

- ⇒ Scenario 2 – the contract expressly prohibits equitable remedies
 - Unlike in *Optus*, the contract has expressly ruled out the availability of equitable remedies because _____. Hence, the contract would be given effect and equity would not intervene
 - Only remedies would be in contract
- ⇒ Scenario 3 – the contract is silent on equitable remedies
 - Unlike in *Optus*, contract is silent on whether equitable remedies would be available
 - Following *Streetscape*, equity would
 - (a) intervene because the contract provided lesser protection than Equity, since _____

Estoppel

- Estoppel occurs when a person is prevented by law from acting inconsistently with his or her earlier representation, an equitable claim that prevents/ prohibits someone from denying the existence of a state of affairs based on their previous actions or behavior in circumstances where such denial would be unconscionable
 - *Commonwealth v Verwayen* (1990) – equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts on it to his detriment, seeks to renege from the promise
 - 1) estoppel by convention: common law; 2) estoppel by representation: common law and equity; 3) promissory estoppel: equity; 4) proprietary estoppel: equity
- 0) Is there a binding contract? – if there's no binding contract, the P can only be granted a remedy for the departure from the promise, if an estoppel can be established

[1] Estoppel by Convention

1) Is there a legal relationship (deed, contract)?

[YES]

- Since there is a deed, estoppel by convention is established to prevent the defendant from departing from the recitals (of facts which were affirmed to exist by both parties) and claiming that those facts are untrue (*Dabbs v Seaman* and *Greer v Kettle*)
- Since there is a contract, estoppel by convention is established to prevent the D from departing from common assumptions shared between the parties (*Doehring*) – if
- This common assumption can override the actual terms of the contract if the court finds it unconscionable for one party to depart from the shared understanding, particularly if the other party would suffer detriment as a result => *Moratic v Gordon*

- Elements (*Moratic v Gordon*¹¹)
 - 1. P had adopted an assumption as to the terms of its legal relationship with D
 - 2. D had adopted same assumption [there is no requirement that aparty had induced the other to adopt this assumption]
 - 3. Both parties have conducted their relationship on basis of that mutual assumption
 - 4. Each party knew or intended that the other would act under this basis, and
 - 5. Departure from assumption will occasion detriment to the P

[NO]

- An estoppel by convention is not available, since there is no legal relationship as there is no deed or contract (*Dabbs v Seaman; Doueihy*)

[2] Estoppel by Representation

1. Is there a representation of past or present facts?

[YES]

- Here, the representation that ____ [*explain facts*] is a representation of past or present fact, not intention as future (*Jorden v Money* [1854])
- Hence, estoppel by representation is available at common law
- However, estoppel by representation is only a rule of evidence and would not itself support an independent cause of action (*Low v Bouverie* and *Waltons Stores Brennan J*)
 - Accordingly, the P's claim would be in contract, and estoppel merely prevents the defendant from denying the representation, so as to enable the plaintiff to establish the elements of a breach of contract – compels the party bound to adhere to the assumption that the contract exists

[NO] – representation is of future facts => representation not available at common law or equity (*Jorden v Money*)

[3] Promissory Estoppel

Step 1: Is there a representation of future fact¹²

[YES]

¹¹ Gordon, sub-lessee and Moratic all has the common assumption that Gordon has no interest in collecting rent from the poker machine and Moratic would suffer financial detriment if the consent is needed, and it would be unconscionable for Gordon to now enforce these terms => the original term was estopped

¹² But this form of estoppel concerns representations as to intention (which are not caught by Estoppel by Representation) – X has contract with Y and X leads Y to believe that certain rights in the contract will not be enforced – if Y relies on that induced belief, then promissory estoppel is made out

- Expansion of Promissory Estoppel in *Waltons*: court allowed Equitable Estoppel to be pleaded in relation to pre-contractual representations – recognizing that in Australia, promissory estoppel extends beyond the traditional scope of *High Trees*¹³, and allows the creation of new rights
- Promissory estoppel goes beyond common law estoppel by representation and by convention => promissory estoppel extended to situations where there was no preexisting legal relationship between the parties (no binding contract) – and could create new rights (*Waltons*¹⁴)

Elements Brennan J in *Waltons* (not agreed to by other Judges in the case so not Binding but frequently cited, such as in *Austotel* as a useful guide):

(1) The P assumed that a particular legal relationship then existed between the P and the D or expected that a particular legal relationship would exist between them and that the D would not be free to withdraw from the expected legal relationship

