

1990

Estoppel and Waiver: The Commonwealth v Verwayen in the High Court

T E. Cain

Bond University

Follow this and additional works at: <http://epublications.bond.edu.au/blr>

This Commentary is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact Bond University's Repository Coordinator.

Estoppel and Waiver: The Commonwealth v Verwayen in the High Court

Abstract

In the recent High Court case of *The Commonwealth v Verwayen*, the facts were that in 1984 Verwayen began an action for damages for personal injury suffered as a result of a collision between HMAS Melbourne and HMAS Voyager, in which he was serving, during combat exercises in 1964.

In 1985 the Commonwealth filed its defence and admitted all the allegations in the statement of claim except the allegation that Verwayen was injured and suffered loss or damage as a result of the collision. The Commonwealth did not plead that the action was barred by the effluxion of time under the Limitation of Actions Act 1958 (Vic), s5, as it might have done. Also, the Commonwealth did not plead that it owed no duty of care to Verwayen.

In 1986 the Commonwealth was given leave to amend its defence and (1) to deny that the collision was caused by the negligence of the ships' companies and that a duty of care was owed to Verwayen, and (2) to allege that the action was statute barred by s5.

Keywords

estoppel, waiver, Commonwealth v Verwayen

ESTOPPEL AND WAIVER *THE COMMONWEALTH v VERWAYEN* IN THE HIGH COURT

by **T E Cain**

Professor of Law
Bond University

In the recent High Court case of *The Commonwealth v Verwayen*,¹ the facts were that in 1984 Verwayen began an action for damages for personal injury suffered as a result of a collision between HMAS Melbourne and HMAS Voyager, in which he was serving, during combat exercises in 1964.

In 1985 the Commonwealth filed its defence and admitted all the allegations in the statement of claim except the allegation that Verwayen was injured and suffered loss or damage as a result of the collision. The Commonwealth did not plead that the action was barred by the effluxion of time under the *Limitation of Actions Act* 1958 (Vic), s5, as it might have done. Also, the Commonwealth did not plead that it owed no duty of care to Verwayen.

In 1986 the Commonwealth was given leave to amend its defence and (1) to deny that the collision was caused by the negligence of the ships' companies and that a duty of care was owed to Verwayen, and (2) to allege that the action was statute barred by s5.

The Commonwealth had waived the Limitation of Actions Act and admitted liability as regards a shipmate of Verwayen. Further, on several occasions, the Australian Government Solicitor joined with Verwayen's solicitors in applications for an expedited hearing of the claim on the grounds that liability was not an issue. Again, the Minister Assisting the Minister for Defence wrote to Verwayen to the same effect.

By a majority of four to three the High Court (Mason CJ, Brennan and McHugh JJ dissenting) affirmed the decision of the majority of the Full Court of the Supreme Court of Victoria and held that the Commonwealth was estopped from disputing (Deane and Dawson JJ) and had waived its right to dispute (Toohey and Gaudron JJ) its liability to Verwayen. Where an action in negligence against an employer is barred by a statute of limitations, the employer has repeatedly represented that he would not resist the commencement of the action out of time and the employee has proceeded on the faith of these representations, the employer cannot later claim the protection of the statute.

1 (1990) 64 ALJR 540.

According to Deane J, there was estoppel by conduct, a general doctrine operating at law and in equity.² If the Commonwealth were allowed to depart from the assumed state of affairs, the detriment which Verwayen would sustain could not be measured in terms merely of wasted legal costs. The past stress, anxiety, inconvenience and effort which were involved in the pursuit of the proceedings would be rendered futile.³ According to Dawson J, there was estoppel by conduct. The equity raised by the Commonwealth's conduct was such that it could only be accounted for by the fulfilment of the assumption.⁴ The view of Mason CJ was that there was estoppel by conduct but an order for costs was sufficient to satisfy it.⁵ Brennan J's view was that there was equitable estoppel (promissory estoppel) but Verwayen could be compensated for the detriment.⁶

According to McHugh J, there was neither estoppel in pais (there was no representation as to present or past fact) nor equitable (promissory) estoppel (an order for costs avoided any detriment to Verwayen).⁷ Toohey and Gaudron JJ found it unnecessary to deal with estoppel.

