

**THE SWORDBEARER HAS ARRIVED:
PROMISSORY ESTOPPEL AND WALTON STORES
(INTERSTATE) LTD V MAHER**

By Eugene Clark *

In *Walton Stores (Interstate) Ltd v Maher*¹ the Australian High Court has significantly broadened the doctrine of promissory estoppel by sanctioning its use as a sword and in circumstances where neither a pre-existing contractual relationship nor any other legal relationship exists between the parties. As such the High Court's decision in *Walton Stores* weakens the requirement that promises, in order to be legally binding, must be founded on consideration. Moreover, it raises fundamental questions regarding the kinds of promises and expectations which courts should enforce. Finally, *Walton Stores* portends the significant expansion of contract law into new areas of promising. Should the law of contract be thus extended, Gilmore's *The Death of Contract*² may need to be supplemented with a chapter chronicling the resurrection of contract law via the sword of estoppel.

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¹ (1986) 76 ALR 513.

² G Gilmore, *The Death of Contract*, 1974, Ohio State University Press.

I have one final thought. We have become used to the idea that, in literature and the arts, there are alternating rhythms of classicism and romanticism. During classical periods, which are, typically, of brief duration, everything is neat, tidy and logical; the theorists and critics reign supreme; formal rules of structure and composition are stated to the general acclaim. During classical periods, which are, among other things, extremely dull, it seems that nothing interesting is ever going to happen again. But the classical aesthetic, once it has been formulated, regularly breaks down in a protracted romantic agony. The romantics spurn the exquisitely stated rules of the preceding period; they experiment, they improvise; they deny the existence of any rules; they churn around in an ecstasy of self-expression. At the height of a romance period, everything is confused, sprawling, formless and chaotic - as well as frequently, extremely interesting. Then the romantic energy having spent itself, there is a new classical reformation - and so the rhythms continue.

Perhaps we should admit the possibility of such alternating rhythms in the process of the law. We have witnessed the dismantling of the formal system of the classical theorist. We have gone through our romantic agony - an experience peculiarly unsettling to people intellectually trained and conditioned as lawyers are. It may be that, in this centennial year, some new Langdell is already waiting in the wings to summon us back to the paths of righteousness, discipline, order, and well-articulated theory. Contract is dead - but who knows what unlikely resurrection the Easter-tide may bring? (at 102-103).

THE FACTS OF THE CASE

The facts of the case are complicated. The Mahers owned commercial premises which, after negotiations with Walton Stores, were agreed to be demolished and replaced by a new building which was to be leased by the appellant. Solicitors for the parties drew up documents to effect the transaction and amendments were called for. The appellant's solicitors wrote to the respondent's solicitors: 'We believe the approval will be forthcoming. We shall let you know tomorrow if any amendments are not agreed to.' Some days later the respondent's solicitors, having heard nothing about the amendments, submitted executed documents 'by way of exchange'. Their covering letter was not acknowledged for nearly two months as the appellant was privately reconsidering its position in the light of changes it had just made to its business operations. The acknowledgment indicated that the appellant was not proceeding with the transaction. Meanwhile, the respondents, to the knowledge of the appellant, had caused the old building to be demolished. New construction was also well advanced in order to meet a time for occupation deadline nominated by the appellant. Kearney J, in the Supreme Court of New South Wales, awarded damages to the respondents, holding that the appellant was estopped from denying that a concluded contract by way of exchange existed. The Court of Appeal dismissed the appeal of Walton Stores, but considered the estoppel to relate not, as the lower court had found, to a representation that a contract existed, but to an omission to correct the respondent's mistaken belief that there had been an exchange of documents or that there was a binding contract.

THE HIGH COURT'S JUDGMENT

In a unanimous decision the High court dismissed the appeal of Walton Stores and held that the appellant was estopped in the circumstances from retreating from its implied promise to complete the contract. Mason CJ and Wilson J, in a joint opinion, applied promissory estoppel in holding that Walton Stores, by retaining the contract documents and doing nothing, was estopped, under the circumstances, from denying its implied promise to complete the contract. Mason CJ and Wilson J noted³ that the estoppel relied upon by the respondents and upheld by the primary judge and the Court of Appeal was common law estoppel as enumerated in *Thompson v Palmer*⁴ and *Grundt v Great Boulder Pty Gold Mines Ltd.*⁵ These cases hold that common law estoppel requires that a representation be to an existing fact. In this case, however, the respondent assumed that 'an exchange of contracts would take place as a matter of course, not that the exchange had in fact taken place'.⁶ Therefore, common law estoppel would not apply because the representation must be as to an existing fact, a promise or representation

³ *Ibid.*, at 515-526.

