

CAN CONTRACT TRUMP ESTOPPEL?

Nick Seddon

Special Counsel, Blake Dawson Waldron, Lawyers

NB this paper is work in progress.

Introduction

It has always been clear that estoppel operates independently of, and in spite of, contract. This was made clear in the *High Trees* case¹ where a variation to a contract by way of reduction in rent was held to be binding despite lack of consideration. This was made clear in *Waltons Stores (Interstate) Ltd v Maher*² where estoppel operated to create what amounted to a contract despite a lack of exchange of contracts (the customary method of contract formation in the circumstances of that case). It was also made clear in *Waltons* that there was no need to satisfy the requirements of the relevant *Statute of Frauds* provision for the contract-through-estoppel to be enforceable.³ Much of the discussion by the judges of the High Court in *Waltons* was based on the supposition that contract and estoppel are distinct categories of the law of obligations and that estoppel does not undermine or displace the law of contract by, for example, blowing away the doctrine of consideration.⁴

Estoppel acts in other ways irrespective of the existence of a contract. For example, it can operate to by-pass a clause in the contract that sets out a formal procedure for making changes to the contract;⁵ or it can establish a legal link where no contract exists, such as by holding a subcontractor to a quotation that is used by a head contractor to win a contract.⁶

Judicial disquiet

Since the High Court's decision in *Waltons*, estoppel has emerged as a new and powerful weapon in commercial litigation. It has certainly been embraced by the profession, as evidenced by the number of cases in which it features. But it has also caused disquiet from time to time. This has been expressed in various ways by judges.

¹ *Central London Property Trust v High Trees House Ltd* [1947] KB 130.

² (1988) 164 CLR 387.

³ *Ibid* at 408 (Mason CJ and Wilson J), at 432-3 (Brennan J), at 445-6 (Deane J), at 464 (Gaudron J). See also *Kintominas v Secretary, Department of Social Security* (1991) 30 FCR 475.

⁴ See, for example, (1988) 164 CLR 387 at 403 (Mason CJ and Wilson J) and at 425 (Brennan J).

⁵ *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251.

⁶ *Drennan v Star Paving Co* 333 P 2d 757 (1958).

Because estoppel very commonly arises out of what was said during negotiations for a contract, concern has been expressed that relying on estoppel in this way opens up commercial litigation to an examination of a “wilderness of pre-contract conversations”.⁷ This concern is wasted because statutory misleading conduct has already made this type of examination necessary.

More generally, Kirby P has been wary of estoppel, based as it is on unconscionability, being employed in what might be termed hard-nosed commercial settings involving players who are well able to look after themselves.

[C]ourts should, in my view, be wary lest they distort the relationships of substantial, well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges.⁸

Other judges have expressed irritation at the use of estoppel as a last-ditch panacea in litigation, somewhat reminiscent of the law student, bereft of knowledge in answering a question, who resorts to “equity” (or even “the vibe”) doing the job.⁹ For example, Bryson J in *Australian Co-Operative Foods Ltd v Norco Co-Operative Ltd*¹⁰ expressed some exasperation at what he considered to be the misuse of estoppel in commercial cases.

Poorly based and incompletely considered forensic attempts to set up pre-contractual estoppels are unfortunately common, and in most cases they are quite unuseful and very wasteful of resources.

In *Johnson Matthey Ltd v AC Rochester Overseas Corp*¹¹ McLelland J did not award costs to the successful plaintiff because he considered that too much time had been taken up with a futile estoppel argument.

There is no doubt that estoppel, and its brother-in-arms, misleading conduct, have added to uncertainty in commercial relationships and the complexity of commercial litigation. In the good — or bad, depending on ones point of view — old days, a contract was a contract and, subject to the rather limited right to rescind or possibly claim damages in tort under the old law of misrepresentation, a commercial contract represented the sole repository of the parties' rights and obligations. This was stated by the parol evidence rule in the case of fully written contracts and was reinforced by the use, in those agreements, of an entire agreement clause. By contrast, now

⁷ *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 at 177 (guess who?).

⁸ *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 586. Kirby P expressed similar sentiments in *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 at 177.

