RICS ADJUDICATION CPD WEBINAR

SUGGESTED TIPS ABOUT ESTOPPEL

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Contents

Background

I am sure many fellow adjudicators have been confronted with arguments by a claimant that a respondent is "estopped," for example, from:

1. being able to enforce time bars
2. insisting upon variations being in writing
3. relying upon the liquidated damages ("LD's") clause.

As a legal practitioner, often acting on behalf of claimants in construction disputes, one discovers that the client has failed to abide by the strict terms of the contract regarding one of the issues identified above. In those all too frequent circumstances, often because of the very strict wording of the contract, one needs to closely examine the evidence available from the claimant to discern whether the elements of estoppel have been established.

If there is evidence satisfying these elements, the claimant wants to use this as a "*get out of jail free card*" to overcome the reasons for non-payment identified in the payment schedule which may include time bars, variations being required in writing and deducting liquidated damages etc.

Unfortunately, there is a tendency for claimant's advisers to use the estoppel card, in circumstances where it may work in playing the game of *Monopoly,* but it does not come up

to proof when dealing with real issues and real money. An adjudicator needs to be on alert to ensure that all the elements are made out sufficiently for the estoppel card to allow the claimant to "get out of jail free".

As adjudicators, we are obliged to value claims under construction contracts, however unpalatable those construction contracts may be. Many construction contracts do not follow '*No Dispute' (1990)*, which emphasised the Abrahamson risk allocation principle that, "*A party to a contract should bear the risk, where that risk is within the party's control; and that risk can be transferred if it is economic feasible for the risk to be dealt with in that location*[1].

If you are sitting late at night adjudicating a matter, where there is obviously an unfair risk allocation in a contract, and the "get out of jail free card" is played by the claimant, please be very careful that you do not gloss over the requirements that the claimant needs to make out its case for estoppel. Your task is not to rewrite an unfair construction contract or give someone a "fair go", if the law surrounding the contract (including estoppel) does not engage because the supporting facts are not established.

I have tried to unravel the mysteries surrounding the elusive term *estoppel* and give you a workable framework to understand what it means.

Of course, this is just a background for your own understanding for future adjudications, because it is up to the parties, and generally the claimant, to provide submissions to convince you that an Estoppel is made out.

This paper does not consider *Issue estoppel*, which is an important issue for adjudicators, and I refer you to the excellent Annotated *Building and Construction Industry Payments Act 2004* (Qld) edited by CDI Lawyers for further information on this important topic.

Estoppel definitions

There are a number of definitions of estoppel which can make the exploration of this topic somewhat complex, particularly when it is used interchangeably with the term *"waiver". In* order to make this presentation digestible, I have extracted some bits and pieces from the texts to introduce the topic, and then I will go a bit further by reference to the cases.

1. **I have firstly used *Hudson* for a text-book definition**, because it is a well-known text for the construction industry. It is a UK text, albeit with Commonwealth and US cases as well, but it is very strong on the four key elements, to which I refer below.

   It refers to *estoppel by representation*, as a rule of law which prevents a plaintiff from alleging a fact necessary to their claim if they have previously, by word or conduct, represented the contrary to the defendant. It must be unconscionable for the

[1] Conference National Public Works, Building National and Council Construction, *No dispute: strategies for improvement in the Australian building and construction industry* (National Public Works Conference, 1990), Paragraph 4.1 page 6

plaintiff to resile from their representation. The four elements that make up estoppel are:

a) **Representation;**
b) **Reliance;**
c) **Acting to detriment;**
d) **Unconscionability**[2]**.**

What is particularly useful in Hudson is the authors comment,
"Estoppel can be invoked less often than many laymen (and indeed legal pleaders) would appear to suppose, usually because the element of detriment cannot be established."[3]
As adjudicators you need to be satisfied that the claimant has demonstrated that it acted to its detriment, and this is often left out, or is not clearly spelt out by claimants.

2. **Looking at Thomson Reuters in Australia**; "*Estoppel*" is a substantive rule of law that operates to preclude a party to legal proceedings from asserting against another party a factual or legal state of affairs which is inconsistent with another, assumed state of affairs (the "assumption").