Toohey and Gaudron JJ held that there was waiver in that the Commonwealth had chosen not to raise defences otherwise available to it.⁸ Deane J did not see the case as one of 'waiver'—waiver is being increasingly absorbed and rationalised by the doctrine of estoppel by conduct and it is preferable to confine 'waiver' principally to cases of true election.⁹ Dawson J thought that where 'waiver' is not used to describe election or estoppel it may be used loosely to indicate non-insistence on a right either by choice or by default but here the matter was determined when the Commonwealth was given leave to amend its defence.¹⁰

According to Mason CJ, 'waiver' is confined to new agreement, election and estoppel. There was no election in *Verwayen*, ie there was no intentional abandonment of a right, with knowledge, where a person was entitled to alternative, inconsistent rights—it could not be said that the Commonwealth was required by a certain point in time to elect whether or not to plead the defences.¹¹ Brennan J used 'waiver' to mean the unilateral abandonment of a right and held that the issue of negligence was not amenable to waiver (an element in a cause of action is not a right introduced solely for the benefit of a defendant) and, although the defence of s5(6) of the Limitation of Actions Act was amenable to waiver, it had not been waived.¹² McHugh J said that there is a number of cases in England and Australia which hold that a party may waive a statutory condition conferred solely for his or her benefit and that some, at least,

2 Ibid, pp 555, 558.

3 Ibid, p562.

4 Ibid, p568.

5 Ibid, pp 547, 548.

6 Ibid, pp 553, 554.

7 Ibid, pp 585, 586.

8 Ibid, pp 570, 573 and pp 577-579, respectively.

9 Ibid, p562.

10 Ibid, p566.

11 Ibid, pp 543, 544.

12 Ibid, pp 551-553.

cannot be accurately categorised as cases of contract, estoppel or election. However, there was no waiver in the present case—where the existence of a statutory right depends upon the fulfilment of a condition precedent, a person entitled to insist on fulfilment of that condition may dispense with fulfilment if he or she knowingly takes or acquiesces in the taking of a subsequent step in the course of procedure laid down by the statute after the time for fulfilment of the condition has passed but Verwayen's right to bring the action was not subject to a condition precedent that it be exercised within the period specified by s5.¹³

Comments

1. *The Commonwealth v Verwayen* is an important case for a number of reasons. It is the fourth in a line of High Court cases concerned with estoppel—other cases being *Legione v Hateley*,¹⁴ *Waltons Stores (Interstate) Ltd v Maher*,¹⁵ and *Foran v Wright*.¹⁶ Again, it is one of a number of cases in the High Court involving a claim to equitable relief on the grounds of unconscionable conduct—other such cases are *Taylor v Johnson*,¹⁷ and *Commercial Bank of Australia Ltd v Amadio*.¹⁸
2. The *Verwayen* case also illustrates the difficulties of terminology which exist in the areas of waiver and estoppel, and reveals some differences in the approaches of the various judges of the High Court. The term 'waiver' is used in various senses, sometimes, for example, being used to embrace new contract, election and estoppel and sometimes to include also the waiver of the fulfilment of a condition precedent to the existence of a statutory right. Likewise, the word 'estoppel' has several meanings—for example, 'estoppel by conduct', 'estoppel by representation', 'estoppel in pais', 'promissory estoppel', 'proprietary estoppel', 'common law estoppel', 'equitable estoppel'.
3. WAIVER
 In *Verwayen*, Mason CJ¹⁹ agreed with Isaacs J in *Craine v Colonial Mutual Fire Insurance Co Ltd*²⁰ that waiver is an intentional act with knowledge whereby a person abandons a right by acting in a manner inconsistent with it. The Chief Justice added that this occurs only where the person waiving the right is entitled to alternative rights inconsistent with each other and that this category of waiver is an example of the doctrine of election. Dawson J also agreed and pointed out²¹ that Isaacs J had contrasted election with the doctrine of estoppel by conduct which looks chiefly at the situation of the person relying on the estoppel, with the consequence that the

13 *Ibid*, pp 581, 583, 584.