⁹ Estoppel “is not to be regarded as a cure all or catch all claim which assures success to a party who is deserving of merit but who has no claim otherwise at law or in equity”: *Public Trustee for the Australian Capital Territory v Jovan Megic* [1995] ACTSC 11 at [36] (Miles CJ).

¹⁰ (1999) 46 NSWLR 267 at 279 (discussed below).

¹¹ (1990) 23 NSWLR 190 at 197 (discussed below).

commercial litigation may indeed be bogged down in a “wilderness of pre-contract conversations”, faxes, minutes of meetings, emails, letters and other communications and information that may have a bearing on the totality of the parties' rights and obligations.

One thing is clear: potential liability for statutory misleading conduct cannot be controlled or eliminated by clauses in the contract. Many have been the attempts to draft exclusion clauses to eliminate or modify the operation of the legislation — but to no avail. The courts have consistently said that it is not possible to contract out of the operation of the misleading conduct section, despite the fact that there is no legislative statement to this effect in the *Trade Practices Act*, the *Australian Securities and Investments Commission Act* or in most *Fair Trading Acts*.¹² So, resort to pre-contractual communications is a common feature of commercial litigation and nothing in the contract can preclude this.¹³

Is the same true of estoppel?

Can estoppel be controlled?

An issue that has arisen concerning the interaction of contract and estoppel is: can estoppel be controlled or even excluded by contract? Is it possible to agree that estoppel will not either arise or be used by either party?

There would certainly be no difficulty in drafting a suitable clause and, as a general principle, the parties to a contract are free to agree to whatever they like. Exceptions to this principle are few and are based either on public policy, for example, the courts will not enforce illegal undertakings or ones that offend some equitable principle;¹⁴ or on legislation, for example, where legislation expressly forbids contracting out¹⁵ or where the courts have interpreted legislation to be mandatory.¹⁶

The courts have expressed different answers to the question. The usual testing ground is an entire agreement clause commonly used in fully-written agreements.

¹² But see *Fair Trading Act* 1987 (SA) s 96; *Fair Trading Act* 1989 (Qld) s 107; and *Fair Trading Act* 1990 (Tas) s 50 which provide that there can be no contracting out of the Act.

¹³ A similar irritation at the too-ready use of misleading conduct in commercial litigation has also been expressed by judges. See *Commonwealth Bank of Australia v Foxman Holdings Pty Ltd* (1995) 49 NSWLR 315 at 318-9 (McLelland CJ in Eq) and *Powercor Australia Ltd v Pacific Power* [1999] VSC 110 at [1674]-[1676] (Gillard J).

¹⁴ Relief against forfeiture and penalties are examples of equitable erosion of freedom of contract.

¹⁵ The *Trade Practices Act* 1974 s 68 is an example. It prohibits exclusion of the terms implied to protect consumers in sale of goods and services contracts.

¹⁶ The *Trade Practices Act* 1974 s 52 is an example, as already noted. There is no express prohibition on contracting out of s 52 but the courts have taken the view that this is not possible.

Entire agreement clause and the parol evidence rule

The purpose of an entire agreement clause is to preclude any argument about the scope and content of a contract. It usually makes it clear that the fully-written agreement is the entire statement of the parties' rights and obligations — nothing more and nothing less — and it usually goes on to make it clear that all that passed between the parties prior to the signing of the contract is superseded and cannot be the basis for any claim, such as under the law of misrepresentation.¹⁷

The entire agreement clause therefore to some extent performs the same role as the parol evidence rule. This rule also makes it clear that, where the parties have expressed their agreement in a fully-written form, it is not permissible to adduce extrinsic evidence that attempts to add to, modify, contradict or explain the written terms.

Both the entire agreement clause and the parol evidence rule are rules of convenience promoting commercial certainty in dealings. They put a box around the contract and endeavour to ensure that there is certainty about what the parties have agreed to. The very concern expressed by Kirby P about the "wilderness of pre-contract conversations" is supposed to be met by these twin devices: look to the contract and nothing but the contract to determine the parties' rights. Many are the issues and matters that are discussed during the negotiations for a contract but only a limited number find their way into the contract as terms. The parties have by their agreement crystallised their bargain in those terms.