   This occurs where:

   (1) the first party has played some part in the assumption being held or maintained by the other party;
   (2) the assumption has been reasonably relied upon by the other party; and
   (3) a departure from the assumption would cause that other person to suffer a detriment[4].

3. **Cheshire & Fifoot, which is a well-known contract text, refer to various types of estoppel**
   a. *Estoppel by representation* which operates to prevent departure from a representation by words or conduct of existing fact, if representee has relied upon it;
   b. *Estoppel by convention* – cannot depart from an assumption that both parties have adopted, if it would be unjust in the circumstances. *Hudson* explains that it is an assumption by both parties, rather than represented by one to the other[5];
   c. *Proprietary estoppel*- giving enforceable rights over land[6]

[2] Hudson's: Building and Engineering Contracts, Sweet & Maxwell/Thomson Reuters, 12th ed (2010), paragraph 1-078 page 90
[3] Supra, paragraph 1-079, page 91
[4] *The Laws of Australia, Westlaw Au, Thomson Reuters, paragraph [35.6.10].*
[5] Supra, paragraph 1-079, page 91
[6] Cheshire & Fifoot's: Law of Contract, 9th Australian edition (2008), Lexis Nexis Butterworths Australia, paragraph 2.5, page 66

Earlier, the authors refer to the long-standing case of *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 to illustrate that *estoppel can operate on the basis of understanding, assumption or non-promissory conduct*[7]. Whilst this is easy to categorise, it is not at all easy for an adjudicator to make findings on *understandings or assumptions*.

The authors say that the *threads* identified above have a common theme, that a person will be prevented from departing from an assumption, representation, promise or assurance that he or she has encouraged or made it if it would be unconscionable to do so in the circumstances. They then go on to discuss the ***overarching estoppel by conduct*** as the basis for enforcing positive promises[8].

In so doing the authors refer to Mason CJ, who stated:
"In conformity with the fundamental purpose of all estoppels to afford protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted, these developments have brought a greater underlying unity to the various categories of estoppel. Indeed, the consistent trend in the modern decisions points inexorably towards the emergence of one overarching doctrine of estoppel rather than a series of independent rules."[9]

4. **However, LexisNexis dictionary definitions states**, "Arguably, there is a *unified doctrine of estoppel* encompassing common law estoppel and equitable estoppel, although that unification has yet to be definitively accepted by superior courts: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; 76 ALR 513*; Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 307 ALR 512; 88 ALJR 552[10]*.*

5. **Having now sufficiently demonstrated that it is a tricky area**, I turn to some High Court cases to assist you to understand estoppel's development.

Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387;
In this case, Waltons urgently needed new premises and it negotiated with Maher to demolish buildings on Maher's land to construct premises for Waltons. Documents were urgently exchanged indicating that a contract would be finalised. Waltons did not sign a contract, and failed to stop Maher from redeveloping the land, when it knew that it would not sign the contract.

The Court's majority 4:1 held that Waltons was estopped from retreating from its implied promise to complete the contract knowing that the owner was exposing himself to detriment by acting on the basis of a false assumption and it was

[7] Infra paragraph 2.3, page 64
[8] Infra paragraph 2.6, page 67
[9] Supra, citing *Commonwealth v Verwayen* (1990) 170 CLR 394 and 410
[10] LexisNexis: Encyclopaedic Australian Legal Dictionary Definition page 15 of 36

unconscionable for it to adopt a course of inaction which encouraged him in the course he adopted.[11]

Commonwealth v Verwayen [1990] HCA 39; (1990) 170 CLR 394;
In this case Verwayen had been injured as a seaman on the HMAS *Voyager* which collided with the HMAS *Melbourne* in 1964. He commenced proceedings against the Commonwealth in 1984, at which time the Commonwealth admitted liability, but damages remained in issue.

At that time, the Commonwealth stated that its policy was not to deny liability, and not plead a limitations (out of statutory time limits) defence. In 1986, its policy changed and it sought the Court's leave to contest liability and plead a limitation.

