Case and Comment

Commonwealth of Australia v Verwayen (1990) 95 ALR 321 Estoppel and gratuitous promises: a new liability?

Introduction

Verwayen represents the first occasion since *Waltons (Interstate) Stores Ltd v Maher*[1] that the High Court has had an opportunity to address in detail the operation of estoppel. The facts are simple and will be viewed in this note as a representative example of a broad context — one which is neither contractual nor pre-contractual — in which to examine the discussion of principle.

In 1964, Verwayen sustained injuries in a collision at sea while serving in the Royal Australian Navy. He commenced negligence proceedings in November 1984 against the Commonwealth. Although he was substantially out of time, the Commonwealth in its defence chose not to plead the *Limitation of Actions Act* 1958 (Vic). Both before and after the commencement of the proceedings, it repeatedly stated that it did not intend to do so either in this case or in any similar case arising from the collision. In November 1985, the Commonwealth reconsidered this policy, obtained leave to amend its pleadings and delivered an amended defence on 29 May 1986 which relied on the Statute of Limitations. Verwayen alleged that the Commonwealth had either waived the statutory defence or was estopped from relying on it.

Unfortunately, while Verwayen ultimately succeeded in the High Court, the presence of two alternative bases for the decision undermines the uniformity and coherence of any emergent principles. The court decided by a majority of four to three that the Commonwealth was not entitled to rely on the defence and therefore, since liability was not in issue, the action could proceed immediately to quantification of damages. However, of that majority, Gaudron and Toohey JJ considered that the Commonwealth had waived its right to plead the statute, whereas Deane and Dawson JJ contended it was estopped from exercising that right. Mason CJ, Brennan J and McHugh J in the minority all agreed that Verwayen had made out a plea of estoppel but in their view, an order that the Commonwealth pay Verwayen's costs would have been a sufficiently just remedy. These three judges, while in the minority on the final result, were actually in the majority so far as estoppel was concerned.

This note will consider whether *Verwayen* clarifies the application of the doctrine of promissory (equitable) estoppel in the context of gratuitous promises made outside a contractual relationship. In so doing, an examination will also be made of the view which certain members of the court advocated, namely that all species of estoppel be fused into a single doctrine. Two

1 (1988) 164 CLR 387.

principal questions arise. First, to what extent can estoppel be understood to confer a right of action against the maker of a gratuitous promise? Secondly, what are the possible remedies that a court will grant in satisfaction of such a right? Finally, some consideration will be given to the argument that this new reach of estoppel is incompatible with the line drawn by traditional contract law between purely moral obligations and legal obligations.

Waiver will not be considered in this note since in the context of gratuitous promises, only waiver in the sense of estoppel is relevant.[2] The extent to which this can be legitimately considered as distinct from estoppel proper is beyond the scope of this comment, but since four out of seven judges in *Verwayen* indicated or implied that the two were all but congruent,[3] it is contended that estoppel merits sole consideration in the present context.

Right of Action or Rule of Evidence?

Although it is generally acknowledged that equitable estoppel creates a right ("an equity"), the extent to which it confers an independent right of action is more debatable. Two contradictory views on this question emerge from *Verwayen.*

Of the judges who consider equitable estoppel as a doctrine distinct from common law estoppel, Brennan J and McHugh J proceed on the basis that the circumstances giving rise to equitable estoppel create an "equity" which *of itself* grounds equitable relief.[4] Dawson J, however, considers the circumstances in which a plaintiff can rely on equitable estoppel to be restricted to those where "the cause of action is not one in which estoppel is an ingredient, however much estoppel may assist the plaintiff in an evidentiary way in establishing the cause of action".[5]

This approach resembles the defensive and evidentiary formulations that usually characterise discussions of estoppel. Dawson J approaches equitable estoppel in this way because he is broadly in agreement[6] with Deane J, who 'fuses' both species into a single doctrine of estoppel based in terms of its theoretical rationale on the principles of common law estoppel. Such a doctrine never of itself creates rights. Deane J argues that the "equity" generated by promissory estoppel does not refer to "an immediate right to positive equitable relief"[7] but rather has the broader meaning of "any

---

2 There are probably two principal 'species' of waiver: waiver in the sense of estoppel and waiver in the sense of election. For a more detailed discussion of waiver see the judgments of Toohey J and Gaudron J in *Commonwealth of Australia v Verwayen* (1990) 35 ALR 321 (hereafter *Verwayen*); also see the recent House of Lords decision in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyd's Rep 391.