This analysis is, of course, limited to certain types of contracts. The parol evidence rule is always preceded by a preliminary question: is this a suitable case for the application of the rule, that is, *is* the agreement fully expressed in the document? Equally, the entire agreement clause pre-supposes that there is an entire agreement in the written document. The parol evidence rule does not apply if it is possible to show that the written document does *not* represent the crystallisation of the parties' bargain but is only a part of it. It would, however, be difficult, but not impossible, to argue that a written document, which contains a statement in it that the document is the entire agreement, is not really the entire agreement but only part of it. In this way an entire agreement clause reinforces the parol evidence rule.

The parol evidence rule is subject to numerous exceptions. All the "excuse" areas of the law of contract are exceptions. So, it is possible to argue misleading conduct, undue influence, unconscionable dealing, mistake (including rectification)¹⁸ or duress

¹⁷ It is not clear that an entire agreement clause would necessarily preclude an argument based on pre-contractual misrepresentation (other than statutory misleading conduct where it is clear that no contractual clause can exclude the operation of the legislation). See the misgivings expressed by Pincus J in *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715 at 723-5. See also *MacDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152 at 154-5 (MacPherson JA).

¹⁸ See *MacDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152 where it was held that rectification could be argued in the face of an entire agreement clause.

for the purpose of setting aside the contract. Then there are other exceptions that seem to undermine the very purpose of the parol evidence rule, such as that it is possible to adduce extrinsic evidence to explain ambiguous or technical terms in the contract or to add implied terms to the contract. It is even possible to adduce evidence of a "side" or collateral contract that adds to the main contract.

Is an entire agreement clause stronger than the parol evidence rule?

Do the same exceptions, or at least some of them, also apply when the parties have chosen to include an entire agreement clause? It may be arguable that the parol evidence rule is a principle of the common law which is subject to well-known exceptions that are also principles of the common law or equity; whereas an entire agreement clause is of quite a different character. It is part of the agreement and, putting it at its highest, the parties have *agreed* that exceptions of the type just listed do not apply. In short, the entire agreement clause does not merely reinforce the parol evidence rule; it replaces it with a much more powerful device for ensuring that the written contract cannot be undermined by resort to extrinsic facts.¹⁹

On the other hand, it may be argued that an entire agreement clause merely answers the essential preliminary question that must be asked if the parol evidence rule is to apply, namely, is this an appropriate case for its application? McLelland J in *Johnson Matthey* treated an entire agreement clause as serving this purpose. He referred to the clause as putting beyond doubt an inference, already drawn, that the written agreement was the integration of the parties' bargain and, having set out the clause, concluded "[a]ccordingly the parol evidence rule applies...".²⁰ Therefore, the entire agreement clause was not necessarily seen as a more powerful device than the parol evidence rule for excluding extrinsic evidence. Rather, it provided a trigger for the application of the parol evidence rule. McLelland J did however go on to say that the inclusion of an entire agreement clause provided "an additional reason for rejecting" an estoppel argument and itself constituted an estoppel by convention.²¹

Does an entire agreement clause really reflect the parties' intention?

Even if it is assumed that an entire agreement clause is a more powerful device than the parol evidence rule for excluding extrinsic evidence, it is still necessary to ask whether the entire agreement clause really does state the parties' joint intention. The law has traditionally ascertained that intention by looking to the words of the agreement — a circular process — but, again, one of convenience that promotes certainty in transactions. It is, however, a very common phenomenon that a written contract does not in fact state the parties' joint intention, particularly when the parties

¹⁹ See Derham, "Estoppel by Convention — Part 1"(1997) 71 *ALJ* 860 at 869 where the author appears to assume that the use of an entire agreement clause may succeed in excluding extrinsic evidence where the parol evidence rule would not. (Part 2 of this article appears at (1997) 71 *ALJ* 976.)

²⁰ (1990) 23 *NSWLR* 190 at 194.

²¹ *Ibid* at 196.

have used a standard form agreement. Standard form agreements will almost invariably contain an entire agreement clause. So, in many circumstances, the entire agreement clause is not as powerful a statement as it may first seem. Even in a fully negotiated contract, the entire agreement clause is simply part of the "boilerplate" and has not been the subject of keen negotiation. The very problem now being investigated in this article only arises because the entire agreement clause is not in fact a true statement of what it says, at least as far as one party is concerned. From that party's perspective, what was said or what was indicated outside the contract was much more important than the written words.

