

## “ONE DAY THIS WILL ALL BE YOURS”: ESTOPPEL BY ENCOURAGEMENT AND ACQUIESCENCE

*Promises, representations or conduct which leave a party with an expectation that they will receive property in the future often lead to dispute and litigation.*

*A reasonable approach to cases such as these is to assess whether the conduct amounts to a contractual promise (for example, a contract to leave property in a will); a promise upon which a party relies yet not a contract (promissory estoppel); an estoppel by representation or encouragement; or an estoppel by acquiescence. Of these doctrines, it is estoppel by encouragement and by acquiescence which most commonly arise. These two doctrines bear many like elements, but they are different. They involve different evidentiary issues. Understanding that which sets them apart is important when assessing prospects and the necessary evidence for trial.*

### Introduction

The expression “equitable estoppel” covers several discrete equitable doctrines including promissory estoppel, proprietary estoppel<sup>1</sup> by encouragement and proprietary estoppel by acquiescence. The elements of “equitable estoppel” were set out by Brennan J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 428-429. While the elements set out are not a code, they are commonly regarded as useful guide, or check<sup>2</sup>. As Meagher JA observed in *DHJPM Pty Ltd v Blackthorn Resources Ltd* [2011] NSWCA 348, it is necessary “to attend carefully to the identification of the assumption or expectation which the object of the estoppel is said to be estopped from denying or asserting”, so directing attention to the correct doctrine, “which must then be applied in a disciplined and principled way”<sup>3</sup>.

While the circumstances in which claims of this nature may arise are multifarious, they often concern land, and expectations of family members to it. Evidence may evolve over years, perhaps decades. A proper understanding of these equitable doctrines and points of difference between them is important from the early stages of a case. It is useful to have the principles firmly in mind before embarking upon the often-complex task of gathering evidence and settling pleadings.

Circumstances giving rise to an estoppel need to be distinguished from contracts not to revoke a will, or to leave property by will. Although a will is revocable until death or loss of capacity, equity enforces such promises by fastening a trust on the estate to give effect to the contract<sup>4</sup>.

### Promissory estoppel

The controversy that accompanied *Waltons Stores (Interstate Ltd) v Maher* (1988) 164 CLR 387 was that, for the first time, it permitted the enforcement of a non-contractual promise where equity demanded. There was concern, unfounded as matters transpired, that it would outflank the law of contract and the need for contractual intention and consideration for promises to be enforced.

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<sup>1</sup>The word “proprietary” reflects the fact that the remedy is all about promises to confer interests in property, usually land’: *Guest v Guest* [2022] UKSC 27 at [4] per Lord Briggs

<sup>2</sup> *Kramer v Stone* [2023] NSWCA 270 at [78]

<sup>3</sup> *DHJPM Pty Ltd v Blackthorn Resources Ltd* [2011] NSWCA 348 per Meagher at [44].

<sup>4</sup> See, for example, *DeLaforce v Simpson-Cook* [2010] NSWCA 84 at [31]

Promissory estoppel was not the stalking horse it might have been. The similarities between promissory estoppel and contract, in particular the requirement that the promise be clear, and intended to be relied upon, makes this form of estoppel relatively uncommon. More common are claims of estoppel by encouragement, and estoppel by acquiescence.

### Estoppel by encouragement and estoppel by acquiescence

The recent decision of the New South Wales Court of Appeal in *Kramer v Stone* [2023] NSWCA 270 is a useful exposition of the principles relating to estoppel by encouragement. It also helpfully articulates differences between estoppel by encouragement and estoppel by acquiescence. *Kramer v Stone*, which concerned land in Upper Colo, New South Wales, is typical of these cases, involving encouragement by parents of a child that should he continue to work the land, one day the land would be his.

Estoppel by encouragement and estoppel by acquiescence have their genesis in two old cases, *Dillwyn v Llewelyn* (1862) 4 De GF & J 517; 45 ER 1285 and *Ramsden v Dyson* (1866) LR1 HL 129 respectively. In broad terms, the former involves encouragement by the representor of an assumption on the part of the aggrieved party; the latter involves acquiescence by one party where it knows that the aggrieved party is operating under the assumption.