⁴ (1933) 49 CLR 507.

⁵ (1937) 59 CLR 641.

⁶ *Walton Stores (Interstate) Ltd v Maher* (1986) 76 ALR 513, at 519.

as to future conduct being insufficient. Mason CJ and Wilson J were not prepared to overrule a long line of authority dating from *Jordon v Money*.⁷

Although the facts in *Walton Stores* did not support a theory of common law estoppel, their Honours held that promissory estoppel, however, would apply.⁸ Tracing the development of the doctrine of promissory estoppel in England and Australia their Honours concluded:

One may discern in the cases a common thread which links them together, namely, the principle that 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 'played such a part in the adoption that it would be unfair or unjust if he were left free to ignore it': per Dixon J in *Grundt*, at 675; see also *Thompson*, at 547. Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.⁹

Their Honours noted that a voluntary promise will not generally give rise to an estoppel because the promisee should know that until there is a final exchange no contract is consummated.¹⁰ In the present case, however, it was held that it would be unconscionable for the appellant to remain silent while knowing that the respondents were proceeding on the assumption that they had an agreement and that the exchange of contracts was a mere formality.¹¹ The unconscionable conduct of the appellants was founded upon two factors. First was the urgency which characterised the transaction. This urgency was brought about by the appellant who had to give up possession of its existing premises which meant that the new building had to be available for fitting out by January 15 and completed by February 5.¹² Moreover, the appellants knew that the respondents would not be able to complete in time unless they started almost immediately. Second, the respondents had executed a counterpart deed which was forwarded to the appellant on November 11. The respondent did not hear again from the appellant until January 19, even though the appellant had known since December 10 about the costly work being done on the site by the respondent. It was unconscionable under these circumstances for the appellant to remain silent. It had to complete the contract or warn the respondents that it had not yet agreed on what course to take. For these reasons, the appellant should be estopped from denying the existence of a contract.¹³

⁷ (1854) 5 HLC 185.

⁸ *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, at 525-526.

⁹ *Ibid.*, at 524.

¹⁰ *Ibid.*, at 523.

¹¹ *Ibid.*, at 525-526.

¹² *Ibid.*, at 526.

¹³ *Ibid.*

Like Mason CJ and Wilson J, Brennan J found that the evidence did not support the view that the respondent thought that an exchange of contracts had taken place or that there was an existing agreement.¹⁴ Upholding a long line of cases dating from *Jordon v Money*¹⁵, Brennan J held there was no common law estoppel in the case at bar because the scope of common law estoppel does not extend to compel adherence to representations of future intentions.¹⁶ His Honour also agreed with Mason CJ and Wilson J in holding that the facts did, however, warrant a finding of equitable estoppel.¹⁷ In concluding that promissory estoppel is merely one type of equitable estoppel, Brennan J posited that in order for equitable estoppel to be applied a plaintiff must prove the following:

- (1) the plaintiff assumed or expected that a particular legal relationship exists between the plaintiff and the defendant or that a particular legal relationship will exist between them and, in the latter case, that the defendant is not free to withdraw from the expected legal relationship;
- (2) the defendant has induced the plaintiff to adopt the assumption or expectation;
- (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation;
- (4) the defendant knew or intended him to do so;
- (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and
- (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.¹⁸

Gaudron J, like their Honours Mason CJ, Wilson J and Brennan J found that the assumption relied upon by the respondents, that contracts would be exchanged, was a statement as to future conduct, and not a representation as to an existing fact.¹⁹ She concluded:

It is clear from *Jordon v Money* and the many cases in which it has been applied that a representation as to future conduct will not found a common law or evidentiary estoppel. That it will not found a common law or evidentiary estoppel is not merely a matter of authority, but also a matter of logic - at least in so far as the

¹⁴ *Ibid*, at 543-45.

