Bond Law Review

Volume 12 | Issue 1 Article 4

2000

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Equitable Estoppel: Defining the Detriment – A Reply to Denis Ong

Abstract
[extract] I have advanced the outlines of an expectation theory of estoppel elsewhere. However, it is a thesis for which I was unable to supply much doctrinal support. The weight of judicial opinion seemed to me to fall clearly on the side of the reliance thesis. But Dr Ong thinks otherwise. According to Ong, the expectation thesis of estoppel finds ample support in the judgment of Dixon J in Grundt v Great Boulder Proprietary Gold Mines Limited. This is venerable authority indeed. It is the locus classicus on the doctrine of estoppel by conduct, both in Australia and in England. But it cannot be conscripted to the cause of the expectation thesis. In the first part of this reply I show that Ong's reading of Grundt is mistaken. In the second part I criticise his attempt to draw support for the expectation thesis from the law governing equitable relief for breach of contract.

Keywords
equitable estoppel, detriment, contract law, Grundt v Great Boulder Proprietary Gold Mines Limited

Cover Page Footnote
The author would like to thank Dr Andrew Robertson for helpful correspondence during the preparation of this reply.

This article is available in Bond Law Review: http://epublications.bond.edu.au/blr/vol12/iss1/4

EQUITABLE ESTOPPEL: DEFINING THE DETRIMENT – A REPLY TO DENIS ONG

By Michael G Pratt[*]

Introduction

The recent emergence of an expansive and uniquely Australian breed of equitable estoppel has stirred many to write. Much of this literature aims to define the purpose of the doctrine, and the prevailing orthodoxy is that estoppel seeks to prevent detriment due to reliance on the conduct of others. That detriment consists in the costs incurred by the reliant party that are rendered ineffectual by the desertion of the assumption that led to the reliance. I will refer to this as the 'reliance' thesis of estoppel.[1] In a recent article in this journal Denis Ong presented doctrinal support for an opposing view according to which the detriment that estoppel seeks to prevent consists in the failure of the inducing party to adhere to the expectation that led the induced party to change position.[2] I will refer to this as the 'expectation' thesis.

I have advanced the outlines of an expectation theory of estoppel elsewhere.[3] However, it is a thesis for which I was unable to supply much doctrinal support. The weight of judicial opinion seemed to me to fall clearly on the side of the reliance thesis.[4] But Dr Ong thinks otherwise. According to Ong, the

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1 Reliance theorists include Spence M, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel,* Oxford, Hart (1999); Robertson A, 'Towards a Unifying Purpose for Estoppel' (1996) 22 *Monash Univ L Rev* 1; Parkinson P, *Principles of Equity*, LBC, (1996) 201-280; Beech A, 'The Remedy for Estoppel: Identifying and Preventing Detriment' in Carrol R (ed) *Civil Remedies: Issues and Developments,* Federation Press (1996) 156.

2 Ong D, 'Equitable Estoppel: Defining the Detriment' (1999) 11 *Bond LR* 136.

3 'Identifying the Harm Done: A Critique of the Reliance Theory of Estoppel' (1999) 21 *Adel L Rev* 209. See also Pratt M, 'Defeating Reasonable Reliance' (1999) 18 *Univ Tas LR* 180.

4 This despite the fact that courts routinely award estoppel relief in the expectation measure. They just as routinely cite the avoidance of detrimental reliance as the reason for granting that relief. See, for example, *Waltons Stores v Maher* (1988) 164 CLR 387 at 419 (Brennan J); *Silovi Pty Ltd v Barbaro* (1988) 13 NSWLR 466 at 472 (Priestley JA); *Commonwealth v Verwayen* (1990) 170 CLR 394 at 409 (Mason CJ);

expectation thesis of estoppel finds ample support in the judgment of Dixon J in *Grundt v Great Boulder Proprietary Gold Mines Limited*.[5] This is venerable authority indeed. It is the *locus classicus* on the doctrine of estoppel by conduct, both in Australia and in England.[6] But it cannot be conscripted to the cause of the expectation thesis. In the first part of this reply I show that Ong's reading of *Grundt* is mistaken. In the second part I criticise his attempt to draw support for the expectation thesis from the law governing equitable relief for breach of contract.