(2) D has induced the P to adopt that assumption or expectation

(3) the plaintiff acts or abstains from acting in reliance on the assumption or exception;

- This was also accepted by Mason CJ and Wilson J

(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

- This was the position in *Quaglia* – you need detriment for promissory estoppel – assess the detriment at the time that the promisor seeks to resile from the promise

- Quoted Dixon J in *Grundt*¹⁵ – real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumption were deserted that led to it

- [for detrimental reliance, see examples in proprietary estoppel by encouragement]

[6] The defendant has failed to act to avoid that detriment whether by fulfilling the assumption of expectation or otherwise

- In *Waltons Stores*, Mason CJ, Wilson J and Brennan J also required it to be unconscionable, based on the defendant's conduct, for the defendant to now depart from the assumption – more like it was unconscionable to just watch and not attempt to stop the detriment from the assumption

¹³ Case about subleasing the flats and paying half the rent due to war – detriment lies in that otherwise they would have to pay back-rent – the D was estopped from enforcing their original value right due to their representation even if there was no consideration here, but there was an agreement in writing

¹⁴ Maher operating under an assumption that completion of contract was mere formality, *Waltons* induced that assumption through impliedly promising and would be unconscionable for *Waltons* to stand by and not tell Maher to stop when they knew Maher was undergoing the work

¹⁵ Reasoning: if landlords had not promised to accept reduced rent, P may have broken rent and went somewhere else (suffered detriment as they could not take up on those options) e.g. breaking the rent and paying contractual damages would be less detrimental than now having to pay the excess rent & paying lump sum now

NOTE: on the use of *Waltons* – unclear what it established but definitely establishes an estoppel in Equity can generate new rights that did not exist before => goes beyond estoppel by representation and estoppel by convention and beyond traditional promissory estoppel

[4] Proprietary Estoppel [equitable estoppel]

- Unlike promissory estoppel, which traditionally only applies where there are pre-existing contractual relationships, and does not create new rights, proprietary estoppel can give rise to an independent cause of action (*Pascoe v Turner*)
- Two types: by encouragement and by acquiescence

[BY ENCOURAGEMENT] –

- (1) State the test for proprietary estoppel by encouragement: where one party encourages the other party to believe that they either have or will acquire a proprietary right, and the other party relies on that encouraged belief to their detriment if the 1st party resiles from the encouraged belief (*Crabb*¹⁶; *Dillwyn v Llewelyn*)
- (2) Was there encouragement that induced the representee to believe they have, or will acquire, a proprietary right?

[YES]

- a. Here, the representor's words and actions ____ [explain] did encourage the representee to believe that they have or will acquire a proprietary right
- b. *Crabb* – the council agreed to grant an easement although never formally executed it through a formal legal easement – but the Council built gates which amounted to representation to the P to make the P believe that they have access over Mill Park Road over point A and B gates
- c. *Dillwyn v Llewelyn* – father encouraged son to believe he had a proprietary right in the father's land by letting the son go into possession, and wrote the land would be given to the son even if formal title was not transferred
- d. *Pascoe v Turner*¹⁷ - Proprietary estoppel arose by virtue of Mrs Turner improvements to the house, which were made with his encouragement and acquiescence to the improvements and in reliance on his declaration of gift of the house to her – note that she renovated more than just what a normal tenant would do

¹⁶ The case about 2 plots of land and access to Mill Park Road – there was a representation to Crabb that he would have the right of access which he relied on to his detriment by selling Plot One and thus having Plot Two landlocked => Council estopped from denying Crabb right of way => proprietary estoppel – note here remedy was the access point to the road as no amount of money would compensate over land locked land and remedy is not an issue in this case

¹⁷ Note that there had been words of gifts of the house's content and the house, which was effective to gift the house's content but not the house (since formalities for a legal transfer were not satisfied and *Corin v Patton* failed – BUT estoppel argued on the basis that Pascoe had made a promise (representation) and she detrimentally relied on it and used her own money to fund the renovation – he was estopped from kicking her out of the house, to perfect the gift, and give her ownership of the house

- i. *Note on relief*: rare for court to give a whole house, but it was to protect her against the future manifestations of his ruthlessness. IF he still had legal title, and she is granted a license, she may find herself ousted by a purchaser for value without notice, so that he would leave her alone, and there was an imbalance of wealth (he was wealthy while she used 1/4th of her pension money for renovations)
- e. *Sidhu v Van Dyke*¹⁸ – Mrs VD detrimentally relied on the promises in the form of not seeking a property settlement in the divorce and not seeking out gainful employment based on Mr S's promise that she would get the Oaks Cottage, she devoted herself completely over the 8.5 years (even if this was a conditional promise case)
- f. *Austotel*¹⁹ - compared to *Walton Stores* where all terms were agreed to, here the terms haven't been finalized and there's no way a commercial operator could have thought there was an agreement already when they knew a fundamental term has not yet been finalized