By majority, albeit with a strong dissenting minority, the Court held that the Commonwealth could not now dispute its liability to Verwayen:

1. By Deane and Dawson JJ on the basis of estoppel;
2. By Toohey and Gaudron JJ on the basis of waiver.

It was clear that the detriment suffered by Verwayen was a sticking point for Mason CJ, who discussed estoppel in considerable depth, but found that the detriment suffered by Verwayen could be satisfied by an award of costs. Brennan J also discussed estoppel comprehensively, but had difficulty with the detriment point, as His Honour could only find it as Verwayen's financial loss in continuing with the proceedings.

Nevertheless, the case canvasses estoppel principles in great depth, and is often cited by claimants in support of their submissions.

Australian Financial Services and Leasing Pty Limited v Hills Industries Limited [2014] HCA 14 (7 May 2014).
This recent case dealt with monies being paid under a mistake of fact to third parties induced by fraud. When the payer sought to recover the monies, the third parties argued that they had changed their position and suffered detrimental reliance. The Court found that it would be inequitable for the third parties to have to repay the monies they had received from the payer.

The majority did not deal with the overarching doctrine of estoppel, as it was not an estoppel case, but at paragraph [153] in the judgement of Gageler J, His Honour in dealing with estoppel held,

> *"Secondly, whatever other differences might exist between its operation in various specific categories of circumstances, the doctrine now operates at law as in equity as a substantive rule of law.*

[11] *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387, see head note page 388

What claimants must establish?

As mentioned previously, claimants argue that a respondent is "*estopped*" from, for example, enforcing time bars, insisting upon variations being in writing or relying upon a liquidated damages clause. Let us explore what the claimant will need to demonstrate under each element.

1. **Representation**

It is important to appreciate from the principles above, that the representation can be by conduct, or both parties can assume a fact, which means that sometimes there does not have to be an actual representation by the respondent to the claimant!

The difficulty for the adjudicator is making a finding about a representation that effectively blocks a respondent from relying upon its legitimate *time bars* or *variations being required in writing* or *being entitled to levy LD's*.
Most of you would have come across contracts where a party is not taken to have waived a clause, unless they have done so in writing, and respondents rely upon this non-waiver mechanism expressly identified in the contract.

You therefore need to be very careful that a *representation* has been demonstrated on the claimant's evidence, and you would need an affidavit or statutory declaration, or strong submissions directly coupled with correspondence, to demonstrate this, and sometimes this is at best a bit *loosely demonstrated.* This is precisely what *Hudson*[12] warns about.

Of course, if you have statements from the respondent like:

> *"Don't bother with the paperwork, just get the work done, and you will be paid"; or*
>
> *"I can't keep up with your EOT claims, don't worry about putting them in, we just want the job finished quickly"*

as an adjudicator, it is easier to find a representation in these circumstances, than if the claimant only gives you evidence that:

> *Twice previously the respondent had processed claims for variations outside the 7-day notification period requirement, or*
>
> *Paid the claimant for oral variations twice previously.*

Experienced respondents have learned over time to not make obvious representations, so if you are confronted with the more likely latter scenario, the respondent will no doubt argue (particularly if they have lawyers providing the submissions) that two occasions are not sufficient to demonstrate a course of conduct, to amount to a representation.

[12] Hudson's: Building and Engineering Contracts, Sweet & Maxwell/Thomson Reuters, 12th ed (2010), paragraph 1-079 page 91

Whilst it becomes difficult for adjudicators to make findings about a *representation*, providing you make a diligent, unbiased effort to unravel the facts, your decision should withstand judicial criticism, if it *goes upstairs*.

2. Reliance

Generally, reliance is easily demonstrated by a claimant in their material.

However, you may have circumstances where sometimes the claimant has put claims in on time, made them in writing, or submitted EOT's; whereas at other times it has not done so. The claimant then argues that it relied upon the *representation* (however that is characterised) that time bars, requirements of writing or LD's should not apply. The respondent will no doubt argue that *reliance* is not made out, because the claimant is trying to have a *bet both ways* and could not have reasonably relied upon the representation, if they sometimes complied with the strict contractual requirements.