In fact, as a general proposition, it is true to say that the law is counter-intuitive: it gives primacy to the written document in the name of certainty of transactions, whereas human experience tells us that what is the subject of express or special consideration outside that writing is usually far more significant.²² As McHugh JA said:

Indeed the case for applying the doctrine of promissory estoppel seems particularly strong when the promisee is induced to confer the right on the promisor by the promise that the right will only be acted on in special circumstances or at a particular time or place or in a particular way ... I think that the decisive consideration is that it is unconscionable for a promisor to insist on his strict rights if he has induced the promisee to give them to him by an assurance that they will only be used in a particular way or in particular circumstances and the exercise of those rights is contrary to the assurance.²³

In a different context and in a different era, the same sentiment was expressed by Isaacs J.

[I]n practice a great mass of business rests upon the word of the parties, or upon quite informal memoranda ... Where a great mercantile firm in substance invites its customers to dispense with the formalities of written contracts, and to rely upon the business honesty and fidelity of the firm to the pledged word of its responsible agents, it is distinctly dishonourable to repudiate a transaction so entered into upon the ground that the customer was simple enough to place reliance on anything short of a written undertaking duly signed.²⁴

The same could be said where a written contract is used but it is informally modified prior to execution.

²² I made this point a long time ago in "A Plea for the Reform of the Rule in *Hoyt's Pty Ltd v Spencer*" (1978) 52 ALJ 372 at 379 and 381.

²³ *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 at 193.

²⁴ *Charlick v Foley Bros Ltd* (1916) 21 CLR 249 at 251. Isaacs J's condemnation was directed at the use of a Statute of Frauds defence.

Estoppel and entire agreement clauses

The case law is divided on the question whether an entire agreement clause could be used to exclude evidence of pre-contractual negotiations and statements which are relied on by one of the parties in trying to establish an estoppel.²⁵

In *Australian Co-Operative Foods Ltd v Norco Co-Operative Ltd*²⁶ Bryson J followed two earlier cases²⁷ to hold that an estoppel could not be enforced if, in order to establish it, resort was had to pre-contractual undertakings or understandings when an entire agreement clause expressly excluded resort to such material. In fact what Bryson J said in this regard was merely obiter dicta (as he acknowledged) because he had concluded that no estoppel could arise on the facts and so there was no need to consider the question of whether the entire agreement clause would preclude an estoppel. He nevertheless expressed a clear preference for the view that an entire agreement clause was effective to prevent an estoppel, arguing that the parties' fully expressed bargain in a written contract was the "final and considered expression of the parties' contractual intention" which prevailed over any evidence adduced in support of an estoppel that was alleged to operate contrary to that expressed intention.

Similar justification for this view was given by McLelland J in *Johnson Matthey Ltd v AC Rochester Overseas Corp.*²⁸

It would be a serious threat to the stability of commercial relationships and dealings if parties who, after lengthy and intricate negotiations, deliberately recorded their agreement in permanent written form, were subject to the risk of having that permanent written record yield to the inherently less reliable evidence of oral statements made during the course of negotiation, given possibly many years after the event when witnesses may have become unavailable, and when memories may have faded or become distorted by subsequent occurrences and changing perceptions of self-interest.

He then referred to Kirby P's "wilderness of pre-contract conversations" passage. McLelland J was of the view that an entire agreement clause itself generates an estoppel by convention.²⁹

²⁵ This paper does not canvass the possibility of the contract precluding the operation of an estoppel *during* the contract, as in *High Trees* and *Update Constructions*. It would be difficult or impossible to draft a suitable clause that was proof against the informal dealings and conduct of the parties.

²⁶ (1999) 46 NSWLR 267 at 279.

²⁷ *Johnson Matthey Ltd v AC Rochester Overseas Corp* (1990) 23 NSWLR 190 (McLelland J) and in *Skywest Aviation Pty Ltd v Commonwealth* (1995) 126 FLR 61 (Miles CJ).

²⁸ (1990) 23 NSWLR 190 at 195. Followed in *C G Mal Pty Ltd v Sanyo Office Machines Pty Ltd* [2001] NSWSC 445 where Young CJ in Eq held that an entire contract clause would have precluded an argument based on proprietary estoppel, though on the facts the estoppel had not been made out.

