

*WALTONS STORES (INTERSTATE) LTD  
V MAHER: IMPLICATIONS FOR THE LAW  
OF CONTRACT*

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The purpose of this note is to analyse the decision in *Waltons Stores (Interstate) Ltd v Maher*,<sup>1</sup> (“*Waltons Stores*”) including its factual basis, and assess its importance from the point of view of the development of contractual principles. The note is in two parts. The first section ascertains the basis for the decision itself, and the later part discusses the implications for the general law of contract. One of the many significant aspects of *Waltons Stores* is the attempt by the High Court, and in particular by Deane J, to consolidate the divergent threads of the law of estoppel into a coherent body of law. A discussion of this issue is left to another time. It is the practical effect of the case on contractual undertakings with which this note is concerned.

### The decision

The executives of *Waltons Stores Ltd* (“*Waltons*”) could not have foreseen the impact that their decision to search for new commercial premises in the New South Wales country town of Nowra would subsequently have on the development of the law of contract. The search for new premises was of some urgency because *Waltons* had to give up possession of its existing premises by 15 January 1984. Negotiations for a lease were commenced with *Maher* who owned suitable land in the business district of Nowra. Those negotiations

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1. (1988) 164 CLR 387.

proceeded on the basis that Maher would demolish an existing building on the land and erect a new one in accordance with plans and specifications approved by Waltons. The date for completion of the new building was 15 January, although an extension of time was subsequently given until 5 February. By October 1983 Waltons and Maher had agreed on the rent and other significant terms of the lease, but some amendments were still under discussion. The following events, which were regarded as crucial, then took place:

1 Maher's solicitors informed Waltons' solicitor that "the agreement must be concluded within the next day or so, otherwise it will be impossible for Maher to complete it". It was explained to Waltons' solicitor that, although Maher had already commenced some demolition work on 1 November, he did not wish to demolish a new brick part of the old building until there were "no problems" with the contract. All this stressed the urgency of finalising the agreement.

2 In response Waltons' solicitor sent fresh documents to Maher's solicitor incorporating the now agreed amendments and stating that, although specific approval from Waltons had not been obtained for each amendment, "we believe that approval will be forthcoming". Waltons' solicitor also stated, "we shall let you know tomorrow if any amendments are not agreed to". This indicated that Waltons regarded the terms of the agreement as settled if no further communication was made.

3 On 11 November Maher's solicitor sent an amended counterpart deed of lease, executed by Maher, to Waltons "by way of exchange" and asked that the original deed of lease be executed by Waltons and returned to him.

4 No response or communication was then received by Maher or his solicitor until 19 January, when Waltons announced it was not proceeding with the transaction. Waltons' solicitors had retained possession of the documents, but Waltons never executed the original deed. No contract was ever concluded between the parties. Waltons had in fact instructed its solicitors to "go slow" with the proposed transaction as an independent property consultant had advised that the lease of the premises might not suit its retailing strategy in rural centres.

5 During November, December and January Maher finished demolishing the old building and proceeded to construct the new

one. Waltons knew the work was proceeding since at least 10 December.

The High Court found as a fact that, although no contract had been concluded, Maher assumed that a legal binding contract was a formality and would be concluded as a matter of course. Maher was entitled to assume this because he had stressed the urgency of reaching an agreement and Waltons had simply retained the counterpart deed after indicating everything was finalised.<sup>2</sup> Moreover, Waltons had induced this assumption held by Maher. As Brennan J put it:

The retention of the counterpart deed and the absence of any demur as to the schedule of finishes or terms of the deed was tantamount to a promise by Waltons that it would complete the exchange.<sup>3</sup>

As Maher had acted on the false assumption to his detriment by continuing with the building work (to the knowledge of Waltons), the view of the High Court was that Maher was entitled to succeed on the basis of the principles of equitable estoppel. Maher obtained damages in lieu of specific performance pursuant to Lord Cairns' Act, because the estoppel raised "an equity" against Waltons. Brennan J stated:

That equity is to be satisfied by treating Waltons as though it had done what it induced Mr Maher to expect that it would do, namely, by treating Waltons as though it had executed and delivered the original deed. It would not be appropriate to order specific performance if only for the reason that the detriment can be avoided by compensation. The equity is fully satisfied by ordering damages in lieu of specific performance.<sup>4</sup>

In the course of his judgment, Brennan J gave the most precise and succinct exposition of the principles of equitable estoppel:

In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defen-

2. *Ibid*, 407, 429.