Ong on *Grundt*

According to Ong, the purpose of estoppel is uncontroversial: it seeks to prevent detriment to those who act or abstain from acting on the faith of an assumption induced by another. The only controversy is how to define this detriment.[7] Ong identifies two possibilities.[8] On the view he favours, the

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Mortgage Acceptance Nominees Ltd v Australian Thoroughbred Finance Pty Ltd (1996) 69 SASR 302 at 305 (Doyle CJ); and *Public Trustee, as Administrator of the Estate of Williams v Wadley* (1997) 7 Tas R 35 at 47 (Crawford J). See also Pratt M, 'Identifying the Harm Done,' above n 3.

5 (1937) 59 CLR 641.

6 In *Commonwealth v Verwayen* (1990) 170 CLR 394 at 434 Deane J referred to Dixon J's judgment in *Grundt* as a 'classic expositions of the doctrine of estoppel by conduct.' In *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 414 Brennan J referred to it as a 'classical statement' of estoppel *in pais*. In *Central Newbury Car Auctions Ltd v Unity Finance Ltd* [1957] 1 QB 371 at 380 Denning LJ referred to Dixon J's 'well-considered analysis' of estoppel in *Grundt* as 'the most satisfactory that I know.'

7 Nowhere does Ong address the view that estoppel is concerned with promise-keeping, and *not* with detriment-prevention. Indeed, he does not refer to any of the literature on equitable estoppel. Proponents of the view that estoppel is about promise-keeping include: Birks P, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) *UWA Law Review* 1 at 61-64; Morgan B, 'Estoppel and Gratuitous Promises: A New Liability?' (1991) 13 *Syd LR* 213; Mescher B, 'Promise Enforcement by Common Law or Equity?' (1990) 64 *ALJ* 536; and Edelman J, 'Remedial Certainty or Remedial Discretion in Estoppel after *Giumelli*?' (1999) 15 *JCL* 179.

8 In fact Ong also identifies a third possibility, intermediate between the other two, in the judgment of Mason CJ in *Commonwealth v Verwayen*. According to Ong, the Chief Justice regarded the detriment against which estoppel seeks to protect as something more than the cost of reliance but less than the value of the promised performance. Here Ong seems to confuse the quantum of relief with the nature of the detriment to be avoided. Mason CJ is very clear that the detriment against which estoppel seeks to protect is 'that which flows from reliance upon the deserted assumption': (1990) 170 CLR 394 at 415. However it does not follow that the *relief* to be granted must equate with the cost to the induced party of his or her

relevant detriment is defined as the failure to adhere to the assumption that led the induced party to act. The alternative possibility, favoured by reliance theorists, identifies the detriment against which estoppel seeks to protect as the cost to the induced party of the action in reliance that is rendered futile by the abandonment of the assumption that induced it. It is this definition that Ong insists flies in the face of *Grundt*.

Ong's argument turns on an oft-cited passage from *Grundt* in which Dixon J describes the basis of estoppel by conduct.[9] Ong is impressed by the fact that in this passage Dixon J identifies the 'real' detriment against which equitable estoppel[10] seeks to protect as 'that which would flow from a change of position

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change of position. Mason CJ holds that the remedy must 'do justice between the parties' (at 416) and so must be 'proportional' to that cost, even if it is not identical with it.

9 Dixon J wrote: '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 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.' *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674-75.

10 Ong asserts (at 136) without argument that in the passage in question Dixon J is describing equitable estoppel. In fact, Dixon J was describing estoppel at *common law*, which was being asserted in defence to a claim of trespass made in the Western

if the assumption were deserted which led to it.'[11] According to Ong, the reliance costs rendered ineffectual by the inducing party's non-performance cannot be the measure of detriment so-defined since the assumption that induces a change of position is an assumption of promised performance, not of reimbursed reliance. People do not rely because they expect to recover their expenses; they rely because they expect promises to be performed. And since the detriment defined by Dixon J is said to flow from the abandonment of the assumption that *led to the reliance*, it must therefore consist in the abandonment of the promised performance.[12]

But this conclusion is quite wrong. Dixon J says nothing to support it. He says only that no real detriment occurs unless and until the assumption that induced the change of position is abandoned. He nowhere implies that this detriment *consists in* or is *measured by* the abandonment of that assumption.