²⁹ *Ibid* at 196.

Even so, McLelland J went on to hold that the particular problem that prompted one of the parties to argue estoppel was solved by implying a term to the same effect as would have been the case had the estoppel argument succeeded. An entire agreement clause does not preclude the implication of a term.³⁰ Nor does it preclude rectification of the contract.³¹ This last point is significant because it demonstrates that the entire agreement clause does not mean what it says, that is, established legal principles can cut across what the parties have apparently agreed.

The factual backgrounds in each of *Australian Co-operative Foods* and *Johnson Matthey* were very similar. In each case the party arguing estoppel was saying that a particular clause which was plain and unambiguous should be read subject to a qualification. In *Australian Co-operative Foods* the clause provided the licensor of a trade mark with control over the labelling "get-up" of products. The licensee argued that co-branding was allowed without seeking the licensor's permission whereas the literal wording of the clause said no such thing. The argument was not successful. In *Johnson Matthey* the relevant clause allowed the purchaser of products to terminate the agreement if better prices could be obtained elsewhere. The purchaser found better prices in the United States. The supplier argued that the clause must be read as referring only to competition in the Australian market. McLelland J agreed with this argument by saying there was an implied term to that effect rather than through the operation of an estoppel.

The opposite point of view — that contract cannot trump estoppel — has also been expressed in a number of cases. The fullest discussion of the case law appears in *Branir Pty Ltd v Owston Nominees (no 2) Pty Ltd*³² but, as in *Australian Co-operative Foods*, what was said was, strictly speaking, obiter dicta. Speaking for the Full Federal Court, Allsop J said:

However, in my view, there appears, if I may say so respectfully, to be great force in the views of McHugh JA in his rejection of the exclusion of a role for estoppel (at least in equity) where the detriment founding the estoppel is, in effect, the entry into an agreement which in turn negates, by its terms, the representation or conduct which was sufficiently clear to found an estoppel and reliance upon which led to the agreement being entered.³³

In *Whittet v State Bank of New South Wales*³⁴ Rolfe J was faced with a very similar problem to those considered in *Australian Co-operative Foods* and *Johnson Matthey*, namely, an argument that a clear clause should be read subject to a qualification. In

³⁰ *Hart v MacDonald* (1910) 10 CLR 417 at 430 (Isaacs J). One of the requirements for the implication of a term is that it must not contradict an express term of the contract. It is difficult to see how the implication of a term in the face of an entire agreement clause does not infringe this principle.

³¹ *MacDonald v Shinko Australia Pty Ltd* [1999] 2 Qd R 152.

³² [2001] FCA 1833 at [444]-[448] Allsop J for the Full Federal Court.

³³ *Ibid* at [447]. The reference to McHugh JA is to his judgment in *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170 at 193.

³⁴ (1991) 24 NSWLR 146.

Whittet a mortgage to secure a loan was expressed to be an all moneys mortgage. Mrs Whittet, a co-mortgagor with her husband, had been assured that her exposure would be only up to a fixed amount. She argued that the bank was estopped from claiming more from her. Rolfe J acknowledged that earlier decisions had expressed the view that an estoppel by convention could not be raised to contradict the written contract but also considered that what was said in the *State Rail Authority* case had made it clear that the opposite view was permissible when there is sufficiently clear proof to justify the estoppel. He held in this case that an estoppel by convention should operate to modify the mortgage agreement in accordance with the assurance that had been given to Mrs Whittet.

The discussion of the operation of estoppel in *Whittet* was in terms of estoppel and the parole evidence rule rather than estoppel when there is an entire agreement clause. There was no mention of an entire agreement clause in that case.

Rolfe J made the important point that the fear that the integrity of written agreements would be too easily threatened was not justified because of the stringent standards that the law requires to establish an argument that the writing should be qualified. Both the law of rectification and the law of estoppel require clear and convincing proof before a court will be persuaded to accept these arguments. To this may be added the stringent requirements needed to argue an implied term³⁵ and the different stringent requirements needed to argue collateral contract.³⁶ The law has thus developed safeguards where an argument is mounted that an apparently complete written agreement should be added to, or qualified, by reference to extrinsic evidence. There is no reason why estoppel as a device for modifying or qualifying such agreements should be treated any differently.