It can become tricky to decide whether the reliance was reasonable, and also operative for the particular claims being time-barred. Naturally, the submissions of the parties will force you to decide one way or the other. By now you can probably appreciate that it is a very difficult area, and is largely dependent on what are the likely correct facts, which you must find.

3. Acting to detriment

This is not always well demonstrated by claimants, and it is a vital element. In *Australian Financial Services* [13]the majority of Hayne, Crennan, Kiefel, Bell and Keane JJ's explained detriment in the context of estoppel, but it was really dealing with equitable remedies, rather than estoppel. Nevertheless, as far as detriment is concerned, the majority held, citing Dixon J in *Grundt* that:

> *[85] "The fundamental purpose of an estoppel is to provide protection against the detriment which would flow from a party's change of position if the assumption which led to it were deserted*[14]*.*
>
> *[87] It will be observed that Dixon J saw that a party's position, which had changed on the basis of an assumed state of affairs that is now sought to be altered, provided the necessary detriment. The passage makes clear that the detriment must flow from reliance upon that assumption*[15]*, when that assumption is to be departed from.*
>
> *[88] Detriment has not been considered to be a narrow or technical concept in connection with estoppel. So long as it is substantial, it need not consist of expenditure of money or*

[13] *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* [2014] HCA 14 (7 May 2014).

[14] *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 410.

[15] *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 415.

> *other quantifiable financial detriment, as Robert Walker LJ observed in Gillett v Holt*[16]*. His Lordship went on to say that the requirement of detriment must be approached as "part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances."*

It was important to provide you with these extracts for the latest explanation of *detriment* in order that you can apply the element to the facts of your adjudication. As I said it was not an estoppel case, but you can glean that a clamant would need to demonstrate in our context:

1. That it *lost an opportunity* to put a claim in on time, claim variations in writing, or lodge an EOT, in reliance on the respondent's representation;
2. As to it being *substantial*, you may find the difficulty for the claimant, even if they can demonstrate the *reliance* element, if they have sometimes put claims in on time, claimed variations in writing or claimed EOT's. In that case the claimant may not be able to argue the detriment was *substantial*.

4. Unconscionability

This is an essential ingredient in finding an estoppel, and potentially the most dangerous element for adjudicators to consider, particularly for those of you who are tempted to rewrite the contract.

Construction contracts are very often very one-sided, such that any reasonable person could think that the weaker party *should not be bound*. However, if you have found that the contract contains those terms, then that is not a matter about which you can make a decision. The parties have entered into the contract and should be bound by it, and you have to decide the dispute within the framework of the contract, and of course within the limits of the surrounding law. It is not for adjudicators to expand those limits.

The difficulty with this element is that estoppel really emerged out of equitable principles in preventing the unconscionable conduct. For example, Deane J in *Verwayen* held[17]:

> *"The doctrine of estoppel by conduct is founded upon good conscience. Its rationale is not that it is right and expedient to save people from the consequences of their own mistake. It is that it is right and expedient to save them from being victimised by other people."*

Whilst as an adjudicator you must be wary of equity because of your limited jurisdiction, Deane J's distinction may help you in understanding how far you can go.

In my view you have a duty to consider this element as to whether it would be unconscionable for a respondent to resile from its position by insisting upon the application of the strict terms of the contract. So long as you keep within those parameters,

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16 *[2001] Ch 210 at 232-233,* referring with approval to *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641.

17 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 440.

and not stray into making finding about the strict contract terms being unconscionable, you should have carried out your duty properly.

Respondent's arguments

Respondents often argue:

1. There was no *representation* by them, however that has been characterised by the claimant;
2. The claimant could not have *relied* upon a representation, if any (which is inevitably denied) as the claimant acted inconsistently by sometimes complying with the contract requirements, and *it cannot have a bet both ways*;
3. The claimant has failed to demonstrate that it acted to its *detriment*, and the onus of demonstrating that falls to the claimant;
4. The conduct was not *unconscionable*, but merely followed robust commercial practices which are quite normal in the *rough and tumble* of the industry;
5. The adjudicator needs to be reminded that they are not allowed to apply *equitable principles* in deciding the merits of the case as BCIPA grants no equitable jurisdiction to an adjudicator. To do so would fall outside their *jurisdiction*, or they would be demonstrating *a bias in favour of the claimant*.