3. *Ibid*, 429.

4. *Ibid*, 430.

dant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise.<sup>5</sup>

Although Mason CJ and Wilson J in their joint judgment do not specifically follow this formulation, it is clear that they also regard these as the essential elements of the estoppel.<sup>6</sup> Deane J in discussing the principles of equitable estoppel, also speaks to much the same effect.<sup>7</sup>

It should be emphasised that Deane J found as a fact that Maher assumed not that a contract *would be* entered into between the parties, but that a contract *had been concluded*.<sup>8</sup> This view was supported by Gaudron J.<sup>9</sup> This factual conclusion meant that Gaudron J and Deane J could base their reasoning on the general common law principle of estoppel by conduct.<sup>10</sup>

No resort to the doctrine of promissory estoppel was necessary as (on their finding of fact) the assumption related to the existence of present facts not future expectations. But for the majority the assumption held by the plaintiff was founded on a representation of future conduct, that is, that the defendant represented he *would* enter into the lease.<sup>11</sup>

## The consequences

The remainder of the paper analyses some of the consequences of the decision in *Waltons Stores* from a contractual point of view. It is not proposed to analyse each of the individual judgments of the High Court in detail, but rather to isolate in general terms particular themes which emerge from the case. Why is the decision so important?

5. *Ibid*, 428-429.

6. *Ibid*, 406-407. Note, however, that at one point in the judgment (at 406) there is a reference to the "promisee changing his position or suffering detriment" (our emphasis) as a result of the promise. This suggests that the requirement of detriment (requirement 5) is not essential. But (inconsistently) in the same paragraph Mason CJ and Wilson J do refer to the requirement of detriment.

7. *Ibid*, 453. Deane J however apparently suggests that the defendant must be *aware* of what the plaintiff is doing on the basis of the mistaken belief. Brennan J indicates that it is sufficient if the defendant knew or *intended* the plaintiff to act on the assumption (requirement 4).

8. *Ibid*, 441.

9. *Ibid*, 460.

10. Although Deane J takes the view that estoppel by representation was not solely a common law principle; *ibid*, 447-448.

11. Mason CJ and Wilson J state that this is the correct interpretation of the facts; *ibid*, 398. Brennan J clearly prefers this construction (at 430).

## 1 Promissory estoppel as a cause of action — the demise of consideration?

Traditionally, the doctrine of promissory estoppel was limited in two inter-related ways. First, it was confined to circumstances in which there was conduct or a promise by one party waiving rights under a pre-existing contractual or (possibly) other legal relationship.<sup>12</sup> Secondly, promissory estoppel was considered to be “a defensive equity” and the principle “does not create new causes of action where none existed before”.<sup>13</sup> Even Lord Denning, one of the significant judicial proponents of equitable estoppel, applied this second limitation.<sup>14</sup> Typically, therefore, the defendant relied on promissory estoppel where, for example, in the context of a lease the lessor promised (without consideration) to reduce the rent after the commencement of the term, and the lessee relied on this promise to his or her detriment. If sued by the lessor for the unpaid rent, the lessee could rely on the defence of promissory estoppel. In these circumstances there existed a pre-existing contractual relationship between the parties (that is, the lease) and the estoppel was being used “defensively” in response to the lessor’s claim for the rent.

The decision in *Waltons Stores* immediately removes both these limitations. There was clearly no pre-existing contractual relationship between the parties and Maher certainly did not use the estoppel as “a defensive equity”. Indeed Maher, as plaintiff, obtained damages from the defendant, *Waltons*, because *Waltons* was prevented from retreating from its implied promise to complete the contract.

This discarding of the limitation raises the possibility, almost heretical to the common lawyer, of gratuitous promises being enforced provided that the requirements for estoppel set out by Brennan J are satisfied. Indeed, it may mean that in circumstances where, according to traditional concepts of consideration, a promise could not be enforced, the pleading of estoppel will lead to an indirect enforcement of the promise. Suppose, for example, that a developer freely and voluntarily promises additional payments to a builder

12. *Kurt Keller Pty Ltd v BMW Australia Ltd* [1984] 1 NSWLR 353, 369.

13. *Combe v Combe* [1951] 2 KB 215 Denning LJ, 219.

