

IN THE COURT OF APPEAL

THE SUPREME COURT OF WESTERN AUSTRALIA

CACV 001 OF 2012

BETWEEN

BLADE MCDANIELS

Appellant

AND

HILBERT SCHULZ

Respondent

SUBMISSIONS FOR THE APPELLANT

Junior Counsel: Ahshiba Sultana

The learned trial judge erred in fact and law in failing to find that the respondent was estopped from not extending the term of the agreement on the basis that:

1. The respondent had represented to the appellant that he would extend the term; and
2. That the appellant had changed his position on the basis of the representation

(A) Summary of Submissions

1. The respondent had represented to the appellant that the term was extended.
2. The appellant had relied on this expectation and has suffered a detriment.
3. It was unconscionable in all the circumstances to not extend the term of the agreement.

(B) Submissions

1. The respondent had represented to the appellant that the term was extended

1.1 To give rise to an estoppel the representation must be clear and unequivocal.¹ A clear representation may properly be seen as implied by the words used or to be adduced from either failure to speak where there was a duty to speak or from conduct.²

1.2 Where a representation is made about future conduct, then this is either a promise or something very close to a promise. The courts of equity have stated that in certain

¹ *Legione v Hately* (1983) 152 CLR 406.

² *Legione v Hately* (1983) 152 CLR 406, 439; *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, 552.

circumstances a person could not depart from such a statement about the future. In other words it was binding, despite there being no consideration.³

- 1.3 Uncertainty of a term in a contract will not prevent the equity from arising. The interest promised or expected need not be certain before a court will consider an equity to be established.⁴
- 1.4 If the statements made were “of such a nature that it would have misled any reasonable man, and the plaintiff was in fact misled” by them then that will be sufficient.⁵
- 1.5 Such a clear representation may properly be seen as implied by the words used or to be adduced from either failure to speak where there was a duty to speak or from conduct.⁶
- 1.6 Silence can support an estoppel if the silence reinforces or generates an assumption which, if not adhered to, causes detriment to the other party.⁷
- 1.7 The respondent was apprehensive having learned of the appellant’s past failures and also realised that the agreement resulted in the respondent’s potential share in the reward diminishing. He failed to communicate this concern to the appellant and through his reply to the appellant’s email in mid-April 2011 he agreed to have the term of the contract extended with a succinct “k”.⁸
- 1.8 In mid-May the respondent had neither agreed nor disagreed to the appellant’s suggestion of an extension of another month. The respondent knew at all times that the appellant was in the midst of gathering members and equipment required for the operation. By remaining ‘silent’ and not expressing an opinion which involves a termination of the contract, the respondent had further led the appellant to believe that the term was extended.

2. The appellant had relied on this expectation and has suffered a detriment

- 2.1 The party making the representation must demonstrate that he acted in reliance on the said representation, and that this reliance was reasonable given all the circumstances.⁹
- 2.2 There must be detrimental reliance by the person to whom the representation was made.¹⁰
- 2.3 The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon.¹¹

³ *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513.

⁴ *Flinn v Flinn* [1999] 3 VR 712 [80]–[95].

⁵ *Western Australian Insurance Co Ltd v Dayton* (1924) 35 CLR 355.

⁶ *Legione v Hately* (1983) 152 CLR 406, 438–439.

⁷ *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513,514.

⁸ Facts [16]

⁹ *State Railway Authority of NSW v Health Outdoor Pty Ltd* (1986) 7 NSWLR 170.

¹⁰ *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, 514.

¹¹ *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, 538.

2.4 While both parties were aware that time was of the essence, the respondent had made it clear that he preferred a task force of 150 men as he was uncertain that a task force of 100 men would be sufficient. This was important as the respondent had made it clear that they would only get one crack at the operation. The appellant's reliance was reasonable considering the circumstances.

2.5 There was a change in the appellant's position on the basis of the alleged representation which was made in regards to the email he sent to the respondent in mid-April 2011. It was after the exchange of emails that the appellant continued acquiring more equipment. He had also spent much of his money on equipment. The appellant continued to do so after the conversation he had with the respondent in mid-May.¹²

3. It was unconscionable in all the circumstances to not extend the term of the agreement.

3.1 The doctrine of promissory estoppel extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable.¹³

3.2 The question of detriment "must be approached as part of a broad enquiry as to whether departure from a promise would be unconscionable in all the circumstances".¹⁴

3.3 Unconscionable conduct may be found in the creation or encouragement by the party estopped in the other party of an assumption that a promise will be performed and that the other party relied on that assumption to his detriment.¹⁵

3.4 The appellant's prior informal agreement and subsequent inaction, in all the circumstances, constituted clear encouragement or inducement to the respondent to continue to act on the basis of the assumption which he had made. It was unconscionable for the respondent, knowing that the appellant was exposing himself to detriment by acting on the basis of a false assumption, to adopt a course of inaction which encouraged the appellant in the course he had adopted.

Conclusion

On the basis of the above submissions, counsel for the Appellant respectfully requests that the appeal be upheld as the respondent should be estopped from not extending the term of the agreement.

Dated 22 May 2012

K.H.A Ahshiba Sultana

Junior Counsel for the Appellant

¹² Facts [17], [19]

¹³ *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, 523.

¹⁴ *Donis v Donis* (2007) 19 VR 577, 583.

¹⁵ *Commonwealth v Verwayen* (1990) 170 CLR 394, 444.

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LIST OF AUTHORITIES FOR THE APPELLANT

Junior Counsel: Ahshiba Sultana

Commonwealth v Verwayen (1990) 170 CLR 394

Donis v Donis (2007) 19 VR 577

Flinn v Flinn [1999] 3 VR 712

Legione v Hately (1983) 152 CLR 406

State Railway Authority of NSW v Health Outdoor Pty Ltd (1986) 7 NSWLR 170

Walton Stores (Interstate) Ltd v Maher (1988) 76 ALR 513

Western Australian Insurance Co Ltd v Dayton (1924) 35 CLR 355