

## EQUITABLE ESTOPPEL: DEFINING THE DETRIMENT

By DENIS SK ONG, Associate Professor of Law, School of Law, Bond University.

### The Grundt View

In *Grundt v Great Boulder Proprietary Gold Mines Limited*<sup>1</sup> Dixon J described equitable estoppel as follows:

...The principle upon which estoppel *in pais* is founded is that the law should not permit an *unjust* departure by a party from an assumption of fact<sup>2</sup> which he has caused another party to adopt or accept for the purpose of their legal relations. This is, of course, a very general statement. But it is the basis of the rules governing estoppel. Those rules work out the more precise grounds upon which the law holds a party disentitled to depart from an assumption in the assertion of rights against another. One condition appears always to be indispensable. That other must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption. In stating this essential condition, particularly where the estoppel flows from representation, it is often said simply that the party asserting the estoppel must have been induced to act to his detriment. Although substantially such a statement is correct and leads to no misunderstanding, *it does not bring out clearly the basal purpose of the doctrine*. That purpose is to *avoid or prevent a detriment* to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting. This means that the *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. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. His action or inaction must be such that, if the assumption upon which he proceeded were shown to be wrong and an inconsistent state of affairs were accepted as the foundation of the rights and duties of himself and the opposite party, the consequence would be to make his original act or failure to act a source of prejudice...<sup>3</sup>

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1 (1937) 59 CLR 641.

2 The relevant assumption has subsequently been extended to include, not only an assumption of present fact, but also an assumption of *future* fact (namely, the assumption made by one person of the truth of a *promise* made to him by another person that the latter will do, or will abstain from doing, something if the promisee will do, or will abstain from doing, another thing): *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387.

3 (1937) 59 CLR 641 at 674-675. Emphasis added, except for '*in pais*'. See also *Thompson v Palmer* (1933) 49 CLR 507 at 547 (per Dixon J). In *Grundt*, Dixon J's specific reference to the law not permitting

Thus, Dixon J took punctilious care to emphasise that, in equitable estoppel, the detriment to the party asserting the estoppel is *not* to be measured by the monetary value of that party's induced act or induced abstention, but, rather, that detriment is to be measured by the loss which that party would suffer if the estopped party (ie, the inducing party) were permitted to abandon the assumption which he had induced the other party to accept as the basis of their legal relationship with each other. The monetary value of the induced act or abstention cannot be the measure of the induced party's detriment because the induced act or abstention does not form any part of the benefit promised to the induced party. The detriment to the induced party is the inducing party's failure to confer on him the benefit so promised, and it is this detriment which equitable estoppel is designed to prevent.

Thus, if A, the owner of Whiteacre (worth \$1,000,000) were to promise B that if the latter were to build a house (at a cost to B of \$100,000) on Whiteacre, then he (A) would, upon B's completion of the house, transfer to B the title to Whiteacre, and B, induced by A's promise, were to build the house, then B's detriment, if A were permitted to break his promise, would *not* be the cost incurred by him in building the house (\$100,000), since A had *not* induced B to assume that A would reimburse to B the cost of construction. B's detriment would be his inability, by virtue of A's refusal, to obtain title to the improved land (worth \$1,100,000 – on the view that the construction of the house has added \$100,000 to the value of the land). The only way of preventing detriment to B is to compel A to transfer Whiteacre to B.<sup>4</sup> Anything less than the order that such a transfer be made would fail to prevent A from causing B to suffer 'the real detriment'.<sup>5</sup>

The real detriment to B is not the sum of \$100,000 which he expended on the construction of the house, since A never promised B that B would receive from A the cost of building that house. Thus, if A refuses to reimburse to B the cost of construction, B is not entitled to complain about A's refusal to do so. If B is not entitled to complain about A's refusal, then A's refusal cannot amount to a detriment to B of a kind which equity will seek to prevent. Equity cannot, without self-contradiction, recognise as a detriment to B an act or omission by A about which equity does not permit B to complain.

A's promise to B was that B would receive the title to Whiteacre from A if B built the house on Whiteacre, and it was this promise, and not the non-existent promise of A to reimburse to B the cost of construction, which induced B to build the house. This means that if A were permitted to abandon the assumption with which he had induced B to build the house then the real and only detriment to B would be A's falsification of that assumption, namely, A's failure to transfer to B the title to Whiteacre. Preventing B from suffering detriment is, in such a situation, identical to preventing A from falsifying the assumption.

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the estopped party to make an 'unjust departure' from the relevant assumption means that, in his view, equitable estoppel is *not* a rule of *evidence*, but a principle of *equity*: (1937) 59 CLR 641 at 674.