14. *Ibid.*

in return for the builder agreeing to make additional efforts to complete the project by the agreed contractual date, which is proving difficult to meet. The builder then relies on this promise to his or her detriment by adjusting his or her own business activities, for example re-organising sub-contractors and suppliers of materials. The developer is aware of this reliance. No consideration is provided by the builder for the developer's promise because the builder is already under an existing contractual duty to complete the work by the stipulated deadline.<sup>15</sup> The builder therefore incurs no detriment as defined by the common law cases on consideration.<sup>16</sup>

However, applying the principles of estoppel a different result can be reached. The developer's promise of payment means that the builder can reasonably assume that a particular legal relationship exists or will exist between them. There is also no doubt that the developer has induced the builder to adopt that assumption by a clear and unambiguous promise of payment. The builder has then relied to his or her detriment on the assumption to the knowledge of the developer by making adjustments to his or her business activities. It is unconscionable for the developer to deny the existence of a contractual obligation to pay.

This conclusion is not mere speculation. There is no doubt that the Justices of the High Court were aware of the possible impact of their decision on the common law notions of consideration. Mason CJ and Wilson J spoke in terms of "promissory estoppel tending to occupy ground left vacant due to the constraints affecting consideration".<sup>17</sup> Deane J was even more direct:

To the contrary, the extension of the existing applicability of estoppel by conduct in those fields to that category of case would, if anything, strengthen the overall position of the doctrine of consideration by overcoming its unjust operation in special circumstances with which it is inadequate to deal.<sup>18</sup>

It is true that equitable estoppel will, however, not provide a remedy in all cases in which consideration is absent. Sometimes estoppel will not place the plaintiff in a superior position. For in-

15. *Stilk v Myrick* (1809) 2 Camp 317.

16. *Ibid.*

17. *Supra* n 1, 402.

18. *Ibid.*, 453.

stance, if a guarantee is given in consideration of an advance being made to the principal debtor, and the advance has already been made to the debtor before the promise of guarantee is given, there is no consideration to support the guarantee, which therefore fails.<sup>19</sup> The stipulated consideration (the "advance") is past consideration, and therefore, of no effect. Estoppel will probably not aid the plaintiff creditor here because reliance to the detriment of the plaintiff creditor on the faith of the promise will need to be shown. On these bare facts and in the absence of, for example, further advances being made to the principal debtor, there is no such reliance as the advance has already been made. No estoppel will be created.

A particular consequence of the view that gratuitous promises not supported by consideration may be enforced arises in respect of a "letter of intent" to contract, which has been sent prior to the execution of the contract. Such a letter may be sent, for example, to a builder prior to the formal acceptance of his or her tender. Generally the view has been taken in Australia that a "letter of intent" does not create a binding legal obligation.<sup>20</sup> But, depending on the precise wording of the document, such a letter may induce an assumption that a binding contract will exist between the parties. If the recipient of the letter acts in reliance on the promise to his or her detriment to the knowledge of the writer, then an estoppel may be created.

## 2 The enforcement of pre-contractual statements — a new era

The effect of *Waltons Stores* is not only to enable promises unsupported by consideration to be enforced. Arguably, the decision has another allied consequence of enabling a statement made in pre-contractual negotiations to be enforced when it would be otherwise unenforceable either due to the fact that the statement is inconsistent with the terms of the written contract (the so-called rule in *Hoyts*

19. *Astley Industrial Trust Ltd v Grimston Electric Tools Ltd* (1965) 109 SJ 149.

20. *Coogee Esplanade Surf Motel Pty Ltd v Commonwealth* (1976) 50 ALR 363. But it is different if a subsidiary unilateral contract can be proved: *British Steel Corp v Cleveland Bridge & Engineering Co* [1984] 1 All ER 504.

*Pty Ltd v Spencer*<sup>21</sup>) or because of the operation of the parol evidence rule.

