

WAIVER AND ESTOPPEL

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INTRODUCTION

The principles of waiver and estoppel have a number of elements in common and are not necessarily mutually exclusive. Nevertheless they have some important differences and frequently achieve different results.

At the outset, it should be noted that both waiver and estoppel —although quite fashionable now —have been around for a long time.

The celebrated author Chitty tells us in respect of waiver:

It appears that the genesis of this doctrine is attributable to the difficulties which arose out of the strict application of the provisions of the Statute of Frauds 1677. Pursuant to that Statute, any variation of a contract required to be evidenced by writing must itself be in writing. If a variation is merely oral it is of no effect. Thus any oral forbearance or concession made by one party to the other should also strictly be unenforceable. Nevertheless, the courts have shown themselves reluctant to apply this rule in its full severity. Accordingly they establish the distinction between a variation (for which writing will still be necessary in the case of a contract required by the Statute of Frauds to be evidenced in writing) and a waiver which may be oral.¹

Similarly principles of estoppel generated excited observation in the 19th century.

The evolution of both has been gradual but may be distilled into what I hope are some clear propositions.

1. Generally both waiver and estoppel have been employed as defences to actions. Although there is some trend now to plead them in an initiating process as either full explanations of circumstances said to give rise to a cause of action or in the case of some types of estoppel as a cause of action in itself (and I

refer here to positive allegations of unconscionable conduct) generally in the context of contractual claims, they are defences.

2. At the cornerstone of both waiver and estoppel are the words and conduct of the parties, express or implied, but always unequivocal.

3. Knowledge of a party's rights by the person said to have waived a right is almost always an essential element of waiver; in estoppel knowledge by the representor is not relevant.

4. A consideration of a claim for waiver focuses on the words and conduct of the person who is said to have waived a right; in estoppel the focus is on the person who made the representation

5. A party seeking to rely on waiver does not need to show that they relied on the other party's conduct, or that they suffered any particular detriment—the conduct itself is sufficient. In estoppel, reliance and detriment by the party seeking to rely on it are essential elements.

6. Waiver usually involves a permanent alteration of rights whereas estoppel may not be permanent.

Each of these propositions requires further analysis, in the light of the principles of each doctrine.

WAIVER Definition

Waiver is a difficult term to define and is not a term of art.²

Though the subject of much learning and refinement, in the end it is a doctrine based on simple considerations of common sense and equity.³

Principles of waiver by election are concerned with the extent to which a person must elect between alternative and inconsistent rights and remedies. The primary meaning of the word is the abandonment of a right by one

party in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted.⁴

Once the choice has been made the party will usually be bound by it.

*If a man is entitled to one or two inconsistent rights it is fitting that when with full knowledge he has done an unequivocal act showing that he has chosen the one he cannot afterwards pursue the other, which after the first choice is by reason of the inconsistency no longer his to choose.*⁵

Words and Conduct are Essential and They Must be Unequivocal

Waiver is evidenced by the words or conduct of the person said to have waived his right.

The words or conduct must be unequivocal although they may be express or implied. In other words, the conduct of the person is viewed objectively.

Requirement to Communicate the Waiver

It is often said that waiver must be communicated but communication itself is capable of different meanings. Obviously, unequivocal, express words or acts may constitute waiver and will satisfy the need for communication.

But sometimes, waiver may be inferred (and communication satisfied) from conduct in the circumstances—see for example *Zucker v Straightlance Pty Ltd*.⁶

Examples of unequivocal words or conduct showing an election to continue with the contract include:

- an insistence on the part of the promisee that the promisor perform, for example where a lessee has failed to pay rent (which gave rise to a right in the lessor to re-enter the premises). The lessor's insistence that the lessee continue

to pay rent will usually be a waiver of his right of re-entry,

- an extension of time for performance granted by a promisee notwithstanding the promisor's breach of an essential time stipulation may be regarded as an election to continue performance.

Examples of equivocal words or conduct showing no election either way include:

- silence where there is no duty to speak
- where a purchaser of land makes an alternative purchase from a third party, the alternative contract will usually be considered to be equivocal conduct
- paying stamp duty may be equivocal in that it may be an offence not to have the document stamped whether or not a contract is terminated (cf *Zucker*, supra in which case there was no evidence that there was a supervening reason to pay the stamp duty).

The conclusion of the court or tribunal of fact will be largely dictated by factual considerations and it is unwise to rely on the facts of cases except insofar as they indicate in general terms the types of behaviour which are likely to be regarded as equivocal or unequivocal.