4 See, for example, *Dillwyn v Llewelyn* (1862) 4 D F & J 517, 45 ER 1285; *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699; *Crabb v Arun District Council* [1976] 1 Ch 179.

5 *Grundt v Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641 at 674 (per Dixon J).

Indeed, the view that, in such a situation, B's detriment would be no more than the sum of \$100,000 which he had expended on the construction of the house, was specifically rejected by the High Court in *Giumelli v Giumelli*.<sup>6</sup>

There, however, the High Court favoured an intermediate position. Although the court did order A to do more than merely to reimburse B for the monetary value of B's acts and abstentions (being acts and abstentions induced by A), it did not order A to make good the assumption with which he had induced B's acts and abstentions. Instead, the High Court ordered A to pay to B the monetary value of the land which A had promised to transfer to B, as distinct from ordering A to transfer to B the land itself. Technically, therefore, the court held that A was not estopped from denying the truth of the assumption with which he had induced B to act, in that, notwithstanding that A had promised to transfer the land to B, and notwithstanding that B had acted on A's promise to him, A was permitted to deny to B the title to the land.<sup>7</sup>

### **Alternative View of Detriment (the Lesser Detriment)**

In *Commonwealth v Verwayen*<sup>8</sup> Mason CJ suggested that the notion of detriment in equitable estoppel was susceptible of being measured in two different ways, observing:

When a person relies upon the correctness of an assumption which is subsequently denied by the party who has induced the making of the assumption, two distinct types of detriment may be caused. In a broad sense, there is the detriment which would result from the denial of the correctness of the assumption upon which the person has relied. In a narrower sense, there is the detriment which the person has suffered as a result of his reliance upon the correctness of the assumption.<sup>9</sup>

Mason CJ's attempt to establish these two types of detriment offers a conceptual challenge. The Chief Justice argued that detriment was capable of being understood in a narrower sense, namely, as that which the person asserting the estoppel has suffered as a result of his reliance upon the correctness of the assumption induced in him by the estopped party. However, the distinction thus purportedly drawn by the Chief Justice is not easy to discern. This is so because 'the detriment which the person has suffered as a result of his reliance upon the correctness of the assumption'<sup>10</sup> induced in him by the estopped party (being Mason CJ's narrower sense of detriment) is precisely the same as 'the detriment which would result from the denial of the correctness of the assumption upon which the person has relied'<sup>11</sup> (being Mason CJ's broad sense of detriment).

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6 (1999) 73 ALJR 547 at 553-554 (per Gleeson CJ, McHugh, Gummow and Callinan JJ).

7 In this regard, see *Commonwealth v Verwayen* (1990) 170 CLR 394 at 441-442, where Deane J noted that ordering A merely to pay compensation to B means that A is not *estopped* from denying the truth of the assumption with which he had induced B to act.

8 (1990) 170 CLR 394

9 *Ibid* at 415.

10 *Ibid* per Mason CJ.

11 *Ibid*.

Perhaps, by this reference to detriment in the ‘narrower sense’,<sup>12</sup> Mason CJ was merely describing the cost of the induced act (or abstention) to the induced party, as distinct from the value to the induced party of the fulfilment of the inducing promise (or other assumption). However, Mason CJ appears to have overlooked that the estopped party induced the other party by virtue of a promise made to that other party. That promise must be precisely defined. That promise is that the inducing party will either do, or abstain from doing, an act only if the induced party will either do, or abstain from doing, another act. Thus, the promise made by the inducing party is that he will do, or abstain from doing, an act. The promise made by the inducing party is not that he will reimburse to the induced party the monetary value of the latter’s act or abstention. There will therefore be no detriment to the induced party if the inducing party does not so reimburse the induced party. However, there will be detriment to the induced party if, but only if, the inducing party does not do, or does not abstain from doing, the act, as promised. There will be no detriment if the inducing party does carry out his promise. As Dixon J noted in *Grundt*:

...So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain...<sup>13</sup>

If the induced party is allowed to complain only if the inducing party falsifies the inducing assumption, then the *only* detriment, ‘the real detriment’,<sup>14</sup> to the induced party is that which would arise if the inducing party were permitted to falsify the inducing assumption, namely, by repudiating it. To the induced party, there is no possibility of his suffering any detriment in ‘a narrower sense’<sup>15</sup> than the withholding from him of the benefit inherent in the inducing assumption.