14 (1983) 152 CLR 406.

15 (1987-1988) 164 CLR 387.

16 (1989) 64 ALJR 1.

17 (1982-1983) 151 CLR 422.

18 (1982-1983) 151 CLR 447.

19 *Verwayen*, pp 543, 544.

20 (1920) 28 CLR 305, 326.

21 *Verwayen*, pp 563, 564.

knowledge (and intention) of the person sought to be estopped is immaterial, whereas election looks at the conduct and position of the person who is said to have waived. Toohey and Gaudron JJ also agreed.²²

Toohey J said,²³ quoting Mason J in *Sargent v ASL Developments Ltd*,²⁴ that usage has sanctioned waiver as signifying (1) the legal grounds on which a person is precluded from asserting one of two alternative, inconsistent legal rights to which he is entitled, or (2) the legal grounds on which a person is precluded from raising a particular defence to a claim against him, and that the former is better categorised as 'election'. In *Verwayen*, 'waiver' was being used in the sense of (2) *ante* and there was such waiver. Such waiver is incapable of being withdrawn. Gaudron J used 'waiver' to signify deliberate action or inaction which has resulted in a changed relationship between the parties and held that the relationship was changed by the defence originally delivered by the Commonwealth. Both the 'combat exercise defence' and the defence that the action was statute barred were susceptible of waiver.²⁵ A person cannot take up two inconsistent positions. Further, detriment to the other party need not be shown.²⁶

Deane J also thought that in the case of waiver the act of the waiver operates directly to waive a right or entitlement without any need to establish that the other party has acted on the basis of the right or entitlement being no longer asserted.²⁷ According to Dawson J, a person may waive a personal or private statutory right, in the sense of not relying upon it, and such a waiver does not amount to an election and does not necessarily give rise to an estoppel. However, when the term 'waiver' is used in that sense, the question is whether a party, having failed to insist upon his right at an appropriate time, should later be allowed to do so. In *Verwayen*, that question was determined when the Commonwealth was given leave to amend its defence.²⁸

Brennan J saw waiver and election as distinct doctrines since a right may be waived although there is no alternative right inconsistent with it. Election involves a choice between alternative inconsistent rights. An election is binding on the party who makes it when it is made overtly or, at the latest, when it is communicated to the party affected by it. It is binding whether or not the party affected by it has relied on it. *Verwayen* was concerned not with election but with the unilateral abandonment of a right. When a party possessed of a right knows that a new legal relationship is to be constituted between him and the party whose interests may be affected by a waiver, the right must be exercised before the new relationship is constituted or he will be held to have waived it.²⁹

22 Ibid, pp 570 and 576, respectively.

23 Ibid, pp 570, 572, 573.

24 (1974) 131 CLR 634, 655.

25 *Verwayen*, pp 578, 579.

26 Ibid, pp 570, 573 and pp 577-579, respectively.

27 Ibid, p562.

28 Ibid, pp 565, 566.

29 Ibid, pp 550—552.

4. ESTOPPEL

As to 'estoppel', estoppel by conduct or representation, sometimes called 'estoppel in pais', operates at common law and in equity. (Promissory estoppel and proprietary estoppel operate only in equity.)³⁰

It seems that the various categories are all intended to serve the same purpose, *ie* protection against the detriment which would flow from a party's change in position if the assumption that led to it were deserted.³¹

