

LIMITATIONS ON CONTRACT TERMINATION

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LIMITATIONS ON CONTRACT TERMINATION

IMPORTANT TO CONSIDER AND DIFFERENTIATE

- Whether right to terminate was waived.
- If an estoppel is relied upon, what kind of estoppel.
- What facts support the estoppel and the elements.
- Remedy (declaration, damages, injunction, specific performance, relief against forfeiture).



LIMITATIONS ON CONTRACT TERMINATION

WAIVER AND ELECTION

- Common law remedy, equitable principles are irrelevant.
- Waiver is not an independent doctrine.
- Essence of election is a choice between alternate remedies or inconsistent rights.



LIMITATIONS ON CONTRACT TERMINATION

REQUIREMENTS FOR ELECTION

- Must be existing inconsistent rights, usually a choice between a right to terminate and to continue performance.
- Can elect expressly, or election can be implied from conduct.
- The occasion for election is only after the right to terminate arises and when the relevant facts creating the right to terminate are known.
- An equivocal act is required to make an election.
- Delay is not determinative, although an election can be implied from unreasonable delay in some circumstances.
- There is no requirement to prove detrimental reliance, nor is consideration required.



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ADVANCE WAIVER

- Exception or curiosity?
- *Kwei Tek Chao v British Traders and Shippers* [1954] 2 QB 459 at 481 per Devlin J.
- Is advance waiver better explained by estoppel?



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ESTOPPEL – PROMISSORY OR BY REPRESENTATION

- Representation of fact or future conduct, or a promise.
- Representation must be clear and unequivocal.
- Silence will rarely be sufficient.
- Reliance and detriment are essential.
- Essence of any estoppel is that the termination would be unconscionable.



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ESTOPPEL – PROMISSORY OR BY REPRESENTATION

Waterman v Gerling Insurance Ltd (2005) 65 NSWLR 300 at [83]

“in promissory estoppel, it is necessary for a plaintiff to establish (1) that it has adopted an assumption as to the terms of a legal relationship with the defendant; (2) that the defendant has induced or acquiesced in the plaintiff’s adoption of that assumption; (3) that the plaintiff has acted in reliance on its assumption; (4) that the defendant knew or intended that the plaintiff so act; and (5) that it will occasion detriment to the first party if the assumption is not fulfilled [*Waltons Stores (Interstate) Ltd v Maher* [\[1988\] HCA 7](#); [\(1988\) 164 CLR 387](#), 428-429 (Brennan J)]”



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CONVENTIONAL ESTOPPEL

- Sometimes called common law estoppel, but significantly reliance and detriment are still essential: *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39 at [71]-[74].
- Principles are as stated by Dixon J in *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674-675:
“the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations”
- the party against whom the estoppel is asserted “must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it” (at 675).”
- Essence of conventional estoppel is the adoption of a mutual assumption by both parties, and that it would be unconscionable for one party to now depart from that mutual assumption by terminating the contract.



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REMEDY

- Usually an estoppel will prevent a party from otherwise exercising a valid right to terminate a contract for breach or to accept a repudiation.
- Minimum equity is still a relevant consideration.



QUESTIONS?



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