These arguments have to be carefully considered, because you are deciding a dispute between two parties who often have robustly opposed views to the facts and the law. Whatever those views may be, and however unpalatable they may appear, they must be considered on their merits in light of the contract and the law and *the particular circumstances,* and not compared to some theoretical ideal scenario.

Suggested approach for adjudicators

I have had to consider estoppel in a number of adjudications, and it is never easy to make a decision about it. However, you cannot equivocate, *you must decide*, as that is your task.

In my experience in considering estoppel, I recommend:

1. Reading all the submissions from both sides, and check each parties' submissions against the evidence they have provided, *before descending into each element*;
2. If submissions are not supported by evidence, unless you can draw an inference from the surrounding facts, you should reject those submissions, because they clutter your mind unjustifiably;
3. Then considering the remaining contending submissions and evidence from both sides, and you have to develop the most believable evidence to derive the most likely "*story*";
4. *At this time you now descend into consideration of each element*, which may require a re-evaluation of the *story* you have developed in order to make *findings* on each element;
5. In order to do so, you need to evaluate and sift through each party's case very carefully. This is never easy, because you cannot see the witnesses, and you have to decide to prefer one party's version to the other, on each separate element.

6. Sometimes you:
    a. can identify that one witness has not demonstrated they have the qualifications, experience or direct knowledge of the subject matter about which they are giving evidence;
    b. can prefer one party's version, because other witnesses corroborate that evidence;
    c. can look at other facts in correspondence, site minutes, emails, claims showing a story that appear inconsistent with a party's evidence, thereby allowing you to reject that evidence;
    d. have to make a judgment call on which of the two believable contending witnesses should be preferred. If it is line-ball, keep in mind one of the parties has the onus of proof, and in such a case you may justifiably find that they have not discharged that onus.
7. If you do this separately for each element, you should then have the flesh on the bones of the *story* upon which you can make a decision. Along the way, as I say, you are making findings on each element.
8. If just one of the elements of estoppel has not been established YOU CANNOT make a finding of estoppel, however unpalatable that may be.

Concluding remarks

This presentation has only touched the surface of this very complex area. The High Court has not yet definitively found that there is *overarching estoppel by conduct* principle, which would make life a bit easier for adjudicators, who have limited jurisdiction. It does; however, appear as if it is creeping closer to finding this principle.

This means that arguments that an adjudicator is applying equitable principles, which are outside jurisdiction, may well continue.

However, in my view, there is enough authority around to relatively safely conduct an analysis of the elements of estoppel, including making an unbiased finding about the last element of unconscionability, on the basis that it is a principle of law, which has an impact upon parties' contractual arrangements, if the facts and submissions support such a finding.

However, for those of you who are still troubled by the framework I have given, may I refer to an adjudication I decided a number of years ago. It was a hard-fought case where the difference between the parties was about $25 million. I was confronted with a dilemma regarding estoppel. The claimant had made submissions about estoppel regarding a number of issues, but surprisingly not regarding EOT's. The significant volume of evidence pointed towards an estoppel against the respondent levying LD's, but I had no submissions from the claimant about it, and I think neither were there any from the respondent.

I could not make any finding about estoppel regarding EOT's as neither party had made submissions about this issue, although both had fought hard about estoppel on other issues. It was a significant issue involving the levying of approximately $10 million LD's.

In order to resolve this dilemma, I wrote to the parties asking for submissions in light of the evidence as to whether the respondent was estopped or waived its rights to LD's. After carefully considering the submissions of both parties, I made a finding that estoppel was made out against the respondent levying LD's.

The respondent *took the matter upstairs* to the Supreme Court, as I recall essentially on the basis I acted outside jurisdiction in asking for submissions in the circumstances. The matter was settled shortly after the first court appearance. However, in many ways I was sorry that a Court had not decided the extent to which an adjudicator could use their powers under s25(3) of BCIPA, in the context of evidence pointing toward an estoppel.

We must therefore wait for the Supreme Court to assist adjudicators' decision-making in this tricky area, and in the interim, I hope that these notes help you in some way.

Chris Lenz

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