

EQUITABLE ESTOPPEL: DEFINING THE DETRIMENT - A REJOINDER

*By Denis S K Ong**

In an article entitled *Equitable Estoppel: Defining the Detriment*,¹ I cited Dixon J's judgment in *Grundt v Great Boulder Proprietary Gold Mines Limited*² (hereinafter *Grundt*) to support the view that where a promisor has induced a promisee to act to the promisee's detriment by failing to carry out his promise to the promisee, the detriment to the promisee who has thus been induced is not the lost monetary value of the promisee's act, but rather that detriment is the loss caused to the promisee by his not having obtained the benefit which would have accrued to him if the promisor had carried out his promise.³

In my article, I also suggested that, applying the doctrine of equitable estoppel, the promisor (the inducing party) would be compelled to fulfil his promise because that was the only way to avoid detriment to the promisee (the induced party), notwithstanding that the promised act was disproportionately more valuable than the induced act. I noted that in contract law consideration need not be adequate and I argued, but by way of analogy only, that the promisee's induced act should likewise not be required to be adequate.⁴

My views, as summarised above, have been criticised by Michael G Pratt in *Defining the Detriment in Equitable Estoppel: A Reply to Denis Ong*⁵ (hereinafter the Reply).

I propose to make my Rejoinder to the Reply in two sections: (i) *Defining the Detriment*; and (ii) *Induced Conduct of Promisee need not be Adequate*.

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1 (1999) 11 Bond LR 136.

2 (1937) 59 CLR 641, at 674 – 675.

3 (1999) 11 Bond LR 136, at 137-138.

4 (1999) 11 Bond LR 136, at 140-142.

5 (2000) 12 Bond LR 48.

Defining the Detriment

High Court's Rejection of the Reliance Thesis

Pratt states that 'the detriment against which estoppel seeks to protect [is] the cost to the induced party of the action in reliance that is rendered futile by the abandonment of the assumption that induced it'.⁶ He calls this view 'the "reliance" thesis of estoppel'.⁷

He claims that:

...The weight of judicial opinion [seems]...to fall clearly on the side of the reliance thesis. ...⁸

Pratt's claim is wrong. What he calls the reliance thesis of estoppel (hereinafter the reliance thesis) was decisively rejected by the High Court in *Giumelli v Giumelli*.⁹ In that case counsel for the inducing parties (the promisors) had argued in the High Court for the acceptance of the reliance thesis,¹⁰ and for the rejection of the expectation thesis (the view that the detriment which equitable estoppel seeks to prevent is the promisee's not obtaining the performance of the promisor's promise). In *Giumelli*¹¹ the High Court, in rejecting the reliance thesis, observed:¹²

...[The promisors] emphasise that an order for the creation and conveyance of the promised lot went beyond any 'reversal' of the detriment occasioned [to the promisee] in reliance upon the ... promise. They submit that it was not open to the Full Court, in a case such as the present, to grant relief which went beyond the reversal of such detriment. In that regard, [the promisors] claim decisive support from the decision in *Verwayen*.¹³ However, in our view and consistently with the course of Australian authority since *Verwayen*,¹⁴ that decision is *not authority*¹⁵ for any such *curtailment*¹⁶ of the relief available in this case. Rather, there is much support in the judgments for a *broader view*¹⁷ of the present matter.

6 (2000) 12 Bond LR 48, at 50.

7 (2000) 12 Bond LR 48, at 48.

8 *Ibid.*

9 (1999) 196 CLR 101.

10 *Ibid.*, at 106.

11 (1999) 196 CLR 101.

12 *Ibid.*, at 120 (per Gleeson CJ, McHugh, Gummow and Callinan JJ).

13 (1990) 170 CLR 394.

14 Citations made by the High Court at this point are omitted.

15 Emphasis added.

16 Emphasis added.

17 Emphasis added.

The High Court then proceeded to confirm¹⁸ the endorsement of the expectation thesis which had been made by McPherson J in *Riches v Hogben*.¹⁹

In *Giumelli*²⁰ the High Court held that, in equitable estoppel, the induced party was prima facie entitled to compel the inducing party to adhere to the inducing assumption.²¹ However, the High Court in that case decided to award to the induced party the *monetary value* of the promised act, rather than compel the inducing parties to carry out the promised act itself; but the Court refrained from compelling the inducing parties to carry out the promised act only because other relevant persons had not been made parties to the litigation.²² The High Court's reasons for decision as well as the order that it made were consistent only with its rejection of the reliance thesis. It should be noted that the High Court did *not* award to the induced party the monetary value of the *induced conduct* (which it would have had to do if it had accepted the reliance thesis), as opposed to awarding to the induced party (the promisee) the monetary value of the *promised act* (an award which constituted the High Court's rejection of the reliance thesis).