¹⁵ (1854) 5 HLC 185.

¹⁶ *Ibid*.

¹⁷ *Ibid*, at 534-43.

¹⁸ *Ibid*, at 542.

¹⁹ *Ibid*, at 565.

representation gives rise to an assumption as to a future event. Because common law or evidentiary estoppel operates by precluding the assertion of facts inconsistent with an assumed fact, the assumption must necessarily be as to an existing fact and not as to a future event.²⁰

Gaudron J also held, however, that the assumption that contracts would be exchanged is equally an assumption as to future *rights* which provides the basis for the operation of equitable estoppel.²¹ Once the appellant knew that demolition work had started, it ought then to have been aware that the respondent's 'expectation of exchange was reasonable on the facts known to the respondent, but was not reasonable in light of the appellant's change of attitude. At that stage prudence was required. It was not forthcoming.'²² Accordingly, Gaudron J held that 'where imprudence is "a proximate cause of the other party's *adopting and acting upon* the faith of the assumption" the justice of an estoppel is made out'. (emphasis added) (*Thompson v Palmer*, at 547; *Grundt*, at 676).²³

Deane's J opinion was somewhat paradoxical. He supported the findings of Kearney J and the Court of Appeal that common law estoppel applied and that the respondent thought that a contract existed between the parties.²⁴ Although the scope of his decision, upholding the lower court's finding of common law estoppel, was the narrowest opinion of all the justices, Deane's J statements, in dicta, indicated that he was prepared to go the furthest in extending the bounds of estoppel, both equitable and common law. Stressing the fusion of common law and equity, Deane J criticised the tendency to maintain common law and equitable estoppel as separate doctrines:

To ignore the substantive effects of the interaction of doctrines of law and equity within that fused system in which unity, rather than conflict, of principle is now to be assumed is, however, unduly to preserve the importance of post separation and continuing distinctness as a barrier against the orderly development of a simplified and unified legal system which fusion was intended to advance.²⁵

Relying on this rationale Deane J contended that there is no reason that estoppel cannot apply to an assumption as to a future state of affairs as well as representations of existing facts. Thus in Deane's J view *Jordon v Money* and the cases which have followed it should no longer be

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*, at 567

²³ *Ibid.*

²⁴ *Ibid.*, at 546-47.

²⁵ *Ibid.*, at 555-57.

considered 'good law in this country'.²⁶ Thus promissory estoppel should continue to be seen as an extension of estoppel by conduct and be generally extended, 'to include an assumption of fact or law, present or future'.²⁷

SIGNIFICANCE OF THE DECISION

Walton Stores, it is submitted, is a significant decision in several respects. First, it answers in the affirmative the question raised by Finn²⁸ and other commentators²⁹ as to whether equitable estoppel is possessed of a single unifying principle or is characterized by 'disparate strands evident in equity jurisprudence each sharing the common designation, "estoppel", but otherwise having separate existences'.³⁰ *Walton Stores* makes it clear that unconscionability is the unifying principle which forms the basis of the different heads of equity incorporated under equitable estoppel.³¹

Second, *Walton Stores* also removes any doubts as to whether a pre-existing contractual relationship or a pre-existing legal relationship of some kind is necessary for promissory estoppel to apply. In *Walton Stores* there was no prior contractual or legal relationship - the parties were merely in the negotiation stage - yet, the High Court found promissory estoppel to apply. This view is in stark contrast to the view recently upheld in *Kurt Keller Pty Ltd v BMW Australia Ltd*.³² in which Powell J

²⁶ *Ibid*, at 559.

²⁷ *Ibid*, at 560, citing Lord Denning MR who in turn was summarising Sir Owen Dixon. See *Moorgate Ltd v Twitchings* [1976] QB 225 at 242.

²⁸ PD Finn, 'Equitable Estoppel', in PD Finn (Ed) *Essays in Equity*, 1985.

²⁹ Cheshire and Fifoot, *Law of Contract* (Fifth Australian Edition) at 112-115; DW Greig and JLR Davis, *The Law of Contract* 1987, Sydney, The Law Book Company at 184; GS Bower and AK Turner, *The Law Relating to Estoppel by Representation* (1977) London, Butterworths at 400.

