promissory estoppel since *Waltons Stores (Interstate) Ltd v Maher* ('*Waltons Stores*'). It is the overarching category of estoppel now accepted by the High Court of Australia.

For an equitable estoppel to operate:

- A must create or encourage in B
- an assumption that
  - a contract will come into existence; or
  - a promise will be performed; or
  - an interest will be granted to B by A; and
- such that B relies on that assumption
- in circumstances where departure from the assumption by A would be unconscionable

See further *Austotel* at 612 (Priestley JA).

**Waltons Stores (Interstate) Ltd v Maher (1988) HCA:**Reasoning

- For an equitable estoppel to be raised, either:
  - an unambiguous representation must be made by the defendant (expressly or impliedly) as to the present or future facts or law; and
  - the representation must have induced an assumption in the plaintiff;
- or
  - the defendant passively acquiesced in an assumption made by the plaintiff;
- and in either case —
  - the plaintiff has reasonably acted (or refrained from acting) in reliance on the assumption
  - the defendant knew or intended that the plaintiff would rely on that assumption
  - departure from that assumption by the defendant would cause detriment to the plaintiff
  - because of the detriment that the plaintiff would suffer, it would be unconscionable to permit the defendant to depart from the assumption or to rely upon their strict legal rights and to deny the assumption.

Decision

- Damages will be awarded, but not execution of the lease (fulfilment of the assumption)

Equitable estoppel may not apply in large commercial transactions (*Austotel v Franklins*).

***Austotel Pty Ltd v Franklins Self-Service Pty Ltd (1989) NSW SC:***Reasoning

- *Waltons Stores* style estoppel does not apply when two well informed commercial parties are playing 'cat and mouse'
- Here, the dispute is between large commercial interests
- It is not unconscionable to allow departure from the representation because big commercial companies knew what they were doing and took an informed risk

Note also the discussion of estoppel in *Rasmussen v Rasmussen*. In that case, it would have been unconscionable for Paul to deny Ernest's interest given the course of conduct, so the Court could have decided on the basis of estoppel (but did not). It was unnecessary to consider estoppel because a common intention constructive trust was established on the facts. It is likely that the same result would have been reached upon an application of the principles of estoppel (would he get 'Markeys' or damages?). Cf *Waltons Stores*: damages was the remedy, not execution of the lease.

## II **Effect of an Estoppel**

### A **Nature of the Rights Created**

Here we are concerned with the nature of the equity that arises as a result of an estoppel:

- How should it be classified? Is it (always) a personal or proprietary right?
  - If not, will the remedy ever be proprietary in nature?
- What remedy will satisfy the equity raised by an estoppel?
  - Preventing detriment?
  - Rectifying detriment (fulfilling expectation)?
  - Minimum equity?
- What are the principles for deciding how the remedy will be determined?
- When in time do the rights arise?

The remedy that will be granted is the 'minimum equity to do justice' (*Giumelli v Giumelli*). By describing the remedy in this way, a great deal of remedial flexibility is conferred upon the Court. Satisfaction of the equity may require the defendant to compensate the victim, or possibly compel the defendant to make good the plaintiff's assumption.

#### ***Giumelli v Giumelli* (1999) HCA:**

##### Facts

- Mr and Mrs Giumelli own an orchard in Western Australia
- They create and run a partnership
- After some time, they purchase a second property to be owned by the Giumellis (not a partnership asset)
- Their children help them pick fruit and clear land
- After leaving school, they become increasingly involved in the partnership
- The parents tell their children that they will be given an interest in the land: several promises were made, each of which became more specific over time
- First promise:
  - The parents say that they would transfer the land to their son, Roberts, if he refused an outside job and worked on the land
  - However, this was too vague to give rise to an estoppel
  - Not clear what part of the land he would receive
- Second promise:
  - The parents say that Roberts can build a house on the land if he and his wife live there
  - This promise is still too vague in relation to the land, but clear in relation to the house
  - Roberts claims an interest in more than the orchard (not clearly identified)
- Third promise:
  - The parents say that they will subdivide the large orchard property and transfer to him a parcel surrounding his house, if he stays on the property and does not take a job outside the family
  - Roberts initially refuses, but after divorcing his wife he returns to the property and fulfils his obligations
  - Roberts relies upon the promise; however, he later leaves after a fight with his parents about his new fiancée, of whom they disapprove
- Steven, another member of the partnership, now moves onto the land

- He lives in a prefabricated house with his family
- Roberts now seeks to have the promised land transferred to him in fee simple

#### Issue

- To what land is Roberts entitled?
- What is the nature of the remedy of estoppel?
  - Should this be a constructive trust, or is a lesser remedy appropriate?
- On what basis should it be granted?
  - What about the interests of third parties?
  - If the land is subdivided, how is the situation to be managed?
  - Can the Court make a warring family live together?