In *Hoyts Pty Ltd v Spencer*<sup>22</sup> a lease of four years duration contained a provision stating that the lessor was entitled to terminate it by “giving at least four weeks” notice in writing of his intention to do so. In fact, prior to the execution of the lease the lessor had promised that he would not give such notice unless required by the head lessors (that is, his own lessors). The High Court held that the lessor’s oral statement could not amount to a collateral contractual undertaking for which damages were recoverable by the lessee. The reason for this conclusion was that the oral promise not to give notice was directly inconsistent with the term of the lease agreement enabling the lessor to give notice. As Isaacs J stated:

The truth is that a collateral contract, which may be either antecedent or contemporaneous (per Erle CJ and Byles J in *Lindley v Lacey* (1864) 17 CB (NS) at pp 586, 587, and per Cockburn CJ in *Angell v Duke* (1875) LR 10 QB 174 at p 177), being supplementary only to the main contract, cannot impinge on it, or alter its provisions or the *rights created by it*; consequently, where the main contract is relied on as the consideration in whole or part for the promise contained in the collateral contract, it is a wholly inconsistent and impossible contention that the other party is not to have the full benefit of the main contract as made...<sup>23</sup>

It is submitted that the decision in *Hoyts Pty Ltd v Spencer* can now be effectively circumvented by the application of the principles of equitable estoppel as enunciated in *Waltons Stores*. The clear and unambiguous statement in pre-contractual negotiations induces the plaintiff lessee to adopt an assumption that their legal relationship will be on the basis that the defendant lessor will not give notice during the currency of the lease. The plaintiff lessee clearly relies to his or her detriment on the assumption by entering into the lease agreement and taking possession. Clearly the lessor knew and intended such reliance. An estoppel, therefore, arises.

This equity will not be affected by an inconsistent term in the main contract of which the lessee was unaware. The reasoning in *Hoyts Pty Ltd v Spencer* to the effect that a collateral, *contractual* undertaking cannot impinge on the terms of the main contract because

21. (1919) 27 CLR 133.

22. *Ibid.*

23. *Ibid.*, 147.



it is “supplementary only to the main contract” is irrelevant when the plaintiff’s rights are founded in equity and arise from the defendant’s unconscionable conduct. Nor is the result affected by the parole evidence rule which precludes the use of oral evidence to add to, vary or contradict a written contract. The oral evidence here is being used for none of those purposes, but simply to establish an equitable estoppel.

In sum, it can be said that the effect of the operation of equitable estoppel in this context is to allow liability for pre-contractual statements in circumstances in which the established rules of contract law would otherwise preclude their enforcement. In particular, it will mean that defendants will find it more difficult to rely on clauses in the written contract which purport to negate their liability for statements made in contract negotiations.

It is true that this development is now less significant because of the operation of the Commonwealth Trade Practices Act 1974 and, more lately, the Western Australian Fair Trading Act 1987, which allow actions in respect of false and misleading conduct inducing a contractual relationship.<sup>24</sup> But the demise of the rule in *Hoyts Pty Ltd v Spencer* may be important in two respects. First, the relevant statement may not be one of existing fact, even having regard to the extended definitions within the Commonwealth Trade Practices Act 1974 and the Western Australian Fair Trading Act 1987. Some promises of future conduct are not actionable pursuant to those statutes. Secondly, in respect of an action arising from the equity created by the estoppel, the plaintiff may be able to recover damages assessed on a contractual basis, that is, damages to put the plaintiff in the position as if the contract had been performed. This will place the plaintiff in a more favourable position than an action pursuant to the Commonwealth Trade Practices Act 1974 or (probably) the Western Australian Fair Trading Act 1987, where damages are generally assessed on a tortious basis.<sup>25</sup> For example, if a vendor of goods is in breach of a contractual promise that the goods have a certain quality, the buyer will be entitled to an amount in damages sufficient to acquire goods of that quality (that is, the

24. (Cth) Trade Practices Act 1974 ss 52, 53; (WA) Fair Trading Act 1987 ss 10, 12.

25. *Gates v City Mutual Life Assurance Ltd* (1986) 160 CLR 1.

difference between the contract and market prices). Such expectation losses are not recoverable if the statement as to quality does not amount to a contractual promise, but is merely a misrepresentation.

It is to the question of remedy we now turn.

### 3 The question of remedy

In *Waltons Stores* the plaintiff claimed and obtained damages under Lord Cairns' Act in lieu of specific performance of the lease. On the facts, therefore, the plaintiff obtained damages assessed on a basis appropriate to an action for breach of contract.<sup>26</sup> The decision does not, however, provide a guide to the compensation to be awarded to the plaintiff in circumstances in which specific performance (or injunction) is not available so that the powers conferred by Lord Cairns' Act cannot be invoked. This will often be the situation when the contract is not one for the disposition of an interest in land.