3 *Verwayen* per Mason CJ at 328-9, per Dawson J at 362, per Deane J at 346 (impliedly by agreeing with Dawson J), per McHugh J at 394.

4 Id per McHugh J at 397, per Brennan J at 346. This is contrasted to common law estoppel which, as an evidentiary rule, merely calls for *the operation of the general law* on an assumed fact.

5 Id at 367.

6 Id at 353: while Dawson J did not actually decide that estoppel should be regarded as a single doctrine, he implies that he may have done so if the instant facts had required it. His later formulation of equitable estoppel (at 367) is substantially similar to Deane J's conception of unified estoppel.

7 Id at 348.

entitlement or obligation (the equities) of which a court of equity will take cognisance".[8] That is, although a plea of estoppel is not necessarily defensive, it *is* necessarily parasitical on some other cause of action. In the context of gratuitous promises, this approach means that promissory estoppel does not confer an independent right of action upon the promisee.

Mason CJ endorses a 'fused' approach to estoppel but differs from Deane J on the question of its theoretical basis. He conceives of a unified estoppel in terms of the principles of equitable estoppel,[9] and refers to the latter as entitling a party to relief,[10] in direct contradiction to Deane J. Thus Mason CJ's view of a unified estoppel reflects those of Brennan and McHugh JJ on promissory estoppel and implies that estoppel can constitute a right of action enforceable in the context of gratuitous promises.

It is submitted that this view, in addition to having the support of a majority of the judges who considered estoppel in detail,[11] is correct in Australia.[12] It seems arbitrary to assert, as Deane J does, that estoppel cannot independently found equitable relief and yet state that a promise by A (later broken) to transfer Blackacre to B is equivalent to promising that a trust will come into existence vesting in B the beneficial ownership of Blackacre and B can therefore sue A for breach of trust.[13] The two positions are not incompatible but it seems a tortuous and circuitous route to a destination more easily reached by conceding that estoppel independently generates rights.

It is in any case difficult to see how a parasitical formulation of promissory estoppel can be maintained now that *Waltons* has eliminated the requirement of pre-existing legal relations.[14] Perhaps this formulation is motivated by a concern to protect the law of contract, for fear that a cause of action in estoppel may enforce gratuitous promises in the absence of consideration. But such a concern is just as adequately addressed by the principles governing possible remedies: principles which emerge with greater certainty than the answer to the question of whether estoppel generates an independent right of action.

Principles of Remedy

At a theoretical level, the two differing approaches outlined above entail different consequences when considering which remedy appropriately

---

8 Id at 349.
9 Id at 333.
10 Id at 332.
11 Brennan J, McHugh J and Mason CJ by inference. It may even be that Gaudron J's endorsement (at 387) of Mason CJ's formulation of remedy can be extrapolated to provide support for this point too, especially as she refers to "the substantive doctrine of estoppel".
12 While the notion that estoppel is now a unified doctrine is yet to be endorsed by a majority of the court, the differing views expressed by Deane J and Mason CJ indicate that the question is not in itself of critical significance to the present discussion. However, it is submitted that Mason CJ's formulation of a 'fused' doctrine is to be preferred, particularly since (as McHugh J points out at 396) where the same matter is concerned, in a fused jurisdiction, equity prevails over the common law by statute.
13 *Verwayen* (1990) 35 ALR 321 at 351.
14 For further discussion of this point in the context of *Waltons* and some subseqent cases, see Patrick Parkinson, "Equitable Estoppel: Developments after *Waltons Stores (Interstate) Ltd v Maher*", (1990) 3 *J Cont L* 50.

vindicates the "equity" generated by estoppel. Six of the judges[15] take the view that the doctrine aims to satisfy the equity by ensuring a promisee does not suffer detriment as a result of a breach of promise by the promisor. This approach, which is consistent with traditional formulations of equitable estoppel, entails reversal of detriment as the prima facie remedy.