Knowledge

The extent to which knowledge by the person said to have waived his rights is essential to a defence of waiver has been the subject of much case law and the situation is still not clearly resolved. The problem of course is that if a person is unaware of his rights, how can he be said to have waived them?⁷

Certainly evidence that a person actually had knowledge of his rights and the circumstances giving rise to them may support a finding of waiver.

Evidence that the person did not know his rights is probably better considered as a claim for estoppel. Accordingly, it is prudent to plead in the alternative and to establish a factual matrix of evidence which permits the alternative argument being advanced.

Attempts to Exclude the Possibility of Waiver

- What happens where an election is expressed to be 'without prejudice'?

An election 'without prejudice' does not avoid the legal consequences of an election. The purpose of the doctrine of waiver by election is to stop a party from simultaneously adopting inconsistent positions; therefore a party cannot prevent unequivocal words or conduct from taking effect merely by saying so. However a statement which is expressed to be 'without prejudice' may in some circumstances be an indication that the parties words or conduct are to be regarded as a temporary rather than a final waiver.

An example arose in *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41. In that case there was a contract for the sale of two lots of land. The contract provided for payment of the purchase price by instalments. Time was expressed to be of the essence. The purchasers failed to pay the final instalment, which, under the contract, gave rise to a right to terminate the contract by the vendor. The vendor however gave the purchasers a further period of time to make payment in these terms:

In order to give you an opportunity of finding the money, and subject to the payment of an additional 50 pounds to cover further interest and the company's costs and expenses, the company will not take action under the contract until Monday 14th January but this must be regarded as an act of grace on the part of the company, and without

prejudice to and in no way varying the company's right to the strict enforcement of the contract.

When the instalment was not paid in the further time the vendors elected to terminate the contract. The court held that time remained of the essence notwithstanding the extension of time – the vendors had not waived the breach and their election to terminate was effective.

However it was very important in that case that the vendors' notice stated a specific date for payment. A party who grants an indefinite period of time will be taken to have waived the right in question.

- What about waiver clauses that purpose to exclude or waive certain rights?

Generally these clauses are governed by the common law rules relating to exclusion clauses. However an exception arises where the right to exclude liability is governed by legislation such as the *Trade Practices Act*. For example, s.75A of the *Trade Practices Act* provides that a right which has been implied by the Act into a contract cannot be excluded by a term of the contract.

- What about 'no waiver' clauses?

These clauses generally state that the occurrence of a particular event is not to be regarded as a waiver of a right. Typically an example is where a lessor seeks to maintain a right to terminate a lease for non-payment of rent, notwithstanding the receipt of monies by the lessor from the lessee.

The clause will be narrowly interpreted but is prima facie valid. It may operate to prevent waiver by making equivocal conduct by the lessor which would otherwise be unequivocal.

It is critical to identify which right has been lost.

As we have seen, the operation of the principles of waiver generally

give rise to a permanent alteration in the party's rights.

*Where a man has an option to choose one or other of two inconsistent things, when once he has made his election, it cannot be retracted, it is final and cannot be altered.*⁹

Accordingly, it is critical to ascertain what right, if any, has been waived. Generally where the waiver arises in the context of a misrepresentation, mistake or duress, a party cannot affirm part of the contract – either the whole contract is terminated or the whole contract affirmed.

Equally in cases where the waiver relates to a right to terminate for breach or repudiation, a party cannot selectively terminate the performance of the contract by claiming that some terms remain in force while others are terminated.

However all of this should be distinguished from the situation where the breach is continuing or where a fresh breach occurs.

A fresh breach may be readily identified but the distinction between a continuing breach and a breach once and for all is more complicated.

It was explained by Justice Dixon in *Larking v Great Western (Nepean) Gravel Limited (in liquidation)* (1940) 64 CLR 221:

If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being forever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintain a building in

repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, then a further breach arises in every successive moment of time during which the state or condition is not as promised, during which, to pursue the examples, the building is out of repair, the life uninsured or the particular support unprovided.

SUMMARY

Waiver requires these elements:

- words and conduct,
- by a person who has knowledge of his rights,
- which are unequivocal although they may be implied from conduct, and
- which are communicated in some way.

Estoppel

Estoppel on the other hand is a substantive principle of law which operates to preclude a party to legal proceedings from asserting against another party facts, legal rights, or the absence of legal obligations to the extent that it would be unconscionable to do so.

The object of estoppel is to preclude the unconscientious departure by a party from an assumption for which he or she bears some responsibility and which has been adopted by another party as the basis of a course of conduct, act or omission which would operate to that other party's detriment if the assumption were not adhered to.⁹

The Elements¹⁰

- The presence of words or conduct of the party sought to be estopped in a representation or promise. Estoppel may be based on a representation of fact or on a promise or assurance as to future conduct.
- The representation or promise must be clear and unequivocal but need not be express.¹¹ The person

seeking to establish the estoppel must demonstrate that the other party has, by words or conduct unequivocally represented a fact which is inconsistent with the exercise of a right or unequivocally promised that the right will not be exercised.