It would be strange, so it seems to me, if matters arising out of pre-contractual negotiations, which could be proved to the extent necessary to justify rectification, namely, by clear and convincing proof, could not be relied upon to found an estoppel by convention because of the source from which they arose.³⁷

Estoppel under common law and equitable principles

McLelland J considered that the type of estoppel that was being argued on the facts of *Johnson Matthey* was estoppel by convention which he considered to be “in the nature of an agreement”. Thus, on this argument, the court had to choose between one or another agreement as representing the true intention of the parties. Common law principles, as exemplified in the parole evidence rule, have always preferred the written over any oral undertakings or understandings. The contest between common law

³⁵ *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347 and 404.

³⁶ *JJ Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435; *Heilbut Symons & Co v Buckleton* [1913] AC 30.

³⁷ *Whittet v State Bank of New South Wales* (1991) 24 NSWLR 146 at 153 (Rolfe J).

estoppel and basic contract is resolved in favour of contract, at least where there is an entire agreement clause. Yet it is also clear that in an appropriate case estoppel by convention can be used to modify or add to a written agreement and this represents one of the many exceptions to the parol evidence rule.³⁸

Would the preference for contract over estoppel be differently treated if the basis for estoppel was equity rather than common law? Despite the High Court's expression of the idea that all estoppels can be brought under a single, overarching principle,³⁹ this point of view appears to have withered. It was not treated with any enthusiasm by the current High Court in *Giumelli v Giumelli*.⁴⁰ Gaudron J in *Waltons*⁴¹ and McHugh J in *Commonwealth v Verwayen*⁴² argued for the retention of a distinction between common law estoppel as a rule of evidence and equitable estoppel which creates substantive rights.⁴³ The relevance of this for present purposes is that the argument for contract trumping estoppel may be less strong where the person against whom an estoppel is argued has acted unconscionably, that is, a form of equitable estoppel is being argued. Even so, a common law estoppel in the end turns on whether there is an *unjust* departure from the assumption or facts established by the estoppel.⁴⁴ The distinction between common law and equitable estoppel may therefore be not as great as is sometimes supposed. The distinction is also blurred in so far as a particular set of facts could be interpreted to raise an equitable estoppel on one view or a common law estoppel on another. This is illustrated by the varying interpretation of the facts by the judges in *Waltons Stores*.

Bryson J in *Australian Co-Operative Foods* considered that an entire agreement clause would exclude any type of estoppel.⁴⁵ However, the facts of that case did not test the issue: can an entire agreement clause in effect neutralise unconscionable

³⁸ See cases cited by Derham, "Estoppel by Convention – Part 1" (1997) 71 *ALJ* 860. Part 2 of this article appears at (1997) 71 *ALJ* 976.

³⁹ *Commonwealth v Verwayen* (1990) 170 CLR 394 at 410. See also *Foran v Wight* (1989) 168 CLR 385 at 411-3, 435-6.

⁴⁰ (1999) 196 CLR 101 at 112-3 (Gleeson CJ, McHugh, Gummow and Callinan JJ) "There is no occasion in this appeal to consider whether the various doctrines and remedies in the field of estoppel are to be brought under what Mason CJ called 'a single overarching doctrine' or what Deane J identified as a 'general doctrine of estoppel by conduct'" [footnotes omitted].

⁴¹ (1988) 164 CLR 387 at 458.

⁴² (1990) 170 CLR 394 at 585.

⁴³ There are also differences between the common law and equitable branches of estoppel that need to be resolved if a truly unified doctrine is to emerge. See Robertson, "Knowledge and Unconscionability in a Unified Estoppel" (1998) 24 *Monash University LR* 115; Robertson, "Estoppel by Conduct: Unresolved Issues at Common Law and in Equity" (1999) *National LR* 7 www.nlr.com.au/articles/robertson/robertson.htm. See the discussion by Sheller JA (with the concurrence of Stein and Beazley JJA) in *Wykes v Samilk Pty Ltd* (1999) Aust Contract Rep 90-097 at 91,008-91,013.

⁴⁴ *Grundt v Great Boulder Proprietary Gold Mines Ltd* (1937) 59 CLR 641 at 674 (Dixon J).