There are indications in the judgments that damages should be assessed on a contractual basis, so that expectation losses are recoverable. If, as Brennan J states "[the] equity is to be satisfied by treating [the defendant] as though it had [executed the contract]"<sup>27</sup> it would appear logical also to award *damages* as if a contract did in fact exist. Indeed, although there is some reference in the decision to an "action to enforce an equity",<sup>28</sup> the cause of action in *Waltons Stores* can be regarded as no more than an action for breach of contract. *Waltons* were simply estopped from denying the existence of the contract. An action for breach of contract must surely result in the award of damages for such breach assessed in the normal way.

The matter, however, is in some doubt. Certainly Brennan J takes the view that, because the reason that the intervention of equity is called for is unconscionable conduct on the part of the person bound by the equity, the nature of the remedy will vary according

26. Damages under Lord Cairns' Act are in general assessed on the same basis as damages for breach of contract at common law: *Johnson v Agnew* [1980] AC 367.

27. *Supra* n 1, 430.

28. *Ibid.*, 433, per Brennan J.

to the degree of detriment occasioned. He states:

But the better solution of the problem is reached by identifying the unconscionable conduct which gives rise to the equity as the leaving of another to suffer detriment occasioned by the conduct of the party against whom the equity is raised. Then the object of the principle can be seen to be the avoidance of that detriment and the satisfaction of the equity calls for *the enforcement of a promise only as a means of avoiding the detriment and only to the extent necessary to achieve that object*. So regarded, equitable estoppel does not elevate non-contractual promises to the level of contractual promises and the doctrine of consideration is not blown away by a side-wind. Equitable estoppel complements the tortious remedies of damages for negligent misstatement or fraud and enhances the remedies available to a party who acts or abstains from acting in reliance on what another induces him to believe.<sup>29</sup> (our emphasis)

Let us return to our earlier example of the developer and builder in order to surmise how Brennan J might enforce the promise “only as a means of avoiding the detriment”. Suppose that the developer promises ten thousand dollars in return for the builder completing the work by the contract deadline. The result of an action for the contract price is that the builder recovers this sum, and the developer is estopped from denying the obligation to pay. But also suppose that the builder has spent only three thousand dollars in reliance on the promise (for example, by employing additional subcontractors). It can be said that the detriment suffered by the builder can be avoided by awarding compensation of this lesser amount. Thus the promise is enforced “only to the extent necessary” to avoid the detriment. But if this is the result intended by Brennan J it results in the courts awarding monetary compensation outside the powers conferred by Lord Cairns’ Act (in respect of their equitable jurisdiction) and not in accordance with the usual principles governing the assessment of damages in contract.

#### 4 Is the Statute of Frauds redundant?

It will not have passed unnoticed that the contract which Waltons was estopped from denying in *Waltons Stores* related to the disposition of an interest in land. There was, however, no contract in writing and no written memorandum or note of the lease was signed by Waltons. It was argued, therefore, that Maher was precluded from

29. *Ibid*, 427.

obtaining relief because of the impact of section 54A of the New South Wales Conveyancing Act 1919, which provides that “no action may be brought upon any *contract* for the sale or other disposition of land or any interest in land” (our emphasis) unless the statutory formalities of writing and signature are complied with. The equivalent statutory provision in Western Australia is section 4 of the Statute of Frauds, which, for the purposes under discussion, has similar wording and effect. Section 4 provides:

No action shall be brought...to charge any person...upon any *contract* or sale of land, tenements or hereditaments, or any interest in or concerning them; ...unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised. (our emphasis)

The argument that the operation of section 54A of the New South Wales Conveyancing Act 1919 rendered the assumed agreement unenforceable was rejected by the High Court. Two alternative reasons for this were given in the judgments, and are well summarised by Deane J:

In such a case, there is no scope for the operation of s 54A to render the assumed agreement unenforceable. That conclusion can arguably be justified on the broad basis that, as matter of construction, s 54A applies only to real contracts and agreements and does not apply to an assumed agreement to require that it be evidenced by trappings appropriate to an actual one. It is, however, unnecessary to go quite so far for the purposes of the present case. It suffices for present purposes to say that, in the circumstances of the present case, the estoppel precluding the denial of a binding agreement extends to preclude the assertion of unenforceability of the assumed agreement in that the word “binding” is used in the sense of valid and enforceable. That being so, the estoppel outflanks the provisions of s 54A in that there is no room for their intrusion into the assumed facts to controvert the assumed existence of a binding agreement which Waltons is estopped from denying.<sup>30</sup>