There are many similarities, although important differences, between the two doctrines notwithstanding they often arise in the same circumstances and will both be pleaded in support of a claim.

Importantly, an estoppel by encouragement does not require the same level of certainty in respect of representation or promise as would an estoppel by representation or promissory estoppel<sup>5</sup>. Generally, a representation will be sufficiently clear if it is reasonable for the representee to have interpreted it as having a meaning which it is clearly capable of bearing and upon which it is reasonable to rely<sup>6</sup>. The precise nature of the expected arrangements need not necessarily be susceptible of precise analysis<sup>7</sup>.

For an estoppel by encouragement to arise, it must be established that the representee, induced by the representor, held an assumption that he or she would have an interest in the property<sup>8</sup>. This requires the careful identification of the nature of the assumption held by the representee<sup>9</sup>. That the representee has been “induced” may be implied from conduct<sup>10</sup>.

Reliance must be established as a matter of fact. The relevant assumption need not be the sole inducement for the representee; it need only be a “contributing cause”<sup>11</sup>.

It is necessary that the representee demonstrate it will suffer detriment. “Detriment” is not detriment suffered by reason of the representation, but detriment that has been suffered or will be

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<sup>5</sup> *Kramer v Stone* [2023] NSWCA 270 at [84]

<sup>6</sup> *Ibid* at [86], citing *Galaxidis v Galaxidis* [2004] NSWCA 111 at [93]

<sup>7</sup> *Ibid* at [85]

<sup>8</sup> *Ibid* at [88]

<sup>9</sup> *Ibid* at [88], citing *Doueihi v Construction Technologies Australia Pty Ltd* (2016) 92 NSWLR 247; [2016] NSWCA 105 at [186]

<sup>10</sup> *Ibid* at [89]

<sup>11</sup> *Ibid* at [91], citing *Sidhu v Van Dyke* (2014) 251 CLR 505; [2004] HCA at 19, [71]-[73], [90]

suffered if the defendant is permitted to resile from the representation, assessed at the time a party seeks to resile from the assumption or expectation<sup>12</sup>.

Finally, it must be unconscionable for the representor to be permitted to depart from the representee's expectation. This is a multi-faceted inquiry. Relevant factors include: the nature and character of the detriment; the proportionality of the detriment to the nature of the encouragement; and, importantly, the knowledge of the representor of acts done in reliance on the representation<sup>13</sup>. Note, however, that while knowledge of the acts done in detrimental reliance on the representation is relevant when considering whether it would be unconscionable to permit the representor to resile, it is not an essential element of estoppel by encouragement<sup>14</sup>.

An important point in *Kramer v Stone* was whether estoppel by encouragement required that the representor had actual knowledge of the plaintiff's detrimental reliance. The appellant placed reliance on the observations of Brennan J in *Waltons Store v Maher* at 428-429, where His Honour set out the elements of equitable estoppel, the fourth of which was "the defendant knew or intended him to do so" (that is, that the plaintiff act or abstain from acting in reliance on the assumption or expectation). Leeming JA reasoned that 'Brennan J's requirement that "the defendant knew or intended him to do so" was carefully drafted to capture cases of encouragement and also of silence. The disjunctive "knew or intended" captures (a) cases of encouragement where the defendant intended the plaintiff to hold the assumption, and (b) cases of silence where the defendant knew that the plaintiff was labouring under an incorrect assumption'<sup>15</sup>. Leeming JA concluded that although the position was unsettled, the weight of authority suggested that actual knowledge of detrimental reliance was not necessary in a case where the defendant's own encouragement brought about the plaintiff's assumption<sup>16</sup>. That was also the position reached by Ward P<sup>17</sup>.

Note here an important difference between estoppel by encouragement, and estoppel by acquiescence. Knowledge of acts done in reliance on the assumed state of affairs is a necessary element of estoppel by acquiescence whereas, as discussed above, not so of estoppel by encouragement<sup>18</sup>. In cases of estoppel by acquiescence, the expectation of the claiming party is not induced in the same way by a representation – rather, the equity arises because the defendant knew of the assumption but failed to deny to the plaintiff the correctness of the assumption while possessing that knowledge. Further, in the case of estoppel by acquiescence, knowledge by the silent party of the state of affairs the other party assumed or expected is necessary to support an equitable estoppel<sup>19</sup>.