In *Verwayen*,<sup>16</sup> Mason CJ’s delineation of a purported distinction between detriment in ‘a broad sense’<sup>17</sup> and detriment in ‘a narrower sense’<sup>18</sup> prompted him to develop the following view:

...[C]ases of equitable estoppel have been concerned to grant relief where detriment *would*<sup>19</sup> be suffered if the assumed state of affairs upon which reliance had been placed was held not to exist. But...the relief which equity grants is by no means necessarily to be measured by the extent of that detriment. So, while detriment in the broader sense is required in order to found an estoppel (and it would be strange to grant relief if such detriment were absent), the law provides a remedy which will often be closer in scope to the detriment suffered in the narrower sense.<sup>20</sup>

Because Mason CJ took the view that detriment in the broader sense would always need to be present in order to found an estoppel, and because he also took the view that the law provides a remedy which will often be *closer* in scope

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12 Ibid.

13 (1937) 59 CLR 641at 674.

14 Ibid per Dixon J.

15 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 415 (per Mason CJ).

16 (1990) 170 CLR 394.

17 Ibid at 415.

18 Ibid.

19 Mason CJ’s emphasis.

20 (1990) 170 CLR 394 at 415-416.

to the detriment suffered in the narrower sense, the Chief Justice was suggesting that the law will, often, prevent detriment in an *intermediate* sense, namely, the detriment thus prevented will be *less* than the detriment in the broader sense, but will be *greater* than the detriment in the narrower sense.

Mason CJ's suggestion precipitates the question: given that this intermediate species of detriment is neither detriment in the broader sense nor detriment in the narrower sense, is it possible to formulate a criterion to quantify it? If this intermediate species of detriment cannot be quantified otherwise than by mere reference to its intermediacy, then the conclusion will have to be that it is a detriment of inherently capricious dimensions.

### Proportionality

In *Verwayen*,<sup>21</sup> Mason CJ propounded the principle of proportionality in the context of finding an appropriate remedy for cases of estoppel. He there said:

...A central element of [the doctrine of estoppel] is that there must be a proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption...<sup>22</sup>

This passage raises two questions:

- (i) What is that detriment to which Mason CJ refers, namely, is it detriment in the broad sense, or is it detriment in the narrower sense, or is it detriment in the intermediate sense?
- (ii) If, as Mason CJ himself asserts, it is the purpose of the remedy to avoid the detriment (howsoever identified), then the remedy awarded should merely prevent the occurrence of that detriment. What possible role is there left to play, in this situation, for 'proportionality'?<sup>23</sup> In what sense can there be a *proportionality* between the remedy and the detriment which that remedy merely avoids? Is proportionality a superfluous principle in this context?

### Real Detriment v Lesser Detriment

In *Verwayen*,<sup>24</sup> Deane J described a scenario where the remedy awarded would *not* avoid 'the real detriment' identified by Dixon J in *Grundt*.<sup>25</sup> Deane J there said:

There could be circumstances in which the potential damage to an allegedly estopped party was disproportionately greater than any detriment which would be sustained by the other party to an extent that

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21 (1990) 170 CLR 394.

22 Ibid at 413.

23 Ibid per Mason CJ.

24 (1990) 170 CLR 394.

25 (1937) 59 CLR 641 at 674.

good conscience could not reasonably be seen as precluding a departure from the assumed state of affairs if adequate compensations were made or offered by the allegedly estopped party for any detriment sustained by the other party. An obvious example would be provided by a case in which the party claiming the benefit of an estoppel precluding a denial of his ownership of a million dollar block of land owned by the allegedly estopped party would *sustain no detriment beyond the loss of one hundred dollars* spent on the erection of a shed if a departure from the assumed state of affairs were allowed...In such a case, the payment of, or a binding undertaking to pay, *adequate compensation* would preclude a finding of estoppel by conduct...<sup>26</sup>

It is not easy to accept Deane J's view, in the scenario which he described, that the induced but disappointed party would sustain no detriment beyond the one hundred dollars which that party had spent on the construction of the shed if the allegedly estopped party were left free to deny to him the promised ownership of the land. To the contrary, it would be compelling to regard 'the real detriment'<sup>27</sup> to the induced party as the failure of the inducing party to transfer to him the ownership of the land, given that the promise of such a transfer formed the essence of the inducing assumption.