⁴⁵ (1999) 46 NSWLR 267 at 279.

conduct? It will be recalled that there was no basis for an estoppel argument in the first place.

In *Skywest Aviation Pty Ltd v Commonwealth*⁴⁶ Miles CJ expressed the view that an entire agreement clause could not be effective to exclude fraud but could be effective to exclude a lesser degree of moral turpitude amounting to unconscionable conduct. Of course, a statement of this kind raises the often-asked question: what sort of fraud? Fraud in equity embraces all species of unconscionable conduct. Miles CJ fairly clearly had in mind common law fraud. The judges who have expressed the view that contract cannot trump estoppel were motivated by a concern that unconscionable conduct is determined by the court, having regard to the particular circumstances of the case. The passage cited above from the judgment of McHugh JA in the *State Rail Authority* case could be adapted to answer the question. There he was concerned with the written words of a contract and an alleged assurance that modified or qualified those words. Here we are concerned with the same problem but with the addition of an entire agreement clause that purports to exclude evidence of the modifying or qualifying words. It would be unconscionable for the party against whom an estoppel is argued to insist on his or her strict legal rights which are designed to exclude any possibility of the very estoppel being argued. There is, in a sense, a double estoppel: an estoppel that founds the substantive argument (viz. that a contractual clause should be read subject to a qualification because of an assurance or promise) and an estoppel that prevents the first estoppel from being excluded by the entire agreement clause.

McLelland J in *Johnson Matthey* also assumed two estoppels but resolved the problem differently when he said that the first estoppel *was* excluded by the estoppel by convention raised by the entire agreement clause. It is suggested that where it would be unconscionable to rely on the entire agreement clause (and convincing and clear evidence is needed to establish this) then estoppel trumps contract rather than the other way around.

Interpretation of the entire agreement clause

In *Johnson Matthey* McLelland J pointed out that "[t]he effect of any particular clause will of course depend on its own terms and context". Yet very little attention has been paid to the words used in entire agreement clauses. In that case, the clause provided in part:

This Agreement is executed and delivered with the understanding that it and any Security embody the entire agreement between the parties with respect to the subject matter hereof, that it cancels and supersedes all previous agreements, negotiations, comments and writings in respect thereof, that there are no prior representations, warranties or agreements relating thereto...

From one point of view, one could take the clause at its literal face value and argue that all that it does is to put a box around the *agreement* and any reference to prior

⁴⁶ (1995) 126 FLR 61 at 105.

statements, representations, information, etc being superseded means that they are not part of the agreement. In other words, the clause does no more than the parol evidence rule. It says nothing about other possible causes of action or heads of liability. And, adapting the familiar *contra proferentem* argument, if it was intended to exclude an estoppel then it should have been explicit on that score. No attempt was made to argue this in *Johnson Matthey*.

The drafting could be improved by being explicit about estoppel. For example, the following could be included in the entire agreement clause

...and the parties agree that all previous agreements, negotiations, comments and writings will not be relied on to provide evidence for an estoppel and that neither party will attempt to add to or vary the this agreement as executed by the use of an estoppel ...

The question then is whether this explicit agreement about the non-use of estoppel would in fact preclude an estoppel from being argued when in all other ways the ingredients of estoppel have been satisfied. Arguing an estoppel would amount to a breach of contract. Because of the doubt that surrounds the answer to the question, it is suggested that an attempt to strike out an argument based on estoppel would not be successful. There is at least an arguable case that estoppel can be employed despite the existence of so explicit a clause.

This leaves the possibility of an action for damages for breach of the explicit promise in the clause. It is suggested that if the clause is regarded as effective to exclude an estoppel, then the attempt to argue an estoppel will simply be unsuccessful and so the breach will not be productive of loss. On the other hand, if a court considered that it was unconscionable to rely on the strict legal rights embodied in the entire agreement clause (as is argued here that it would, assuming that all ingredients of estoppel are satisfied) then the clause could not found an action for damages.

Does TPA s 51AA preclude a contract clause trumping estoppel?

We know that a contract clause cannot prevent reliance on s 52 of the *Trade Practices Act*. Does the same principle apply to s 51AA of the *Trade Practices Act*?