#### What is the appropriate relief for proprietary estoppel?

Often the expectation created differs significantly from any detriment which would be suffered should a representor be permitted to depart from its representation. So, whether the expectation is enforced, or the detriment compensated, becomes a critical issue.

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<sup>12</sup> *Ibid* at [94], [96]

<sup>13</sup> *Ibid*, at [97]-[105]

<sup>14</sup> *Ibid*, at [200]. This is different from estoppel by acquiescence, which requires knowledge of acts in reliance of the representation, since it is the knowledge and standing by which gives rise to the estoppel: at [199]

<sup>15</sup> *Ibid* at [288]

<sup>16</sup> *Ibid* at [295]; see also Ward P at [199]

<sup>17</sup> *Ibid* at [199]

<sup>18</sup> *Ibid* at [199] per Ward P; and at [294] per Leeming JA

<sup>19</sup> *Ibid* at [294] per Leeming JA

It can no longer be said that the proper remedy is the “minimum equity” to do justice<sup>20</sup>. A constructive trust lies at one end of the spectrum of available relief, a remedy often granted where the representor is held to its representation. However, “a constructive trust ought not to be imposed if there are other orders capable of doing full justice”<sup>21</sup>. The Court should decide, before a constructive trust is imposed, whether having regard to the issues in the case there is an equitable remedy which falls short of the imposition of a trust<sup>22</sup>. That said, in *Giumelli* the majority proceeded on the basis that prima facie the operation of an estoppel by conduct was to preclude departure from an assumed state of affairs, unless that relief would exceed what could be justified by the requirements of conscientious conduct and would be unjust to the estopped party<sup>23</sup>.

The circumstances of the proprietary estoppel will affect the relief granted. The frequently cited observations of Nettle JA (as he then was, and with whom the others agreed) in *Donis v Donis* [2007] VSCA 89 at [34] demonstrate the point. There, His Honour accepted that an “estopped party would not be held to a promise to transfer property worth \$1 million if the only detriment suffered by the party entitled to the benefit of the estoppel were the outlay of a couple of hundred dollars in constructing a shed on the land”. But circumstances would likely be different where “the detriment suffered is of a kind and extent that involves life-changing decisions with irreversible consequences of a profoundly personal nature ... beyond the measure of money and such that the equity raised by the promisor’s conduct can only be accounted for by substantial fulfilment of the assumption upon which the respondent’s actions were based”.

As to the circumstances to be considered when deciding the proper remedy, the observations of Allsop CJ in *Delor Vue Apartments CTS 39788 v Allianz Australia Insurance Ltd (No 2)* [2020] FCA 588 at [335] are helpful. Equity will look at all the relevant circumstances touching upon the conscionability of resiling from the encouragement or representation previously made. That extends to the nature and character of the detriment, how it can be remedied and its proportionality to the terms and character of the encouragement or representation. It also extends to the conformity with good conscience of keeping a party to any relevant representation or promise made.

In a useful decision on appropriate remedy, Allsop P observed in *DeLaforce v Simpson-Cook* [2010] NSWCA 84, at [4], that proportionality (of detriment, and remedy) “is undeniably a relevant consideration, and sometimes of considerable importance. It should not, however, be transformed into a necessary constitutive element of a cause of action to be pleaded or proved by the party seeking relief. To do so would elevate one consideration above others, and in particular above the importance of making good an expectation by encouragement or representation”.

If a constructive trust is not appropriate, other equitable remedies are available, including an equitable charge<sup>24</sup> and the monetary equivalent of the detriment suffered<sup>25</sup>.

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<sup>20</sup> *Giumelli* at [40]-[48]; *DeLaforce* 78 NSWLR at 485-486

<sup>21</sup> *John Alexander’s Clubs v White City* [2010] 241 CLR 1 at [128].

<sup>22</sup> *Giumelli v Giumelli* (1999) 196 CLR 101 at [10]

<sup>23</sup> *Ibid* at [42]

<sup>24</sup> See for example, in a different context, *NSW Trustee and Guardian v Tongias* [2022] NSWCA 225

<sup>25</sup> see *Guest v Guest* [2022] UKSC 27, where there is a useful and informative discussion about remedies