Ong might object that I have ignored Justice Dixon's stipulation that so long as the inducing assumption is adhered to, 'the party who altered his situation on the faith of it cannot complain.'[13] It follows, on Ong's view, that a promisee cannot complain that his or her reliance was not reimbursed, since the inducing assumption was that *performance* (as distinct from reimbursement) would occur. And since equity cannot 'recognise as a detriment to B an act or omission by A about which equity does not permit B to complain,' it follows that equity cannot recognise the failure to reimburse reliance as a detriment.[14]

But this too is wrong. All that follows from what Dixon J says is that a reliant promisee cannot complain so long as the assumption of performance is not deserted. And this is obvious. Until the promise comes due and the promisor fails to perform as expected, the reliant party has nothing to complain about. It certainly does not follow that after the promisor fails to perform equity will brook a complaint that performance was not rendered, but disregard a complaint that the cost of reliance was not reimbursed.

Australian Warden's Court. It seems, however, that Dixon J understood the same principles to be at work in both species of estoppel: see the remarks of Denning LJ in *Moorgate Mercantile Co Ltd v Twtchings* [1976] 1 QB 225 at 241-42. See also *Thompson v Palmer* (1933) 49 CLR 507 at 547 (Dixon J).

11 (1937) 59 CLR 641 at 674.

12 '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...' Ong at 137.

13 Ibid.

14 Ong at 137.

Ong on Estoppel and Equitable Relief in Contract

In *Waltons Stores v Maher* Brennan J wrote that in moulding relief in estoppel 'the court, as a court of conscience, goes no further than is necessary to prevent unconscionable conduct.'[15] This constraint may be thought to negate the expectation thesis, since compelling a promisor to adhere to the assumption that induced an act of reliance may be more than good conscience requires. Where the cost of the reliance is slight relative to the value of the promised benefit, for example, it may overshoot the bounds of good conscience to compel conferral of that benefit. Expectation theorists must account for cases such as this. Ong proffers an account that draws on the law governing specific performance, but in so doing he relies on a dubious analogy between induced reliance and bargained-for consideration.

Ong asks us to consider an example offered by Deane J in *Commonwealth v Verwayen* of a situation where a grant of expectation relief would seem to travel beyond the demands of good conscience. The example is of 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.[16]

Deane J concludes that good conscience could not reasonably require transfer of the land since the resulting damage to the inducing party would be 'disproportionately greater' than any detriment suffered by the induced party.[17]

Ong counters this example by constructing the following analogy:

> 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' than the

15 (1988) 164 CLR 387 at 419.
16 (1990) 170 CLR 394 at 441-42.
17 Ibid at 441.

> detriment which would be suffered by P if specific performance were not ordered against V?[18]

Ong argues that since the absence of proportionality cannot preclude a transfer of the land to the one hundred dollar purchaser, neither can it preclude a transfer of the land to the person who was induced by the owner to spend one hundred dollars in building a shed on the land.[19]

The problem with this argument is that Ong takes for granted precisely what he needs to demonstrate: that a reliant promisee has a right to performance of the promise which is analogous to the right of a purchaser, and is thus independent of the degree of reliance. An absence of proportionality between the price paid and the value received under a contract of sale is irrelevant to the question of specific performance precisely because it is irrelevant to the existence of the contractual obligation. Consideration need not be adequate. It hardly follows that the degree of reliance is irrelevant to the existence of a *non-contractual* obligation on a promisor to confer a promised benefit on a reliant promisee.

Ong seems to assume that what holds true for consideration in contract also holds true for reliance in estoppel. Indeed he asserts that there is 'almost a conceptual identity' between consideration for a promise and reliance induced by a promise.[20] I fail to see the identity. Consideration functions to render promises legally binding. Reliance cannot render a promise legally binding unless it is requested as part of a bargain, in which case it *is* consideration.