Section 51AA prohibits unconscionable conduct in trade or commerce within the meaning of the unwritten law of the States and Territories. Some judges think that s 51AA covers all equitable doctrines in which unconscionability is an element.⁴⁷

⁴⁷ In *ACCC v Berbatis Holdings Pty Ltd* (2000) 169 ALR 324 at 335 French J supported this view referring to Finn, 'Unconscionable Conduct' (1994) 8 *JCL* 37 at 39 and Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *LQR* 166. See also *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380 noted in (1997) 71 *ALJ* 432 where Batt J did not specifically discuss this point but assumed that the legislation was available through s 51AA in respect of unconscionable use of contractual guarantees.

Others say that it was parliament's intention to cover *Amadio* unconscionability⁴⁸ and that is all.⁴⁹ If the former view is correct, it is arguable that estoppel is covered.

If so, does this mean that s 51AA prevents contracting out in the same way as s 52 has been interpreted? Section 51AA refers to unconscionability under general law principles. If the general law principles allow contracting out of an unconscionability-based doctrine, then this must be reflected in the application of s 51AA. It is not the same as s 52 which sets a statutory standard of conduct. Therefore, it is arguable that s 51AA does not strengthen the case for saying that estoppel cannot be precluded by a contract clause.

The opposing argument is that the legislative provision merely borrows from the general law for the purpose of establishing what amounts to unconscionable conduct but this does not import the general law proposition (if indeed it exists) that it is permissible to contract out of liability for unconscionable conduct. Just as the legislature has said through s 52 that a corporation must not engage in misleading or deceptive conduct, so too it has said that a corporation must not engage in unconscionable conduct. Therefore an entire agreement clause that attempted to exclude an estoppel would be ineffective in cases to which s 51AA applies.

Conclusion

There is clear disagreement among judges who have pronounced on the question whether the use of an estoppel can be precluded by a contractual clause, such as an entire agreement clause.

The concern of the judges who hold that an estoppel can be precluded by contract is the same concern that informs the parol evidence rule, namely, security of transactions. Yet there are numerous exceptions to the parol evidence rule. These exceptions to the parol evidence rule recognise that humans do not act like automatons in their commercial activities. To assume that a contract is fixed in some intractable way is to ignore the realities and dynamics of commercial relationships. This is of course recognised by the law of contract in so far as it accommodates changes to the contract. Here we are concerned with the first statement of the contract at the time of execution. But even then it is not in accordance with the realities of the relationship to assume that a written agreement necessarily represents the true intention of the parties to it. The numerous exceptions to the parol evidence rule are testament to this.

The concern of the opposite point of view is that unconscionable conduct cannot be excluded, just as fraud cannot be excluded by agreement. The concern that written

⁴⁸ *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

⁴⁹ This view was expressed by Tamberlin J in *Cortis Exhaust Systems Pty Ltd v Kitten Software Pty Ltd* [2001] FCA 1189 at [21] and by Gyles J in *GPG (Australia Trading) Pty Ltd v GIO Australia Holdings Ltd* [2001] FCA 1761 at [115]-[126].

agreements may be too easily undermined is met by the strict requirements of proof that are always present when attempts are made to resort to extrinsic evidence to supplement, qualify or alter the written contract. In varying forms, these strict requirements apply whether the basis for the argument is collateral contract, rectification or implied term. The same requirement is part of the law of estoppel. If clear and convincing evidence is adduced to show that the reality of the agreement that was made between the parties is not what the written words say, then the true intention of the parties should be given effect to, despite a clause in the contract that attempts to preclude this.

The ultimate question is: is it unconscionable to agree not to rely on unconscionable conduct? Experience shows that equitable principles cannot be controlled by contract. Examples are the law relating to penalties and liquidated damages and the law relating to relief against forfeiture.⁵⁰

On balance, therefore, an attempt to trump estoppel by a contract clause will not be successful so long as the necessary ingredients of estoppel are present.

⁵⁰ Another example of where equity prevails over a clear statement in a contract is where there is an acknowledgment of receipt of money. A court can investigate whether the money has in fact been paid despite the acknowledgment: *Byers v Dorotea Pty Ltd* (1986) 69 ALR 715 per Pincus J at 723; *Cousens v Grayridge Pty Ltd* [2000] VSCA 96 per Batt JA at [58].