

ESTOPPEL

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Excerpt Chapter 1, paras 1.29-1.33
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1.29 Historically, the equitable concern manifested through the use of estoppel was characterized as being about “fraud”, but today estoppel is usually not thought to be based on such an extreme misleading of one person by another. A person going back on his or her word does not have to be characterized as “fraudulent” in order for an estoppel to apply. A better idea of how estoppel is generally used (aside from the contexts of estoppel by deed and election) comes from what Groberman J.A. for the British Columbia Court of Appeal said in *Desbiens v. Smith Estate*:

[I]n determining whether an estoppel is raised on a given set of facts, the court must consider all aspects of the case. Estoppel by conduct can only arise where it would be unconscionable to allow a defendant to benefit from his or her conduct. Usually, though perhaps not always, the conduct will be ‘blameworthy’ in the sense of being deliberate or reckless.

Estoppel is, as an equitable concept, flexible. It must, however, be applied with some caution, so as to avoid legal uncertainty and arbitrariness. The object of its application is to avoid truly unconscionable results, and not simply to resolve disputes by reference to some abstract and vague concept of fairness.¹

1.30 Two estoppel elements in particular are affected by such equitable considerations: the requirement for detrimental reliance in establishing the need for estoppel and the limited effect of the estoppel. This distinction between equity’s role in “liability” versus “effect” (or “remedy”) is well recognized. In *L.P. v. R.M., Williams J.* said: “Waters points out that when dealing with equity, a distinction must be made between liability (or obligation) and remedy. McLeod and Mamo (*Matrimonial Property Law in Canada*, I-6, ‘Special Property Rules’, p. 33) make a similar distinction speaking of the need to distinguish remedy (*e.g.*, constructive trust) from the right to relief (unjust enrichment).”²

1.31 In the “liability” stage of estoppel, it has to be established that without the estoppel, there would be unfairness, unjustness or unconscionability for the person to whom the statement was made. There is some doubt about the importance of this element or how exactly it is established. The better view is that the unfairness element is subsumed in the elements of statement-reliance-detriment. That is to say: the requirement for detrimental reliance in most of the estoppels is best seen as the manner in which equity interprets its concern about unfairness or unjustness into the process of ascertaining whether estoppel is called for in a given context. The issues relating to detrimental reliance are considered below.

1.32 The other equitable consideration relates not to establishing the need for estoppel, but to giving some “effect” or “relief” or “remedy” as a result of estoppel. Equity can limit the effect of the estoppel to what is necessary to obviate the unfairness that would otherwise result if the maker of the statement were allowed to resile from it. This limit can be substantive or temporal. In proprietary estoppel, it is substantive in that the court will tailor the extent of the property right the claimant will get to suit the minimum necessary to satisfy the equity created by the statement and the detrimental reliance on it.³ To the extent that proprietary estoppel results in a property

¹ [2010] B.C.J. No. 1742 at paras. 39-40, 2010 BCCA 394, 323 D.L.R. (4th) 536, 8 B.C.L.R. (5th) 205 (B.C.C.A.). See also *Parker Cove Owners’ Assn. v. Parker Cove Properties Limited Partnership*, [2010] B.C.J. No. 341, 2010 BCCA 100 (B.C.C.A.); *Westwood Plateau Partnership v. WSP Construction Ltd.*, [1997] B.C.J. No. 1294, 37 B.C.L.R. (3d) 82 (B.C.S.C.); *Litwin Construction (1973) Ltd. v. Pan*, [1988] B.C.J. No. 1145, 52 D.L.R. (4th) 459 (B.C.C.A.); *Revell v. O’Brian Financial Corp.*, [1991] B.C.J. No. 3696, 86 D.L.R. (4th) 155 (B.C.C.A.).

² [2000] N.S.J. No. 77, 32 E.T.R. (2d) 243 at para. 12 (N.S.S.C. (Fam. Div.)), citing Donovan W.M. Waters, “The Nature of the Remedial Constructive Trust” in P.B.H. Birks, ed., *Frontiers of Liability* (Oxford: Oxford University Press, 1994) vol. 2 at 165; and James G. McLeod & Alfred A. Mamo, *Matrimonial Property Law in Canada*, looseleaf (Toronto: Carswell, 1988).

³ *Sykes v. Rosebery Parklands Development Society*, [2011] B.C.J. No. 52, 2011 BCCA 15, 330 D.L.R. (4th) 84 (B.C.C.A.); *Ellis v. Eddy Holding Ltd.*, [1996] B.C.J. No. 2453, 7 R.P.R. (3d) 70 (B.C.S.C.); *Pilcher v. Shoemaker*, [1997] B.C.J. No. 2038, 13 R.P.R. (3d) 42 (B.C.S.C.); *Jennings v. Rice*, [2002] EWCA Civ. 159, [2002] 2 P. & C.R. D92 (C.A.).

right or interest, that will often be an “equitable” right or interest. The other estoppels tend to result in the full satisfaction of the expectations of the recipient of the statement. There have, however, been statements advocating a limitation on the substantive effect of estoppel by representation to the extent of actual detrimental reliance in contexts of mistaken payments, on analogy with the defence of change of position in restitutionary claims. There have even been more generalized statements of support for a reliance-based (as opposed to expectation-based) effect in estoppel from some courts, notably in Australia. In *Commonwealth of Australia v. Verwayen*, Gaudron J. said:

Although it is not necessary for me to deal with the argument that the object of an estoppel is to avoid detriment and not to make good the assumption on which it is founded, it is convenient that I note my agreement with Mason C.J. that the substantive doctrine of estoppel permits a court to do what is required to avoid detriment and does not, in every case, require the making good of the assumption. Even so, it may be that an assumption should be made good unless it is clear that no detriment will be suffered other than that which can be compensated by some other remedy. Where the nature or likely extent of the detriment cannot be accurately or adequately predicted it may be necessary in the interests of justice that the assumption be made good to avoid the possibility of detriment even though the detriment cannot be said to be inevitable or more probable than not.⁴

In practice, however, outside of proprietary estoppel, the substantive effect of the estoppel is to fulfil the expectations of the recipient of the statement.

1.33 The other equitable constraint on the effect of some estoppels is temporal. The effect of the estoppel might be suspensory-only in some cases, such that the maker of the statement can end the effect upon giving reasonable notice to the recipient. This is the default position in promissory estoppel, but also arises in estoppel by convention.⁵ Even in promissory estoppel, however, the effect of the estoppel will be permanent if it is unfair for it to be suspensory only.⁶ There are statements in the context of election and abandonment cases to the extent that the effect of the doctrines is suspensory only, but such cases are probably better thought of as promissory estoppel cases.

⁴ [1990] HCA 39, 170 C.L.R. 394 at para. 32 (H.C.A.).

⁵ *Hillingdon London Borough Council v. ARC Ltd. (No 2)*, [1999] 3 E.G.L.R. 125 (Ch. D.), revd [2000] 3 E.G.L.R. 97, [2001] C.P. Rep. 33 (C.A.) (both decisions in agreement on this point).

⁶ *Subway Franchise Systems of Canada, Ltd. v. Esmail*, [2005] A.J. No. 1474, 2005 ABCA 350, 380 A.R. 274 (Alta. C.A.).