Support for the Expectation Thesis in *Grundt*²³

Pratt says that I am 'quite wrong'²⁴ to claim that Dixon J's judgment in *Grundt*²⁵ supports the expectation thesis. Pratt continues:²⁶

...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*²⁷ or is *measured by*²⁸ the abandonment of that assumption.

18 (1999) 196 CLR 101, at 121 – 122.

19 [1985] 2 Qd R 292, at 300 – 301. See also 302.

20 (1999) 196 CLR 101.

21 *Ibid*, at 125. The inducing assumption may comprise either a representation of fact made by the inducing party or, alternatively, a promise made by the inducing party.

22 (1999) 196 CLR 101, at 125 – 126.

23 (1937) 59 CLR 641, at 674 – 675. (per Dixon J).

24 (2000) 12 Bond LR 48, at 51.

25 (1937) 59 CLR 641, at 674 – 675.

26 (2000) 12 Bond LR 48, at 51.

27 Pratt's emphasis.

28 Pratt's emphasis.

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However, Dixon J in *Grundt*²⁹ does say, and say quite unmistakably, that the only detriment to be prevented is the abandonment of the inducing assumption by the inducing party. In *Grundt*,³⁰ Dixon J says:³¹

...[I]t 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. ...

Thus, Dixon J was quite explicit in his insistence that the detriment to the induced party is to be prevented, *not* by merely reimbursing to the induced party the cost to that party of the induced conduct, but, rather, '*by compelling the opposite party to adhere to the assumption upon which the [induced party] acted or abstained from acting*'.³² The inducing party (the promisor) is compelled to adhere to his inducing assumption because the detriment which would, but for such compelled adherence, result to the induced party (the promisee) is the fact that the induced party would *not* receive the *benefit* which has been specifically promised to him. The *absence* of that benefit, and not anything else, is the detriment which equitable estoppel seeks to prevent. The mere reimbursement to the induced party of the cost of the induced conduct does *not* prevent this detriment, namely, such reimbursement fails to confer on the induced party the promised benefit. Adherence to the inducing assumption is required of the inducing party because that is the only way of preventing the only detriment to the induced party, that only detriment being the non-receipt of the benefit promised to the induced party.

The position stated by Dixon J in *Grundt*³³ is unequivocal: the detriment to be prevented is the abandonment of the inducing assumption by the inducing party. This specific detriment is *not* prevented if the inducing party is permitted to abandon the inducing assumption and is ordered merely to reimburse to the induced party the cost of the latter's induced conduct. The specific detriment is prevented if, and only if, the inducing party is *compelled* to *adhere* to the inducing assumption. In *Grundt*³⁴ Dixon J did not specify any detriment *other than* the loss which the induced party would suffer if the

29 (1937) 59 CLR 641.

30 *Ibid.*

31 *Ibid.*, at 674. Emphasis added.

32 *Ibid.*

33 (1937) 59 CLR 641.

34 *Ibid.*

inducing party were not *compelled to adhere* to the inducing assumption. Consequently, Dixon J did *not* suggest that there was any *other* way of preventing the detriment than by compelling the inducing party to adhere to the inducing assumption.

In *Gillett v Holt*³⁵ the English Court of Appeal explained that, in *Grundt*,³⁶ Dixon J had articulated the expectation thesis. Referring to that classic passage in Dixon J's judgment in *Grundt*,³⁷ the English Court of Appeal emphasised in *Gillett v Holt*:³⁸

The point made in the passage may be thought obvious, *but sometimes it is useful to spell out even basic points*. If in a situation like that in *Inwards v Baker*,³⁹ a man is encouraged to build a bungalow on his father's land and does so, the question of detriment is, so long as no dispute arises, equivocal. Viewed from one angle (*which ignores the assurance implicit in the encouragement*) the son suffers the detriment of spending his own money in improving land which he does not own. But viewed from another angle (*which takes account of the assurance*) he is *getting the benefit of a free building plot*. If and when the father (or his personal representative) decides to *go back on the assurance* and asserts an adverse claim then (as Dixon J put it) '*if [the assertion] is allowed, his own original change of position will operate as a detriment*'.⁴⁰

Thus, the English Court of Appeal has made it abundantly clear that the reliance thesis is untenable because that thesis 'ignores the assurance implicit in the encouragement'⁴¹ given by the promisor to the promisee.

So, in order to prevent the only relevant detriment to the induced party from occurring, namely, in order to give to the induced party the promised benefit, equitable estoppel will act to prevent the inducing party from deserting the assumption with which he had induced the promisee to act or to abstain from acting. This means that the inducing party will be compelled to adhere to the inducing assumption. In short, the expectation thesis, and not the reliance thesis, expounds the law of equitable estoppel.

35 [2000] 2 All ER 289.

36 (1937) 59 CLR 641, at 674 - 675.

