



Précis Paper

Practical Aspects of Estoppel

This discussion concerns recent law on estoppel. The session lasts 27 minutes and practitioners will find it a worthwhile update.

Discussion Includes

- What is estoppel generally in law?
- What are the elements of estoppel?
- How do you prove detriment?
- What is the nature of unconscionability in estoppel?
- What is the different between a claim in contract and estoppel?

Précis Paper

Practical Aspects of Estoppel

1. In this edition of BenchTV, Dennis Flaherty (Barrister) and Ian Benson (Solicitor) discuss actions of equitable estoppel, including the NSW Supreme Court's (Stevenson J) recent decision in *Manno v Manno* [2016] NSWSC 493. Mr Flaherty appeared for the successful defendants in that case.

Estoppel Generally

2. There are many different types of estoppel, including estoppel by acquiescence, estoppel by convention, estoppel by deed, promissory estoppel, equitable estoppel, anshun estoppel and others. In *Commonwealth v Verwayen* [1990] HCA 39; 170 CLR 394, Mason CJ proposed at 410 and 413 that there should be only one type of estoppel, but this proposition has not been primarily followed. For example, the decision of *Ashton v Pratt* [2015] NSWCA 12; 88 NSWLR 281 established that there is still a distinction between proprietary estoppel and promissory estoppel. It is still the basis of ongoing academic and judicial debate as to which elements are required for each type of estoppel and whether there should just be one overarching type of estoppel.

Manno v Manno [2016] NSWSC 493

i. Material Facts

3. In the case of *Manno v Manno* [2016] NSWSC 493, Mr and Mrs Manno (the defendants) migrated to Australia from Italy and bought a large tract of land in the western suburbs of Sydney, where they established a business known as "Sam Manno Bobcat & Tipper Hire". Their eldest son was working in the business with them but their youngest son was working elsewhere. The plaintiff (the younger son) alleged that In 2002, the parents approached him to leave his job and come to work for them on the promise that he would get the business with his older brother when the parents retired as well as a block of land when the land they owned was subdivided. The youngest son said that he did as they said on the basis of these representations which the parents made. The promises were not fulfilled and the youngest son commenced proceedings against the parents.
4. The youngest son pleaded estoppel, such that the parents were estopped from denying the claim by the son. He also argued that there was an enforceable agreement between the parties which was not taken up, but he was unable to prove that there was consideration and was unable to satisfy the written requirements for a contract under s 23C and s 54A of the

Conveyancing Act 1919 (NSW). Thus, the case went to hearing basically only on the question of whether or not there was an estoppel.

ii. Estoppel Claim

5. Mr Flaherty believes in order to satisfy any equitable estoppel claim, the plaintiff needs to establish at least 4 elements:
 - a. A representation or promise in clear and unambiguous terms
 - b. Reliance by the plaintiff on the promise to the plaintiff's detriment
 - c. Reliance on the promise was reasonable in the circumstances
 - d. It is unconscionable for the person who made the representation or the promise (the defendant) not to fulfill the representation or promise
6. In this context the nature of unconscionability is hard to define. Mr Flaherty believes that it is not merely "unfairness" and is dependent on the particular circumstances of the case. In *Manno v Manno*, the unconscionable conduct alleged was that the son acted to his detriment by working for his father in the business for many years at below standard wages and it would be unconscionable for his father and his mother to resile on the representations he said they made to him.

iii. Findings

7. The NSW Supreme Court found in favour of the defendants, with appropriate costs orders made against the plaintiff. The plaintiff failed to prove any of the four elements of estoppel described above.
8. Firstly, it was not accepted that the parents had asked the son to work in the business, but rather it was the other way around. Secondly, the plaintiff could not prove detriment because although he was employed elsewhere and left that employment, he left not of his own volition and his income from his previous employment was about the same if not less than what he was paid by the parents when he worked for their business. Moreover, he lived rent-free with his wife on the property the parents owned. Thirdly, in 2010 his father got cancer and shut down the business because the son had started up his own rival business with most of the same clients. Lastly, the large tract of land was never subdivided by the parents, and evidence showed that it could not be for various reasons including lack of Council approval. In addition, the proceedings did not commence until after the land had been sold by the parents. Thus it was impossible for the parents to carry out the promise.
9. Mr Flaherty notes that if all the elements of estoppel were satisfied, yet the land was unable to be subdivided or had been sold, the court could have possibly fashioned some other

remedy for the plaintiff, for example by recruiting a land valuer to determine the value of the hypothetical subdivided lot of land. However, this would be very speculative as the value would depend on how the land would have been subdivided and the conditions of neighbouring land.

