ADDRESS TO THE CURRENT LEGAL ISSUES SEMINAR SERIES

21 MAY 2009

ESTOPPEL AND THE LAW OF CONTRACT

Professor Grantham and Colleagues

First, may I commend John McKenna's paper to you as an outstanding contribution to legal scholarship. It brings honour to the Queensland Bar.

John's paper shows the benefit of deep learning and long reflection. It is truly a guide for the perplexed: a mighty work of an energetic organising intelligence. He has given us a comprehensive overview and made a penetrating analysis of what is a vexed area of the law. He surveys a very tricky terrain in a spirit of moderation and calm scholarship to produce a fair-minded assessment of the state of the ground that will be of enduring value to scholars, practitioners and judges.

But there is a limit to calm scholarship and the spirit of moderation and fair-mindedness. I think we've had quite enough of that. I propose to have a big whinge and get some things off my chest. I certainly don't intend to be at all even-handed or fair-minded.

My comments are directed not at cases of widows and orphans and undue influence or the other established occasions of equitable intervention in respect of property

rights. My concern is with commercial cases and especially the notion of estoppel by convention as affecting contracts and especially the negotiation of contracts.

Let us reflect for a moment upon the propositions cited in the paper from *Galaxidis v Galaxidis*[1] in the New South Wales Court of Appeal. You will find the passage at the bottom of page 20 of the paper going over to page 21. There was suggested that a representation will be sufficient to found an estoppel "if it is reasonable for the representee to have interpreted the representation in a particular way being a meaning which it is clearly capable of bearing and upon which it is reasonable for the representee to rely. In these circumstances, it would be unconscionable for the representor to deny responsibility for the detriment that arises because of that reliance."

The court was speaking of the clarity of expressed intention needed to found a promissory estoppel, but assume that the requirement of clarity is no greater in the case of an estoppel by convention.

We are talking about the meaning of a convention gleaned from the course of negotiations and we are saying that this meaning is effective to trump the meaning of the signed contract where the meaning of the convention is no more than one interpretation of the parties' dealings which is open. And the convention is apt either to replace the need for a signed contract or to trump the signed contract because it is unconscionable of the other party to rely either, on the absence of a signed contract, or on the objective meaning of the written contract which, *ex hypothesi*, is at the very

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1 [2004] NSWCA 111 at [93].

least also an available interpretation of the parties' dealings. Indeed, that interpretation is the one vouched by the best evidence of the terms of the parties' bargain.

That just does not make a lot of sense.

And one cannot but doubt the utility of such propositions in actually deciding cases. The *Texas Bank Case*, the *fons et origo* of the notion of conventional estoppel, was itself decided on the basis of a purposive construction of the contractual instruments. The world is not a better place because Lord Denning did not leave it at that.

The propositions in *Galaxidis* may well signal a cultural shift away from protection of the values of commercial certainty which have traditionally been engaged upon the signing of a written contract.

In my last ten years or so at the Bar, I found that frequently when discussing upcoming hearings with managers of corporate clients, they would express their concern as to how their lawyers could get across to the judge the extent to which their companies' reasonable commercial expectations had been disappointed by the other side's performance. I would say to them: "Well, we will read the terms of the contract to the judge."

To which they would usually reply with something like: "But that won't convey the extent to which we were really relying on them. We had many discussions with them in which we explained our problems to them and they always told us that they

understood where we were coming from and that they were confident that they could solve our problems. If we hadn't been given these assurances, we would have signed up with someone who would have."

They were always quite serious. They seemed to have no appreciation of the significance of the written contract as the final and exclusive charter of the parties' rights and obligations.

As John has noted in his paper, erosion of commercial certainty inevitably follows in estoppel's wake.

The attendant uncertainty affects the parties to the contract, their assigns and their bankers. More broadly, it also has an adverse impact on the courts and the public interest.

In this regard, the lengthy forensic investigations directed to reconstructing the contractual negotiation in each case come at a cost in terms of time and money for the courts, and the taxpayers who fund them, and for other litigants who are kept in the holding pattern while we all relive the negotiation of the contract.

If you think I exaggerate it is only because you have not spent months of your professional life in cases in which one side or the other troops witness after witness through the court to say why some arrangement which never actually found its way into a signed contract was utterly crucial to the contract which was eventually signed.

And the actual success rate of estoppel by convention suggests that it is a dog that rarely barks. It seems that the concern to make commerce safe for those who are not able or willing to engage in commerce in conformity with considerations of reasonable prudence is a game which is unlikely to be worth the candle so far as the return to the wider community is concerned.

The problem is serious. It is an aspect of the problem which, a couple of years ago, led Chief Justice Gleeson, formerly the Chief Justice of Australia, to warn against the excessive demands which the commercial sector is making on the legal system in this country.

These are pragmatic concerns. They are no less important for being pragmatic, but they are, I acknowledge, merely pragmatic concerns.

Those who support an expansion of estoppel by convention point to the hypothetical case where both parties to a contract know that they had actually agreed that come what may a particular aspect of their contract should have an operation contrary to the objective interpretation of the contract which they ultimately signed. Surely, so it is said that there ought to be a remedy which holds each side to what it agreed and knows it agreed?

The first response I would give to this question is that there is such a remedy: it is called rectification. Surely it is better to draw the line by reference to equity's traditional concern to prevent dishonesty and deliberate sharp practice – as

exemplified by the decision of the High Court in *Taylor v Johnson*[2] – than to invoke vague and subjective notions of unconscionability.

Secondly, the real world is never so clear cut. To get to the facts, you need to get into the potentially bottomless swamp of litigation. But this is to speak again of grubby practical matters.

There are, I think, other concerns at stake here which relate to the values which the legal system of a commercial republic should uphold. There are values of competence and integrity on the part of those who engage in commerce. There are concerns about commercial morality.

The signing of a written contract is a solemn moment in a negotiation. It brings the negotiation to an end. Until then the parties are free to alter their position or even to withdraw from the negotiation altogether. This has been well-understood since the time of Hammurabi.

Commerce proceeds on the assumption that each party to a commercial negotiation is expected to do his or her honest best to ensure that he or she concludes a bargain on the terms most favourable to that party, and that it is that party's responsibility not to execute the contract until it is an accurate charter of the parties' rights and obligations.

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[2] (1983) 151 CLR 422 at 428 – 432.

Each side gives and takes until the contract is concluded, and each side understands that the document finally executed will reflect the final balance struck between give and take. For one party to assert that the signing of the contract was but a provisional episode in an ongoing and open-ended negotiation is distinctly unattractive, in terms of the values of commercial prudence and competence.

Surely no-one would knowingly invest in a company in which the management don't understand or won't accept the solemn importance of the signing of a contract, preferring to pursue the hope that some form of post-contractual royal commission will "make them whole", as they say.

It is impossible to imagine that a manager of a corporation would admit to his shareholders that he is so gormless. And yet before a court that same manager will cheerfully assert his incompetence as he comes forward to claim the rewards of his victimhood.

It seems to me that, in the end, what is at stake is the integrity of those who engage in business in the market. The law should not offer encouragement to those willing to say that they thought that their tentative and provisional arrangements would either replace the need for a concluded contract or, alternatively, would survive the execution of a contract which did not embody those arrangements.

If there is to be a cultural shift of this kind then we will need to put up a sign outside our commercial courts advising litigants: "Please leave Your Mobile Phones and Your Dignity at the Door".