#### Reasoning

- The Full Court of the Supreme Court of Western Australia imposes a constructive trust
  - Full Court: satisfy the equity by giving effect to the representation
  - The High Court rejects this remedial basis
  - A constructive trust does not entail 'constructing' (fabricating) a trust
  - It means 'construing it'
  - The Court doesn't construct a trust that isn't there; it *construes* the relations between the parties
  - Its nature is remedial: designed to remedy wrongdoing
    - Does this mean that it will arise upon curial declaration?
    - This is somewhat unclear, especially since, if a constructive trust is imposed (which is commonly understood as institutional), the rights conferred by that trusts may be understood as arising independently of judicial pronouncement
- Requirements
  - Representation must relate to property
- Is it correct to say that the parents hold the land as trustees, obliged to transfer to Robert the promised land? Or could a lesser remedy suffice to satisfy their conscience?
  - The Court must first consider whether there is a lesser equitable remedy that is sufficient to satisfy the equity
  - Before imposing a constructive trust, consider if there is an appropriate equitable remedy that falls short of the imposition of a trust, having regard to the circumstances of the case
- Followed Deane J in *Verwayen*:
  - 'prima facie the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs. It is only where relief framed on the basis of the assumed state of affairs would be inequitably harsh that some lesser form of relief should be awarded'
- Starting point: 'prima facie the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs.'
  - Ie, the assumption should be made good
  - But would the Court be enforcing an unenforceable promise? (they frame it as 'satisfying the equity')
    - Policy problem: oral agreement that is unenforceable
    - Shouldn't be able to affect property holdings just by speech
  - Unless it would be unfair so to do
    - Here, it would be unfair to the other sons
- 'It is only where relief framed on the basis of the assumed state of affairs would be inequitably harsh that some lesser form of relief should be awarded'
  - Ie, if it would be harsh to enforce the assumption, then something less is appropriate
  - If so, step down the remedy to that lesser form of relief



- Here:
  - Making good Roberts' assumption would cause undue hardship to the defendant
  - The partnership dispute hasn't been resolved so it would be unworkable for Roberts to live on a subdivided block

#### Decision

- Damages are appropriate here: the minimum equity to do justice
- The market value of the land is assessed, and Roberts is given that much in damages as a charge over the property (security interest over the land)
- This is how Roberts can compel payment of the damages
  - Personal right
  - But secured over the orchard as a charge: proprietary, unregistrable, imposed from the date of judgment [???

## B Summary

Equitable estoppel can be used to prevent an owner of property refusing to give effect to an assumption induced in the plaintiff about how that property would be divided:

- Kinds of representations appropriate to give rise to an equitable estoppel
  - Clearly expressed promises (*Giumelli*)
    - 'Some property' too vague
    - Specific subdivision clearer
  - Failure to act (*Waltons*)
    - Acquiescence: watching someone expend resources, labouring under the assumption that they will receive property
- Required detrimental reliance
  - Positive acts
    - Demolition and building (*Waltons*)
    - Construction work (*Inwards v Baker*)
    - Improvements to the land (*Pascoe v Turner*)
    - Labour and improvements (*Giumelli*)
- Available remedies
  - The minimum equity to do justice (*Giumelli*)
  - Giving effect to the assumption
    - Transferring a legal or equitable version of expected property right
    - *Crabb* (easement)
    - *Ives* (legal fee simple)
    - *Pascoe v Turner, Inwards v Baker* (equitable: less than a life estate)
  - Granting a similar property right
    - *Silovi* (profit a prendre)
  - Awarding a personal right to compensation (typically backed up by a charge)
    - *Giumelli* (compensation most appropriate in an unstable family situation)
    - *Waltons* (compensation favoured over execution of the lease)

### C *Comparing Part Performance and Estoppel*

Oral agreements, part performance and estoppel often arise in similar situations:

- The representation is usually some kind of oral promise or agreement alleged by the representee
  - In both there is an undertaking made by one party and acted upon by another
  - For part performance of an oral agreement, the undertaking is contractual and acts of part performance must be referable to it
  - For an estoppel, only a representation is required
  - Representation is wider as it includes mere acquiescence by the defendant
- The acts of detrimental reliance are usually the acts of part performance
  - Establishing a link between acts of part performance and the alleged agreement is more difficult than showing reliance upon an assumption induced by a representation or acquiescence
- Whereas part performance renders the oral agreement enforceable, estoppel does not always give effect to the plaintiff's expectations
  - Part performance usually gives rise to a right to specific performance (if it is available; by contrast, estoppel is more flexible and may not always make good the assumption)
  - An estoppel creates an equity (personal right capable of satisfaction by a court); an agreement also creates personal rights
  - However, an agreement more often gives rise to proprietary remedies since the plaintiff has a right to specific performance of the agreement, as performed
  - Damages or a modified version of the expectation may be awarded to satisfy an equity arising out of an estoppel: only the 'minimum equity' to do justice will be awarded (*Giumelli*)