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RICS BRISBANE



SUGGESTED TIPS ABOUT ESTOPPEL

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7 APRIL 2016



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DRS 40: 1976-2016

Celebrating 40 years of service and standards in the public interest

- Ethos
- Pathos
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OUTLINE

1. Background
2. Estoppel definitions/concepts
3. What claimants must establish?
4. What respondents argue?
5. Suggested approach
6. Concluding remarks



BACKGROUND

1. Very onerous contracts out there
2. Time bars, written variations & LD's
3. Claimant's want a "Get out of Jail free card"
4. Claimant must establish all elements
5. Do not try and rewrite contract
6. Carefully consider evidence and submissions



ESTOPPEL DEFINITIONS

There are a whole lot of definitions including:

1. A rule of law which prevents a plaintiff from alleging a fact necessary to their claim if they have previously by words or conduct represented the contrary to the defendant. [*Hudson's* 12th ed (2010) page 90]
2. 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 [*Thomson Reuters: Laws of Australia para 35.6.10*]
3. Operates to prevent departure from a representation by words or conduct of existing fact, if representee has relied on it [Cheshire & Fifoot 9th ed (2008) page 66]
4. Cannot depart from an assumption that both parties have adopted [Cheshire & Fifoot]
5. Estoppel by conduct – affords protection against the detriment which would flow from a party's change of position if the assumption that led to it were deserted [Mason CJ in *Commonwealth v Verwayen* (1990) 170 CLR 394, 410]



AUSTRALIAN ESTOPPEL CASES

- *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387;
- *Commonwealth v Verwayen* [1990] HCA 39; (1990) 170 CLR 394;
- *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; (2014) 307 ALR 512



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HOW CLAIMANT'S USE IT

Establish estoppel elements [Hudson's]

1. Representation
2. Reliance
3. Acting to detriment
4. Unconscionability



RESPONDENT'S ARGUMENTS

1. No representation
2. No reliance possible
3. Claimant's failure to show detriment
4. Conduct not unconscionable
5. Adjudicator cannot apply equity
6. Adjudicator showing bias



SUGGESTED DECISION APPROACH

1. Read all submissions and check against the evidence
2. Discard unsubstantiated submissions
3. Develop likely *story*
4. Now consider each element, and refine *story*
5. Make findings on each element
6. If 1 element absent – NO ESTOPPEL



CONCLUDING REMARKS

1. Probably moving to estoppel by conduct
2. Consider each element and make findings
3. Make finding on unconscionability within careful constraints
4. Do not allow this to infect your finding on a strict contract term
5. Sometimes ask for further submissions



REFERENCES

1. Please see my attached paper *Suggested tips about Estoppel 7 April 2016* containing all references, and fuller explanation of the concepts
2. It will be emailed to you after the presentation.