Deane J, however, carries through to his analysis of remedy his earlier preference for the fundamentally evidentiary nature of estoppel, which he considers limits the sense in which estoppel generates an "equity". His view is that "prima facie the operation of an estoppel by conduct is to preclude departure from the assumed state of affairs."[16] Although consistent with the theoretical basis he articulates for a unified estoppel, this would seem to have greater potential to encroach upon the domain of contract than the approach of the other judges.[17] In the context of gratuitous promises, the 'assumed (future) state of affairs' relates to the content of the promise. Upholding the assumption therefore indirectly enforces the promise.

However, it is doubtful whether in practice the two approaches would have very different results in the context of remedy. Deane J's preference for upholding the assumption is a prima facie solution only, and he concedes that where such relief "exceeds what could be justified by the requirements of good conscience and would be unjust to the estopped party", it will really represent the outer limits of the possible relief.[18] The practical similarity of the two positions is unconsciously highlighted by Gaudron J. She agrees that reversal of detriment should be the prima facie remedy, yet indicates tentatively that on the instant facts she would, like Deane J, consider that justice requires the assumption to be upheld.[19] Ultimately then, the flexibility of equity prevails.

Factors Affecting Discretion

While relief in equity is always discretionary, it is still governed by principle and authority. In the present context, the driving force behind both the right to relief in the first place, and the choice of a specific remedy, is clearly the notion of unconscionability.[20] Unfortunately, the content of this notion is at best elusive. Unconscionability is not a rule but a generalised standard of conduct: it is therefore by nature instance-specific. Is it then possible to pin down the 'typical' circumstances in which entitlement to relief will arise? In

---

15 Id per Brennan J at 345, per Mason CJ at 333, per McHugh J at 397, per Gaudron J in *obiter* at 387, per Toohey J in *obiter* at 379. Dawson J, while agreeing with Deane J on the question of whether a unified estoppel would be parasitical or independent, declined to express a view on the appropriate remedy for a fused doctrine (at 363). So far as equitable estoppel as a separate doctrine was concerned, he agreed with Mason CJ and Brennan J (at 363).

16 Id at 355.

17 This would be ironic if Deane J's parasitical characterisation of estoppel *is* motivated by concern for contract principles: see above p6. These potentially inconsistent ramifications of his approach may provide further support for the earlier contention that the approach of Mason CJ, Brennan J and McHugh is to be preferred.

18 *Verwayen* (1990) 35 ALR 321 at 357.

19 Id at 387-88.

20 All five judges who considered the question were unequivocal about this: *Verwayen* (1990) 35 ALR 321, per Dawson J at 367, per Deane J at 356, per McHugh J at 397, per Brennan J at 344, per Mason CJ at 332.

particular, is it possible to predict when a court will award the 'maximum relief' of holding the promisor to the assumptions induced by the gratuitous promise?

The more general question of what will be regarded as unconscionable enough to ground relief initially seems to have no satisfactory answer, as exemplified by the following statement of Deane J:

> The most that can be said is that 'unconscionable' should be understood in the sense of referring to what one party 'ought not, in conscience, as between [the parties] to be allowed' to do.[21]

It is probable that it would suffice to prove that the promisee *would suffer* detriment if the assumption induced by the promisor were deserted. Mason CJ characterises this as detriment in the broad sense (as distinct from the narrow sense, which refers to the detriment which the promisee *has suffered* by relying upon the correctness of the assumption).[22]

It is detriment in the narrow sense which is the key to the more specific question of when the maximum relief of upholding the assumption will be granted. The majority in *Verwayen*[23] asserted a preference for compensating detriment rather than fulfilling expectations. Further, it appears that the actual relief granted will be moulded to match detriment in the narrow sense.[24] Though this approach implies that enforcement of gratuitous promises is not the aim of the doctrine, the fact remains that it is sometimes the practical result. Such a result depends on an analysis of detriment in the narrow sense.