Indeed, just like Mason CJ<sup>28</sup> in the same case, Deane J preferred an intermediate (and conceptually indeterminate) sense of detriment. Although Deane J had initially identified, in his hypothesis, the detriment to the induced party as the sum of one hundred dollars, he was conspicuously careful to *avoid* making the suggestion that that party should receive compensation of *only* one hundred dollars. Instead, Deane J, notwithstanding that he had purportedly quantified the detriment at *only* one hundred dollars, declared that the induced party was entitled to 'adequate compensation'.<sup>29</sup> Thus Deane J consigned the induced party to a remedial limbo, in that that party was entitled to *less* than the ownership of the one million dollar block of land, but was entitled to *more* than the sum of one hundred dollars. However, Deane J was quite unable, with respect to the scenario described by him, to formulate a criterion to quantify his notion of 'adequate compensation' in that scenario.<sup>30</sup> The problem created by Deane J springs from his refusal to recognise that 'the real detriment',<sup>31</sup> to the induced party is the failure of the inducing party to carry out his inducing promise.

Deane J was convinced that, on the facts of his hypothesis, to require the inducing owner to transfer his one million dollar block of land to the induced party would expose the owner to damage which was 'disproportionately greater'<sup>32</sup> than the detriment sustained by the induced party, such that 'good conscience'<sup>33</sup> would permit the inducing party to retain his ownership of the land, namely, to repudiate the inducing assumption, and would merely require

26 (1990) 170 CLR 394 at 441-442. Emphasis added.

27 *Grundt v Great Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641 at 674 (per Dixon J).

28 *Verwayen* (1990) 170 CLR 394 at 415-416.

29 (1990) 170 CLR 394 at 442.

30 *Ibid.*

31 *Grundt* (1937) 59 CLR 641 at 674 (per Dixon J).

32 (1990) 170 CLR 394 at 441, per Deane J.

33 *Ibid.*

him to pay the induced party adequate compensation for the detriment suffered by the latter.<sup>34</sup>

The assumption so made by Deane J as to the dictates of ‘good conscience’<sup>35</sup> is perhaps not unassailable. Why would ‘good conscience’ permit the inducing party to avoid transferring his land to the induced party, namely, permit him to avoid doing that act which he had promised the induced party that he would do, and in reliance on which the induced party had acted? In this context, it needs to be emphasised that the induced party was moved to act by the promise of being given the ownership of the land, and that he was not moved to act by the promise of ‘adequate compensation’<sup>36</sup> for some conceptually indeterminate detriment.

Suppose, adapting the facts of Deane J’s hypothesis, that V (Vendor) had entered into a written contract to sell his one million dollar block of land to P (Purchaser) for the sum of one hundred dollars, which P paid to V when the contract was made. Suppose further that V subsequently breached the contract by refusing to transfer the land to P, and P brought a suit against V for specific performance of the contract. Given these circumstances, would ‘good conscience’ permit V to refuse specific performance of the contract of sale *solely* on the ground that, if specific performance were ordered against him, the damage to him would be ‘disproportionately greater’<sup>37</sup> than the detriment which would be suffered by P if specific performance were not ordered against V? There does not appear to be any legal principle which would permit V to refuse specific performance of the contract of sale *solely* on the ground that the value of the land was disproportionately greater than the purchase price. If it would not be unconscionable to compel V to transfer the land to P in a case where the purchase price paid by P was one hundred dollars, then why would it be unconscionable to compel the inducing owner of the land, in Deane J’s hypothesis, to transfer the land to the party who had been induced by the owner of the land to spend one hundred dollars in building the shed on the land?

There is almost a conceptual identity between the consideration given by a promisee to a promisor under a contract, and the induced action or induced inaction of the promisee which results from the inducing promise made by the promisor.<sup>38</sup> In *Waltons Stores (Interstate) Limited v Maher*,<sup>39</sup> Brennan J noted:

...The measure of a contractual obligation depends on the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.<sup>40</sup>

It seems that there is no dispute that the object of equitable estoppel is to avoid detriment to the induced party. What is in dispute is the definition of that

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34 Ibid.

35 Ibid.

36 Ibid.

37 Ibid.

38 *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387 at 424 (per Brennan J).

39 (1988) 164 CLR 387.

40 Ibid at 425. Emphasis added.

detriment. It is suggested that, in order to avoid conceptual anomalies, detriment in equitable estoppel should be understood in the sense of 'the real detriment',<sup>41</sup> as identified by Dixon J in *Grundt*,<sup>42</sup> namely, as that detriment which *would be* suffered by the induced party if the inducing party were permitted to abandon, as the basis of their mutual legal relationship, the assumption which he had induced the other party to accept, and which that other party has accepted either through the latter's action or through the latter's inaction.<sup>43</sup>

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41 *Grundt* (1937) 59 CLR 641 at 674.

42 (1937) 59 CLR 641.

43 *Ibid* at 674-675 (per Dixon J).