10. The court found that there was no inducement or reliance since the son left his original workplace not of his own volition and the parents took him on to help him as he was unemployed, not the other way round. Moreover, there was no unconscionable conduct on the part of the parents by selling the land and using the money to discharge their debts, since it was impossible to subdivide the land and considering the circumstances of the father's illness.

iv. Expedition

11. Due to the father's cancer, Mr Flaherty sought expedition of the case to have it decided quickly. Unfortunately, shortly before the matter could be heard, the father died, so it was necessary to make an application to have someone represent his interests which was able to be done without a grant of probate being obtained.

Differences between Estoppel and Contract

12. In contract it is necessary for there to be an intention to create legal relations, but this is not required in an estoppel claim. Contract looks forward from the time the promise is made, whereas estoppel looks back from the time the promise was due to be performed and asks whether it is unconscionable for the representor to not perform the promise that he or she made.

Other Estoppel Scenarios

13. In *Morris v Morris* [1982] 1 NSWLR 61, a son told his father to sell his house and use the money to put a second storey on the house he owned with his wife, on the promise that the father could live in their house for the rest of his life. Shortly after the father moved in, the son and his wife split up and the question was what happened to the father. The court decided that it would be unconscionable for the husband and wife to not repay the money that the father had put into the house and imposed a charge over the land in favour of the father for the amount he provided to build the second storey.
14. It is also very common for people to make representations that they will provide for others in their wills and those people act on it.

Constructive Trusts

15. The imposition of a constructive trust is not a cause of action in itself but rather a remedy. A court may impose a constructive trust in equity where there has been unconscionable behaviour. The constructive trust is usually over property, including bank accounts.

Advice to Potential Plaintiffs

16. One of the most difficult parts of establishing an estoppel claim is proving a clear representation. Mr Flaherty advises that people should ensure that when a representation is made that it is clear and unambiguous. The best way to do this is by having a lawyer draft the agreement in legal terms. Alternatively, the representation should be reduced to written form which the representor signs or acknowledges.
17. Mr Flaherty notes that this often does not occur in family situations, since families tend to trust each other and do not comprehend a fight occurring between them later on. If so, this leads to disputes involving one person's word against another, which are difficult to resolve especially when the events occurred several years prior. It is very risky to begin expensive litigation based on purely oral representations made by someone else as the outcome is often very uncertain.
18. In the case of *DeLaforce v Simpson-Cook* [2010] NSWCA 84; 78 NSWLR 483, there was a family law dispute where a representation was made in writing. The husband made a notation in the consent orders of the Family Court that the husband would leave his estranged wife a particular parcel of land, but later made a will in which he did not leave it to her. The representation was in writing so there was no issue of evidence or proof to determine what the representation was. Rather, the issue was whether it was reasonable for the estranged wife to rely on the representation. The court found that it was and held that the appropriate remedy was that the land be transferred to her.
19. Nowadays, it is not as difficult to establish detriment, especially in monetary terms due to developments in technology which record and store financial information e.g. bank records.

BIOGRAPHY

Dennis Flaherty

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Dennis Flaherty was admitted to the NSW Bar in 1982 and has practised continuously since that time, primarily in equity, probate, and commercial law. He has authored and presented a number of papers on these topics.

Ian Benson

Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Focus Case

Manno v Manno [2016] NSWSC 493

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_25-04-2016_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/5718755ee4b05f2c4f04d40b>

Cases

Commonwealth v Verwayen [1990] HCA 39; 170 CLR 394

Ashton v Pratt [2015] NSWCA 12; 88 NSWLR 281

Morris v Morris [1982] 1 NSWLR 61

DeLaforce v Simpson-Cook [2010] NSWCA 84; 78 NSWLR 483

Legislation

Conveyancing Act 1919 (NSW)