It is clear that only the second of these reasons can be regarded as part of the *ratio decidendi* of the decision. It is the reason preferred by Deane J himself,<sup>31</sup> and also by Gaudron J.<sup>32</sup> Mason CJ and Wilson J simply state “as the other judgments demonstrate, there is no substance in the argument based on s 54A of the New South

30. *Ibid.*, 446.

31. *Ibid.*

32. *Ibid.*, 464.

Wales Conveyancing Act 1919"<sup>33</sup> without identifying the particular reason. Brennan J however, does adopt the "broad basis" referred to by Deane J.<sup>34</sup>

Even adopting the second reason given by Deane J as to the inapplicability of the Statute of Frauds, there will be few circumstances in which defendants will be able to rely on the statutory provisions by asserting that, although an estoppel may preclude them from denying the existence of an agreement, there is no estoppel precluding them from denying its enforceability. If the evidence is sufficiently cogent to establish an estoppel which precludes a defendant denying the existence of the contract, it is likely that such evidence will suffice to found an estoppel which precludes an assertion that the agreement is unenforceable. The result is that in cases of estoppel precluding the denial of an agreement the Statute of Frauds will generally not prevent the plaintiff seeking relief.

This leads to a significant issue. Although the Statute of Frauds will, of course, still operate in respect of an oral contract, in circumstances in which an oral contract exists, there may also be proof of an estoppel. Suppose A makes an oral promise to lease land to B, and a rent is agreed. The oral *contract* is unenforceable as it is not evidenced in writing. But then suppose also that B acts to his or her detriment in reliance on the promise (for example, by reorganising his or her business) to the knowledge of A. A's promise to lease the land has induced B to adopt the assumption that a legal relationship will exist between them. B has acted in reliance on the promise to his or her detriment, to the knowledge of A. A is estopped from denying the existence of the agreement and its unenforceability. Thus the Statute of Frauds is, in the words of Deane J, "outflanked".

This view would not appear to be affected by the fact that B's acts are not sufficiently unequivocal to amount to acts of part performance. Thus in *Waltons Stores* itself Brennan J specifically held that Maher's acts of demolition and reconstruction did not amount to sufficient acts of part performance. This is clearly correct because Maher's acts were not "unequivocally and in their nature referable

33. *Ibid*, 408.

34. *Ibid*, 432.

to an agreement for a lease of Maher's land".<sup>35</sup> The acts of building, for example, are equally consistent with Maher making improvements to his own land. It thus appears far easier to establish an estoppel and circumvent the Statute of Frauds than to establish the equitable doctrine of part performance.

The conclusion so far reached is that a plaintiff may well succeed in enforcing what is in essence an oral contract for the sale or disposition of an interest in land if it can be shown that the requirements of an estoppel are met. In Western Australia the plaintiff may be met with the additional argument that there has been no compliance with section 34 (1) (a) of the Western Australian Property Law Act 1969, which provides that "no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, *or by operation of law.*" (Our emphasis) Pursuant to this provision it is clear that if the interest in land is disposed of "by operation of law" no writing is required. The interpretation of this section has recently been considered by Mr David Ipp QC in a paper "Formalities Relating to Contracts for the Sale of Land",<sup>36</sup> and it is not proposed to repeat Mr Ipp's views here. Suffice to say, in accordance with Mr Ipp's arguments, it can at least be argued that the enforcement of "[an] equity...created by estoppel"<sup>37</sup> (as Brennan J puts it) is an interest created "by operation of law" within the meaning of section 34(1)(a). It therefore requires no writing, and can be enforced in accordance with the principles enunciated in *Walton Stores*.

## 5 What amounts to detriment?

It is reasonably clear from the judgments of the High Court in *Waltons Stores* that in order to establish an equitable estoppel the plaintiff must not only act on the promise, but also have been in-

35. Ibid, 432. See also *Regent v Millett* (1976) 133 CLR 679, 683.

36. D A Ipp & A N Siopis "Formalities Relating To Contracts For The Sale Of Land — Yet Another Reappraisal" Law Summer School, University of Western Australia, Perth (WA) February 1989.