Mason CJ suggests[25] three instances where the nature of the detriment already suffered may be likely to found the maximum relief: first, where there has been reliance upon an assumption for an extended period, secondly, where irreversible and substantial detriment has been suffered and thirdly, where the promisee occasions loss which cannot satisfactorily be compensated or remedied.

The facts of the instant case show that non-pecuniary damage is a relevant aspect of detriment with respect to the third category (and perhaps the second too, since the distinction between the two seems minimal). The judges (two of them in *obiter*) indicate by a 'majority' of four to three[26] that in the context of estoppel, the detriment suffered by Verwayen in pursuing his case against the Commonwealth (which included financial outlay, anxiety, stress and inconvenience) can be justly remedied by an order for costs. However, closer examination of the reasoning reveals that the court is split on the question of

---

21 Id at 353.

22 Id at 334.

23 Above n13.

24 While only Mason CJ is explicit about the fact that the appropriate remedy matches 'narrow detriment' (id at 335) both Dawson J (at 368) and Brennan J (at 345) implicitly approach remedy on the same basis.

25 Id at 335.

26 Id per Mason CJ at 335, Brennan J at 345-6 and McHugh J at 400 and Toohey J in *obiter* at 379 who refused to take into account the intangible detriment; per Dawson J at 369, Gaudron J at 387 in *obiter* and Deane J at 359 who did not so refuse. This 'majority' bears no relation to the actual decision, since Toohey J, who would not have granted 'maximum relief' on the basis of estoppel, did so on the basis of waiver since he considered the effect of waiver to be necessarily permanent (at 378).

the requisite degree of proof of anxiety and stress, and not the question of whether intangible detriment is irremediable. The true position is that six judges consider that the suffering of intangible detriment such as stress or anxiety would, *if satisfactorily proved*, be compensable only by upholding the assumption or (the same remedy from another perspective) enforcing the 'equity' by granting the maximum relief.[27]

It may be, then, that the threshold at which the court will regard detriment as irreversible, is fairly low.[28] However, since relief in equity is always discretionary, it is not possible to generalise beyond the proposition that non-pecuniary damage suffered by the promisee is more likely than purely financial loss to found the requisite unconscionability needed to justify the award of maximum relief.

Moral and Legal Obligations

The principles of estoppel as expounded in *Verwayen* establish that while a promisor may sometimes be required by a court to fulfil the expectations that he or she (gratuitously) induced, the reason for such a remedy would still lie in the nature of the detriment suffered by the promisee rather than in any inherent legal effect of the gratuitous promise. Thus the basis for (indirect) enforcement differs from the basis of contractual liability, where expectations have been effectively purchased by the mutual exchange of benefit and detriment satisfying the doctrine of consideration.

It is therefore evident that estoppel could potentially provide an alternative basis for enforcing promises: a right to enforce a promise can either be bought (in contract) or it can be deserved (in estoppel). But even if *Verwayen* establishes (as argued in this note) that estoppel is now capable of itself founding relief which in certain circumstances indirectly enforces gratuitous promises, it should be borne in mind that the doctrine originally developed as a negative concept: the right to deny someone else the opportunity to exercise his or her legal rights. In the context of gratuitous promises, the promisor's legal right is itself negative: it is a right not to honour the promise. Thus where the promisor is estopped from so doing, the 'negative' right vesting in the promisee becomes positive: obligations are created where none existed previously. Rather than losing a benefit (as does a representor who is estopped from exercising contractual rights already bargained for) the promisor is burdened with an obligation.