Reliance may operate to estop a promisor from abandoning an assumption induced by his or her promise. But this is conceptually distinct from rendering a promise binding in law. A binding promise results from the exercise of a legal power, one aspect of that exercise being the provision of consideration.[21] Consideration perfects an obligation whose scope is defined by a promise, and which obtains independently of any influence of the promise on the actions of the promisee. In other words, the obligation of a contractual promise accrues independently of any harm that may befall the promisee if it is broken. Hence the irrelevance of the quantity of consideration. By contrast, reliance that is not bargained-for does not operate merely to perfect the obligation of a promise. Rather, it functions as evidence that a promise has so influenced the

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18 Ong at 142.
19 Ibid.
20 Ibid.
21 On contract-making as the exercise of a legal power, see Hart HLA, *The Concept of Law,* Clarendon (1984) 27, 42-43; Fuller L, 'Consideration and Form' (1941) 41 *Col Law Review* 798 at 806-08; Raz J 'Promises in Morality and Law' (1982) 95 *Harvard L Rev* 916 at 933-38; and Coote B, 'The Essence of Contract' (1988) 1 *JCL* 91 at 194-95.

expectations of a promisee as to justify holding the promisor responsible for defeating them.[22] It follows that the scope of the reliance will determine the scope of the inducing party's obligation.

All this requires much fleshing out. My aim here is not to supply a theory of estoppel, much less a theory of consideration. It is to show that Ong's assumption that what goes for consideration in contract also goes for reliance in estoppel is mistaken. Reliance is not a simple stand-in for consideration in Australian law.[23] But even if it were possible to render a promise binding as a contract simply by acting in reliance on it, it would *not* follow that the scope of the reliance would be immaterial. Under section 90 of the American *Restatement (Second) of Contracts* reliance functions as a substitute for consideration in the formation of contracts.[24] But the reliance must be such that injustice would result if the promise were not enforced, from which the courts have inferred a requirement that it must be 'definite and substantial' in relation to the remedy sought.[25] So whereas reliance that is '*not* bargained for must be substantially detrimental to justify enforcement; *bargained*-for reliance need only be 'technically' detrimental.'[26]

Ong therefore fails to refute the argument that *absent a contract* it may exceed the bounds of good conscience to compel conferral of a promised benefit the value of which significantly outstrips the cost of reliance.

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22 See Pratt M, 'Identifying the Harm Done' above n 3.

23 See *Waltons Stores Ltd v Maher* (1998) 164 CLR 387 at 402 (Mason CJ and Wilson J), and 426 (Brennan J). See also A Robertson, 'Situating Equitable Estoppel Within the Law of Obligations' (1997) 19 *Syd LR* 33 at 42-47.

24 Subsection (1) of s 90 reads: 'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.'

25 A requirement of 'definite and substantial' reliance was explicit in s 90 of the first Restatement, published in 1932. It was removed in the second Restatement, published in 1981, because the drafters were concerned that it would inhibit the *partial* enforcement of promises, a remedy they sought to facilitate. The courts have responded by finding an implicit requirement that the reliance be definite and substantial in relation to the remedy sought. See Reidy G, 'Definite and Substantial Reliance: Remedying Injustice Under Section 90' (1998) 67 *Fordham L Rev* 1217; and Knapp C, 'Reliance in the Revised *Restatement*: The Proliferation of Promissory Estoppel' (1981) 52 *Col Law Review* 52 at 58-61.

26 Knapp C, 'Rescuing Reliance: The Perils of Promissory Estoppel' (1998) 49 *Hastings L J* 1191 at 1254.

Conclusion

It has been over a dozen years since the High Court began to redefine the limits of equitable estoppel.[27] That project remains incomplete, and the essential purpose of the doctrine continues to be debated. Ong usefully frames that debate in terms of competing definitions of the detriment which estoppel seeks to prevent. Aligning himself against those who define it as the cost of wasted reliance, he argues that estoppel seeks to prevent promisors from abandoning the expectations that lead promisees to rely. This view has much to recommend it.[28] But there is little support for it in the decided cases. Ong's reading of *Grundt* is unsustainable, and his attempt to defend the expectation thesis against the view that it offends against good conscience depends on a dubious analogy between contract and estoppel.

27 *Waltons Stores v Maher* (1988) 164 CLR 387.

28 Not least that it neatly explains the prevalence of expectation-based relief in estoppel. See above n 4.