37. Supra n 1, 433.

duced to act to his or her detriment.<sup>38</sup> This requirement is apparent from the formulation of Brennan J,<sup>39</sup> is referred to in the joint judgment of Mason CJ and Wilson J,<sup>40</sup> and is an element in the statements of the principles of estoppel and their application to the particular facts of the case, in the judgments of Deane J<sup>41</sup> and Gaudron J.<sup>42</sup> It can be concluded, therefore, that the view expressed<sup>43</sup> by Lord Denning MR to the effect that it is sufficient if the promisee acts on the promise, whether it be to his or her advantage or disadvantage, is not good law in Australia. The requirement of promisees acting to their detriment may have been subsumed by Lord Denning MR in his more general proposition that the promisor “will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so”,<sup>44</sup> but that this is a separate requirement is clear particularly from the judgment of Gaudron J.<sup>45</sup>

Some doubt remains, however, as to the acts and circumstances which will constitute the necessary “detriment” to found the estoppel, and the effect of that detriment on the decision about any remedy<sup>46</sup> which the court may be prepared to grant. The law has never been clear on this issue, probably because of the reluctance of the courts to define the requirement with greater clarity than is necessary to decide the particular litigation. What seems now to emerge fairly clearly from *Waltons Stores* is that, whether or not the action is initially or in its nature detrimental to the promisee, the crucial point is that the promisee, having acted, will suffer detriment if the promise is withdrawn. All judgments cite the statements

38. Of this way of stating the requirement Dixon J said: “Although substantially such a statement is correct and leads to no misunderstanding, it does not bring out clearly the basal purpose of the doctrine.” *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674.

39. See above p 173.

40. *Supra* n 1, 406.

41. *Ibid*, 443.

42. *Ibid*, 458 adopting the words of Dixon J in *Thompson v Palmer* (1933) 49 CLR 507, 547.

43. *Eg* in *Alan (W J) & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189, 213.

44. *Ibid*.

45. *Supra* n 1, 460-461 quoting Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 675, 675-6. See also Mason CJ and Wilson J, 404-406; Brennan J, 420-423, 426-427 (discussing “silence”); Deane J, 443-444 (discussing and applying “estoppel by conduct”).

46. See above pp 180-181.

of Dixon J in *Thompson v Palmer*<sup>47</sup> and *Grundt v Great Boulder Pty Gold Mines Ltd*<sup>48</sup> as authoritative expositions of the general principles of estoppel,<sup>49</sup> and both Brennan J<sup>50</sup> and Gaudron J<sup>51</sup> quote from *Thompson v Palmer*:

[The object of estoppel is] to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment.<sup>52</sup>

Brennan J<sup>53</sup> further quotes Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*:

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...[T]he 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.<sup>54</sup>

and Gaudron J<sup>55</sup> quotes from the same judgment:

[Estoppel depends not only on] the fact...that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position.<sup>56</sup>

There is some authority in Australia indicating that it is not unduly difficult to satisfy the requirement that parties asserting an estoppel must have been induced to act to their detriment, at least in circumstances in which the plaintiff has been led to assume that a debt will be forgiven. The mere refraining from paying the debt, so that the debt would again become enforceable if the promise to forgive were withdrawn, cannot of itself be enough, for the promisee is no worse off than he or she would have been if the promise had never been made. But change in the time or manner of

47. (1933) 49 CLR 507, 547.

48. (1937) 59 CLR 641, 674-6.

49. *Supra* n 1, Mason CJ and Wilson J, 397-398; Brennan J, 413-414; Deane J, 445; Gaudron J, 458, 460-461.

50. *Supra* n 1, 413-414.

51. *Ibid*, 458.

52. *Supra* n 47.

53. *Supra* n 1, 414.

54. *Supra* n 48, 674.

55. *Supra* n 1, 460.