In the case of estoppel by conduct and estoppel by representation, the party estopped is precluded from unjustly departing from an assumption of fact which his conduct or representation has caused another party to adopt for the purpose of their legal relations.³² Until recently it was believed that the representation had to be as to existing fact. Now, there is some authority for the propositions that it may be as to future fact, and it may be of law.³³ (In the case of promissory estoppel, a promise, express or inferred, to do or to refrain from doing a specified act is sufficient.)³⁴

The other party must act to his detriment by adopting the assumption and the estoppel is binding as soon as he has done so.³⁵ The situation of the party relying on the estoppel is looked at and the intention and knowledge of the party said to be estopped is immaterial.³⁶

This kind of estoppel is a rule of evidence, available where there is an independent cause of action, to prevent a person denying what he has previously represented, and not itself constituting a cause of action. The detriment which would be suffered by the other party in the event of departure from the assumed state of affairs is avoided by holding the party estopped to that state of affairs. (Promissory estoppel is concerned, not to make good the assumption, but to do what is necessary to prevent the suffering of detriment.)³⁷

Promissory estoppel is an emanation of the general doctrine of estoppel by conduct.³⁸ It is not confined to the case where there is an existing contractual relationship between the parties but it is uncertain whether there must be some other pre-existing legal relationship between the parties—if such a relationship is necessary, it seems that it was present in *Verwayen*.³⁹ It is not easy to see why such a relationship should be necessary.

30 *Verwayen*, per Mason CJ at p545, Brennan J at p550, Deane J at pp 555, 557 and McHugh J at pp 584, 585.

31 Per Mason CJ at p545 and McHugh J at p585.

32 Per Mason CJ at p545, Brennan J at p550, Deane J at pp 557, 558, Dawson J at p564 and McHugh J at pp 584, 585.

33 Per Mason CJ at pp 545, 546 and per Deane J at pp 555, 558 and 560.

34 Per Mason CJ at pp 545, 546.

35 Per Brennan J at p550.

36 Per Toohey J at p570.

37 Per Mason CJ at pp 545, 546, Brennan J at p553, Dawson J at pp 564, 565 and McHugh J at pp 584, 585.

38 Per Deane J at pp 554, 558.

39 Per Mason CJ at p542 and Dawson J at p565.

There is promissory estoppel where one party makes a representation or promise as to the future which induces in another an assumption, the other relies on the promise to his detriment and departure from the assumption would be unconscionable.⁴⁰ The promisor is precluded from resiling from his promise or denying the assumption without avoiding the detriment by making adequate compensation or giving reasonable notice.⁴¹

The estoppel is binding as soon as the promisee acts on the promise to his detriment.⁴²

Equity is more flexible than the common law and is concerned, not to make good the assumption, but to do what is necessary to prevent the suffering of detriment and the promisee is only entitled to the relief necessary to prevent unconscionable conduct and do justice between the parties.⁴³ Equitable estoppel permits a court to do what is required in order to avoid detriment to the party who has relied on the assumption induced by the party estopped, but no more. In an appropriate case, the party estopped will be held to the assumption, even if that means the effective enforcement of a voluntary promise.⁴⁴

Promissory estoppel does not of itself give rise to a cause of action.⁴⁵

According to Mason CJ,⁴⁶ it should be accepted that there is but one doctrine of estoppel, operating at common law and in equity, and according to Deane J,⁴⁷ there is a general doctrine of estoppel by conduct.

40 Per Dawson J at pp 564, 565 and McHugh J at p585.

41 Per Brennan J at p550, Deane J at pp 557, 559 and McHugh J at p585.

42 Per Brennan J at p550.

43 Per Mason CJ at p545 and McHugh J at p585.

44 Per Mason CJ at p546, Brennan J at p553, Deane J at p557, Dawson J at p564, Toohey J at p574, Gaudron J at p579 and McHugh J at p585.

45 Per Deane J at pp 558, 560 and Dawson J at p567.

46 *Verwayen*, p546.

47 *Ibid*, pp 558, 560.