The onerous nature of this makes it unlikely that the courts will readily grant the maximum relief where estoppel is pleaded in the context of gratuitous promises. Mason CJ states that "the breaking of a promise, without more, is morally reprehensible, but not unconscionable in the sense that equity will necessarily prevent its occurrence".[29] The peculiar difficulty with

---

27 Of the seven judges, only McHugh J indicated that even in the event of positive proof of stress, anxiety etc, he still would have considered an order for costs to be adequate: *Verwayen* (1990) 35 ALR 321 at 400.

28 Gaudron J for example said that "were the present matter to be determined by reference to the substantive doctrine of estoppel, the mere possibility of increased stress and anxiety...would tend in favour of making good the assumption": id at 387-8.

29 Id at 335; also see McHugh J at 399.

attempting to define the point at which purely moral obligations shade into legal ones by reference to unconscionability, lies in the fact that unconscionability is itself largely a moral notion. Where legal enforceability depends on an abstract logical concept such as consideration, the line between legal and moral is fixed and predictable. Where the conversion of a moral obligation into an obligation which is both moral and legal depends upon a moral concept, then the content of what is both morally *and* legally reprehensible is capable of shifting.

While this makes the operation of the doctrine unpredictable, it is potentially a more socially coherent basis for enforcing promises (where it has that effect) than contract law would be in identical circumstances. The doctrines of consideration and privity of contract, though time-honoured, frequently have inequitable consequences[30] and their partial modification need not necessarily be regretted. It may be that the new reach of estoppel reflects concerns already registered by the legislature in the *Contracts Review Act*, 1980 (NSW), the *Fair Trading Act* 1987 (NSW), and ss52 and 52A of the *Trade Practices Act 1974* (Cth) in particular. If so, uncertainty could be minimised by techniques such as analogous application of standards borrowed from the above legislation, or of principles derived from decided cases on unconscionability in other areas of equity's jurisdiction.[31] There are in fact scattered references in *Verwayen* that support this: Deane J states that unconscionability will commonly involve situations where one party has taken advantage of another's special vulnerability or misadventure;[32] Dawson J refers obliquely to unequal bargaining power[33] and Gaudron J to principles of fair dealing.[34]

Conclusion

It would seem, then, that while the indicia of unconscionability are probably too dependent on context to justify Deane J's vision of recognised categories of prima facie enforceable promises/representations, it may nonetheless be possible to apply the principles of estoppel in the context of gratuitous promises in a manner that is neither arbitrary nor idiosyncratic. This would usually generate no more than a quasi-delictual liability to compensate reliance losses. Where the promisee is sufficiently deserving, it may entail the indirect enforcement of the promise for reasons which are not incompatible with the rationale of contract law but rather supplement its deficiencies. *Verwayen* indicates that a promisee is likely to be found sufficiently deserving where features relating to the promisee (eg irreversible detriment, longstanding reliance) or to the promisor (eg taking advantage of special vulnerabilities) outweigh the fact that the promisor deserves to take advantage of his or her legal rights.

Clearly these principles can only be clarified by the specific factual contexts of future cases. It may be that even further development could

---

30 See the extra-judicial comments of Gleeson CJ in "Clarity or Fairness: Which is more important?", 12 *Syd LR* 305 at 306.

31 See Priestley, LJ, "Contract: the Burgeoning Maelstrom", (1988) 1 *J Cont L* 15 at 19-24.

32 *Verwayen* (1990) 35 ALR 321 at 353.

33 Id at 369.

34 Id at 385.

accompany such clarification. If *Verwayen* is an example of increasing judicial willingness to impinge upon the freedom of private relations where justice demands, perhaps there will be support for the argument that certain 'benevolent' promises in domestic contexts (where the courts have traditionally been very reluctant to impose legal obligations), do reasonably create reliable expectations[35] from which departure would be unconscionable. For the present, however, this must remain an uncharted area.

BRONWEN MORGAN

35 See Stoljar, S, "Enforcing Benevolent Promises", (1990) 12 *Syd LR* 17 esp at 30-35.