56. *Supra* n 48, 675.



payment may be significant. Thus in *Je Maintiendrai v Quaglia*<sup>57</sup> a lessor promised to allow a tenant a reduction of rent during the currency of the lease. It was held that the lessor was estopped from subsequently recovering the full amount of the unpaid rent. The detriment was found by the trial judge to exist in the tenant's hardship in having to find the lump sum to pay the arrears. The Court of Appeal of the Supreme Court of South Australia did not upset this conclusion, although the facts were not considered to be compelling. King CJ stated:

The evidence as to detriment is sparse. The respondents' case would be stronger if there were evidence of financial hardship or embarrassment as a result of the debt accumulating or, as in *Holt v Markham* [1923] 1 KB 504, that the money had been spent in other ways and that the respondents were unable to pay, at any rate without difficulty or inconvenience.<sup>58</sup>

Even upon the evidence of detriment preferred by King CJ proof of its existence should not, in most instances, be unduly burdensome. It will, however, be necessary to identify the detriment precisely, for on this turns the question of remedy. In some cases the harm suffered but for the estoppel may be clearly disproportionate to the benefit derived from enforcement of the equity arising from the estoppel. In *Waltons Stores* itself the harm was that Maher would have been left with an untenanted building completed to specifications approved by Waltons, and the remedy was to provide a tenant, namely Waltons. In *Je Maintiendrai v Quaglia*, in the absence of other detriment<sup>59</sup> than that found to be sufficient by the trial judge, the benefit was the value of the rent forgone, whereas the harm that would have resulted lay in being compelled to pay the rent in full, when it might have been paid periodically. In money terms, the harm may have been no greater than the interest on a loan, repayable by instalments, taken out to pay off the lessor. The possibility now opened by *Waltons Stores*, that the remedy may be tailored to meet the detriment,<sup>60</sup> means that there can be different outcomes in particular cases than the simple "estopped" or "not estopped".

57. (1981) 26 SASR 101.

58. *Ibid.*, 107.

59. For examples, see the passage quoted above from the judgment of King CJ.

60. See above pp 180-181.

## 6 The role of the legal adviser

In *Walton Stores* both parties were represented by solicitors. It is not clear from the judgments whether or not Maher's solicitor was under the same assumption as his client, namely, that an exchange of contracts would take place as a matter of course.<sup>61</sup> But what is the consequence of plaintiffs' solicitors in fact being in a position of being able to disabuse their clients of assumptions which they have made? There is no doubt that it will be more difficult to prove an estoppel in such circumstances. Mason CJ and Wilson J emphasise that the problem of establishing an estoppel arising as a result of a voluntary promise "is magnified in the present case where the parties were represented by their solicitors".<sup>62</sup> But Gaudron J indicates that even if the plaintiff's solicitor is in a position to correct his or her client's erroneous impression, an estoppel may still operate. Gaudron J states:

The knowledge of an agent, particularly where the agent is a solicitor acting in the relevant transaction, may also be fatal to the success of an estoppel based on an assumption which the agent knows to be false. However, that is not because of the difficulty in establishing that the assumption was the basis of the relevant action or inaction but because *the person sought to be estopped may escape a relevant duty to inform by reason of the agent's knowledge*. However, that duty cannot be evaded if the conduct relied upon to establish the justice of the estoppel also has the consequence that the person raising the estoppel is shut out from the knowledge of his agent. In the present case enquiry by the respondents of their solicitor may have disabused them of their assumption. However, the sense of false security engendered by the imprudence of the appellant must have also operated to induce in the respondents a belief that enquiry was unnecessary. The conduct of the appellant thus caused the respondents to be shut out from any contrary knowledge had by their agent.<sup>63</sup> (our emphasis)

This, of course, is also important from the point of view of the defendant's solicitor. Beware, therefore, the client who gives instructions (as Waltons did to its solicitor) to "go slow" in respect of a particular transaction. The defendant's solicitor must be very careful not to create an assumption in the other party that the execution of the contract will follow as a matter of course. The defendant's

61. Deane J took the view that in fact the plaintiff's solicitor was under an impression that an exchange *had occurred* — supra n 1, 441.

62. Supra n 1, 406.

63. Ibid, 463.

solicitor cannot rely on the fact that the other party is legally represented and that the other party may therefore be able to ascertain from his or her own legal adviser, that no contract has in fact been concluded.

## Conclusion

The ramifications of *Waltons Stores* cannot be predicted with certainty. Although the facts of the case are somewhat unusual — and the case may be confined in a narrow way — the statements of principle enunciated by the High Court reveal a potentially wide operation. Some of the possibilities have been indicated in this note. As to whether the principles are to be applied broadly, or the decision is to be in some way limited, we will just have to wait and see.