[NO]

- Here, there has been no active encouragement by the representor
 - However, proprietary estoppel by acquiescence may be established
- (3) Was there detrimental reliance by representee
- The person claiming estoppel bears the onus of proving detrimental reliance (*Sidhu v Van Dyke*)
 - Detrimental reliance can include spending time, effort and money pursuing litigation (*Verwayen*) – stress, anxiety and inconvenience suffered can be taken into account (*Verwayen*)
 - In determining the money value for the equitable compensation, the court will take a ballpark figure, without minutely valuing the detriment in monetary terms (*De la Force*)
 - *Verwayen*²⁰
 - Deane and Dawson JJ: Plaintiff had suffered detriment bc of Cth position because the P might have conducted case differently in that year or might have withdrawn the case, argued that cost orders were not sufficient. The P would be subjected to potentially devastating effect of last-minute denial of an expectation of just compensation for his injuries

¹⁸ Re Onus: Ms. VD at all times bore the burden of proving that she had been induced to rely upon Mr. S's promise; did not matter whether or not the promises were the sole motivation to take detrimental action, they only need to be a contributing cause

¹⁹ *Austotel* agreed to lease to Franklins but no formal lease, only agreed in principle for terms if the lease but didn't sign and haven't decided the rent of the extra space – on appeal decided you cannot have estoppel if you don't know what the terms are and rent is a fundamental term (regardless of trial judge saying he could get expert evidence on market rates for rent)

²⁰ Case on Cth changing its approach to litigation (policy and amended its defence) re the collision at sea navy ship case – HCA held that Cth was estopped from raising the two defences although all had different reasonings

- Mason CJ: Order for costs would be sufficient to meet prejudice in terms of expense and inconvenience
- Brennan J: It would be unconscionable for Cth to depart from its representations if Cth paid the costs caused by making the statement and backing out, but after compensation it is no longer unconscionable
- McHugh: costs would be sufficient
- Toohey and Gaudron JJ: not a matter of Estoppel but waiver of defences (Cth waived its rights to bring the defences)

[BY ACQUIESCENCE] – if one party spends money on the property of another person, believing that it is their property and not the actual owner's property (ie made a mistake) and the actual owner stands by, acquiescing in that expenditure, knowing that the person is spending such money (not actively encouraging the knowledge and expenditure that it is their property, but passively acquiescing to it), this is sufficient for a proprietary estoppel to arise

REMEDY

[1] Can Equity enforce the representation/ promise (expectation loss) or is Equity limited to only reversing the detriment suffered (reliance loss, or actual loss suffered)?

YES – can both reverse detriment and give effect to representation

- Equity focus is on the promisor's responsibility for the detrimental reliance of the promisee, and that is what makes it unconscionable for the promisor to renege from the promise => sometimes can only be reversed by giving effect to the representation (promise) => Court can give effect to the representation (ie expectation loss...)
- Eg: where someone owned a \$1 million property, and P built a shed on the property that was worth \$100 dollars => payment of \$100 to the P would prevent the estopped party from losing their land (and proportional)

[2] How does Court decide whether to only reverse the detriment, or to give effect to the representation?

- Principle of 'Proportionality' => consider whether the P's decision in detrimental reliance can be unwound, reversed or unscrambled – needs to be proportionality between the relief ordered and detriment suffered – Court will determine the minimum equity required to do justice to the relying party
 - *Sidhu v Van Dyke*: Court enforced the promise, rather than compensation for the detriment – since Ms VD's decision to not take a property settlement in divorce were life-changing and not reversible
 - *Arfaras v Vosnakis*: Court enforced promise to transfer the burial licence to the Husband, since Husband's decision to bury wife on her mother's land was not reversible

[3] If Court decides to remedy the expectation loss, then how does the Court do that?

[Actual enforcement of the promise, or monetary compensation (value of the promise)?]

=> Minimum equity rule applies

- Look at the practical considerations of enforcing the promise
- Impact on relevant 3rd parties, and any hardship or injustice they would suffer must be considered
- Consider conduct of the defendant (*Pascoe v Turner*)

[4] If Court decides that the 'minimum equity' is an award of monetary compensation, then how does the Court determine the money value?

- Ballpark figure is sufficient –