37 *Ibid.*

38 [2000] 2 All ER 289, at 309 (per Robert Walker LJ, with whom Waller and Beldam LJ concurred). Emphasis added.

39 [1965] 2 QB 29.

40 Therefore, the assertion is *not* allowed.

41 *Gillett v Holt* [2000] 2 All ER 289, at 309.

Induced Conduct of Promisee need not be Adequate

In my article, I wrote:⁴²

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. ...

It may be noted that, in the above passage, I stated that there was *almost* a conceptual identity between contractual consideration and the induced conduct of a promisee in equitable estoppel. Advisedly, I did *not* assert that there *was* an identity between the two concepts.

Pratt's response to that passage in my article is:⁴³

...I fail to see the identity. ...

My answer to Pratt is:

I did not suggest that the two concepts were *identical*. I distinctly stated that they were *almost* identical.⁴⁴ The analogy⁴⁵ which I drew, between contractual consideration and the induced conduct of the promisee in equitable estoppel, is amply propounded in judicial authority. I start with *Dillwyn v Llewelyn*.⁴⁶ There Lord Westbury LC observed:⁴⁷

...[Proprietary estoppel] is somewhat *analogous* to that of [a] verbal agreement not binding originally for want of the memorandum in writing signed by the party to be charged, but which becomes binding by virtue of the subsequent *part performance*. ...

Lord Westbury LC's view in *Dillwyn v Llewelyn*⁴⁸ was approved by Kitto J in *Olsson v Dyson*.⁴⁹ The analogy between the right to the specific performance of

42 Equitable Estoppel: Defining the Detriment (1999) 11 Bond LR 136, at 142. Emphasis added.

43 (2000) 12 Bond LR 48, at 53.

44 (1999) 11 Bond LR 136, at 142.

45 Elsewhere in his Reply, Pratt does acknowledge that my argument was based on analogy. See (2000) 12 Bond LR 48, at 52, 53 and 55.

46 (1862) 4 DF & J 517; 45 ER 1285.

47 *Ibid*, at 521 – 522, and at 1286, respectively. Emphasis added.

48 *Ibid*.

49 (1969) 120 CLR 365, at 378.

a contract and the right of the induced party in equitable estoppel to compel the inducing party to adhere to his inducing assumption, was also implicitly recognised in the judgment of McPherson J in *Riches v Hogben*.⁵⁰

The analogy between contractual consideration and the promisee's induced conduct in equitable estoppel was noted and explained by Brennan J in *Waltons Stores (Interstate) Limited v Maher*:⁵¹

A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise. When these elements are present, equitable estoppel *almost* wears the appearance of *contract*, for the action or inaction of the promisee *looks like consideration* for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting. ...

In *Giumelli v Giumelli*⁵² the High Court rejected the reliance thesis of estoppel, and confirmed as correct the expectation thesis of estoppel.⁵³ The issue in equitable estoppel is therefore this: has the promisor *induced* the promisee to act, or to refrain from acting, on the basis of an assumption held out by the promisor as forming the basis of their mutual legal relations? If the answer to this question is in the affirmative, then the promisor will be compelled to adhere to the inducing assumption, unless one or more of other relevant parties have not been joined in the litigation.⁵⁴ The *adequacy* of the value of the induced conduct in relation to the value of the promised act is irrelevant in equitable estoppel because the adequacy of the induced conduct is neither a term of the inducing promise nor is it made by the promisor a condition precedent to the inducing effect of the inducing promise. In equitable estoppel, the promisor says to the promisee: 'I will do this as soon as you have done that'. The promisor does *not* say to the promisee: 'I will do this as soon as you have done that, *but only if* what I am asking you to do is of proportional value to what I am promising you in return'. Such a proviso has never been implied into any promise in the law of equitable estoppel. Nor should the law of equitable estoppel be changed so as to imply any such proviso into the promise. Since

50 [1985] 2 Qd R 292, at 300 – 302.

51 (1988) 164 CLR 387, at 424. Emphasis added.

52 (1999) 196 CLR 101.

53 *Ibid*, at 120 (per Gleeson CJ, McHugh, Gummow and Callinan JJ).

54 *Giumelli v Giumelli* (1999) 196 CLR 101, at 125 – 126 (per Gleeson CJ, McHugh, Gummow and Callinan JJ).

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the conduct which the promisor intends to induce from the promisee has proved to be sufficient to persuade the *promisor* to make the promise, the promisor should not be allowed to abandon the promise *solely* on the ground that the value of the conduct which his promise has in fact induced is disproportionately less than the value of the promised act. Indeed, in *Giumelli v Giumelli*⁵⁵ the High Court did *not* require the induced party to prove, as part of his action in equitable estoppel, that the *value* of his induced conduct was *adequate* in relation to the *value* of the land which had been promised to him.

55 (1999) 196 CLR 101.