³⁰ PD Finn, *supra*, note 26 at 93.

³¹ *Walton Stores (Interstate) Ltd v Maher* (1988) 76 CLR 513.

³² [1984] 1 NSWLR 353 at 369. See also *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 where a majority of the New South Wales Court of Appeal held that even if a promissory estoppel could be based upon a pre-contractual undertaking (at 173), where Kirby P regarded such a conclusion as a 'controversial one', but McHugh JA saw:

no reason why the doctrine should be confined to ... existing contractual relationships. The rationale of this branch of equitable estoppel is that it is unconscionable for a person to renege from a promise that he will not exercise a right if to do so will place the promisee, who has acted on the promise, at a material disadvantage. It may be just as unconscionable to exercise a right acquired after a promise that any such right would not be exercised if or when acquired. Indeed the case for applying the doctrine of promissory estoppel seems particularly strong when the promisee is induced to confer the right on the promisor by the promise that

held that 'the better view of the Australian authorities ... to be that the doctrine may operate to preclude the enforcement of rights only in a situation where there has been a pre-existing contractual relationship between the parties concerned'.³³ The High Court's view also extends upon the position of recent English courts which have held that promissory estoppel is not limited to cases in which there is a pre-existing contract, but can arise out of any pre-existing legal relationship.³⁴

Third, related to the requirement of a pre-existing contractual or legal relationship is the previously held view that promissory estoppel must be limited to situations in which it is used as a shield to prevent the inequitable assertion of legal rights. In other words it must not be used as a sword to create rights by allowing the plaintiff to base its whole cause of action on promissory estoppel.³⁵ In *Walton Stores* the sword/shield distinction is rejected by Mason CJ, Wilson J and Brennan J.³⁶ The faulty logic incorporated in the sword/shield distinction is analysed by Brennan J at 539-540.

But there is a logical difficulty in limiting the principle so that it applies only to promises to suspend or extinguish existing rights. If a promise by A not to enforce an existing right against B. is to confer an equitable right on B to compel fulfilment of the promise, why should B be denied the same protection in similar circumstances if the promise is intended to create in B a new legal right against A? There is no logical distinction to be drawn between a change in legal relationships affected by a promise which extinguishes a right and a change in legal relationships effected by a promise which creates one. Why should an equity of the kind to which *Combe v Combe* refers be regarded as a shield but not a sword.³⁷

the right will only be acted on in special circumstances or at a particular time or place or in a particular way. (at 193)

See generally Greig and Davis *supra*, note 30 at 6-7.

³³ *Ibid.*

³⁴ See eg *Robertson v Minister of Pensions* [1949] 1 KB 227 (involving a claimant's statutory right to a pension); See generally DW Greig and JLR Davis, *The Law of Contract* 1987, at 143-49.

³⁵ *Combe v Combe* [1951] 2 KB 215. See also *NSW Rutile Mining Co Pty Ltd v Eagle Metal and Industrial Products Pty Ltd* [1960] SR (NSW) 495 at 503 per Herron J, at 510 per Sugerman J, and at 517 per Else-Mitchell J. If there is no pre-existing legal relationship then it is likely that the plaintiff will have to base its case solely on promissory estoppel as a cause of action, thereby using it as a sword to create rights rather than a shield to prevent the unconscionably strict insistence of rights.

³⁶ *Walton Stores (Interstate) Ltd v Maher* (1988) 76 CLR 513, at 539-540.