The requirement that the representation be clear does not mean it needs to be express. It may be implied by conduct or even from silence where there was a duty to speak.¹²

The facts of *Legione v Hately* supra offer some insight into the very strict requirement that the conduct be unequivocal. In that case, purchasers of a parcel of land breached the agreement and the vendors served a notice to complete in which time was of the essence. The purchasers asked the vendors' solicitors for a further 7 days and the solicitors said it would be 'all right' and that they 'would have to get some instructions'. There was no further communication before expiry of the notice and the vendors purported to rescind the contract.

The High Court held that the vendors had not made an unequivocal representation notwithstanding the comments of the solicitor.

The decision, it is suggested, was borderline and illustrates the need for completely unequivocal conduct.

- The person asserting estoppel must have relied on the representation or conduct.
- The result of reliance must be detriment and injustice or inequality (sometimes called unconscionability).

Without these elements, nothing stops a representor from withdrawing the representation or promise – ie the person seeking to establish the estoppel must show that at the time, the representor

seeks to withdraw his representation or promise it would be unfair or unconscionable to do so.

Unlike waiver, the party seeking to rely on the estoppel does not need to show that the representor knew that he was creating an estoppel or affecting his rights.

With respect to the application of the elements of estoppel, the first focus for analysis is the adoption of the assumption by the person claiming the estoppel. In other words, it is important to ascertain what the person claiming the estoppel believed, what detrimental reliance flowed from that person's assumption and what role the representor had in inducing that assumption. Compare the position with waiver by election where the almost exclusive focus is upon the conduct of the person said to have waived a right.

Are the Doctrines Mutually Exclusive?

No. If an allegation of waiver by election fails because of the absence of the requisite knowledge, a party may still be able to prove estoppel in reliance on the words or conduct which were said to give rise to the election: *Coastal Estates Pty Ltd v Melevende* [1965] VR 433.

An election in respect of one right may amount to waiver of the right to rely on subsequent rights. That is, the waiver with respect to subsequent rights may constitute an estoppel.

The Correlation Between the Two Doctrines

WAIVER	ESTOPPEL
Words and conduct critical	Words and conduct critical
Conduct must be unequivocal	Conduct must be unequivocal
Focus is on conduct of person who is said to have waived right	Focus is on conduct of person who relies on estoppel
Knowledge of rights essential	Knowledge irrelevant
Reliance on words or conduct not necessary	Reliance on words or conduct critical
Detriment is not necessary	Evidence of detriment is critical
Evidence of unconscionability not critical	Unconscionability critical
Usually permanent alteration of rights	May not be permanent alteration of rights

REFERENCES

1. Chitty on Contracts: General Principles 23rd edition paragraph [1241].
2. *Banning v Wright (Inspector of Taxes)* (1972) 2 ALLER 987.
3. *Johnson v Agnew* [1980] AC 367 at 398 per Wilberforce LJ.
4. *Banning* supra at 998.
5. *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30.
6. In *Zucker v Straightlace Pty Ltd* (1986) 11 NSWLR 87 at 94 a purchaser of real estate had a contractual right to rescind the contract arising from a defective s149 certificate which was unknown to the vendor. The purchaser insisted on requisitions to title being answered, paid stamp duty, negotiated with tenants and made inquiries of the local Council. In other words, he acted as if he had an equitable interest in the land. He then purported to rescind the contract. The court found that he had waived his right to rescind, saying that he was taken to have acted in a manner which amounted to an affirmation of the contract. In the course of his judgment, Young J said, in respect of the need for communication:

[A]lthough the electing party must show the other party that he is affirming the contract, all that is necessary is that he do such acts from which a court or an ordinary bystander would conclude that he was affirming the contract on the assumption that the court or bystander knew what the electing party knew, and it is immaterial that at the time when those acts were committed the other party was unaware of the facts upon which the electing party might have chosen to rescind the contract.
7. See for example, *Matthews v Smallwood* [1910] 1 Ch 777.
8. *Scarf v Jardine* (1882) 7 App Cas 343 at 360 per Blackburn LJ.
9. *Halsbury's Laws of Australia* 35; 6 [1].
10. See generally *Thompson*.
11. *Legione v Hateley* (1983) 152 CLR 406.
12. *Legione* supra per Mason and Deane JJ at 438.

Ms Olsen is a member of the NSW Bar. This is a paper that she delivered to a forum of the IAMA on 3 October 2001.