³⁷ *Ibid.*, at 521: 'And it can be argued (see, for example, Greig and Davis, *The Law of Contract*, p 184) that there is no justification for applying the doctrine of promissory estoppel in this situation, yet denying it in the case of non-contractual promise in the

Fourth, the use of promissory estoppel as a sword, as opposed to its limited use to prevent the unconscionable insistence upon strict legal rights, arguably marks a significant expansion in the kinds of promises and expectations traditionally considered as enforceable in contract law. Moreover, as Finn contends, equitable estoppel and its attendant 'notions no more certain than sanctioning unconscionable conduct, preventing injustice or unfairness'³⁸ are not the appropriate means for determining what promises should be enforced and which expectations should be recognized and given legal enforcement.³⁹ As Finn concludes:

That is not to say that the law should not be more sensitive to the injustices which can be occasioned by the breaking of non-contractual promises. The contention, rather, is that equitable estoppel is not the appropriate vehicle to carry the judges into that field of judicial regulation. In that area of promising, of making representations, currently untouched by equitable estoppel, the problem it is suggested is a problem about promising and promises - about of, when and why there should be enforcement, about the doctrines of consideration, of unilateral contract and conditional gifts; about contract law itself. These, not equitable estoppel, are the matter to be examined and reappraised if a new departure is to be made.⁴⁰

If Finn is correct, *Walton Stores* may not only significantly weaken and undermine traditional common law doctrines like consideration, but also introduce greater uncertainty into the law by requiring judges, lawyers and all who would ascertain the law to weigh the various equities involved in each individual case. On the other hand, if *Walton Stores* is limited, in future cases, to factual situations where the underlying unconscionability is similarly clear, then this decision may herald a more flexible judicial approach to contracts which will enable courts to remove the shackles of traditionally limited and disparate approaches 'to forge flexible principles from equity, contract, tort and restitution'.⁴¹ It is also possible that a diminution in the primacy of consideration doctrine will result in a resurgence of contract law and lead to a reversal of the present trend to

absence of a pre-existing relationship. The promise, if enforced, works a change in the relationship of the parties, by altering an existing legal relationship in the first situation and by creating a new legal relation in the second.' See Generally D Jackson, 'Estoppel as a Sword' (1965) 81 *Law Quarterly Review*, 223 at 242.

³⁸ PD Finn, *supra*, note 26 at 93.

³⁹ See also GH Treitel, *Doctrine and Discretion in the Law of Contract*, Oxford, Clarendon Press, 1981, at p 8, where Treitel, although speaking specifically of the law in regard to mistake, echoes Finn's general caution against the adoption of equitable standards when noting that 'the continuing absence of principles governing its [equity's] exercise is a source of increasing dissatisfaction'.

⁴⁰ Finn, at 94.

⁴¹ Cheshire and Fifoot, *Supra*, note 27, at 118; PD Finn, 'Equity and Contract' in PD Finn (ed) *Essays in Contract*, 1987.

rely on tort theory which has expanded since the recognition of liability for negligent misstatements in *Hedley Byrne and Co Ltd v Heller and Partners Ltd*.⁴² As Greig and Davis point out, one of the principal factors leading to the need for a doctrine of negligent misstatements 'stemmed from the withering of contract as a broad basis of liability'⁴³ in the 19th century. Yet there is no reason why the giving of negligent advice cannot give rise to a cause of action founded upon a contract between the plaintiff and defendant that the defendant should take care in the giving of such advice.⁴⁴ Arguably, *Walton Stores* marks a shift away from 19th century consideration principles focusing on the benefit to the promisor, and a move towards an expanded use of estoppel which emphasises the reliance by plaintiffs on the implied promises of defendants to provide reasonably reliable advice. If this happens, contract law may gradually resume its pre-19th century role as the provider of a broad basis for civil liability - a role which, with the advent of strict consideration principles, has yielded to an expanding law of tort.⁴⁵

Finally, no matter what the outcome of the jurisprudential debate referred to above, as a practical matter, there is no doubt that, as a result of *Walton Stores*, the re-discovered, re-formulated and expanded doctrine of equitable estoppel will assume a far greater role generally and especially in commercial settings involving mistake, misunderstandings or failed expectations.⁴⁶ The sword of estoppel has arrived; and with it in hand, lawyers have a powerful weapon which will no doubt see considerable use in the years ahead.

⁴² [1964] AC 465. See generally G Gilmore, *supra*, note 3; S Berns, 'The Expanding Domain of Negligent Misstatement', (1985) 8 (2) UTasLR pp 127-165.

⁴³ Greig and Davis, *The Law of Contract* (1987) at 181.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ DMJ Bennett, 'Equitable Estoppel and Related Estoppels' (1987) 61 *Australian Law Journal* 540.