Walton Stores (Interstate) Ltd v Maher and Another
(1988) 76 ALR 513; 164 CLR 387
Chapter 5 (page 224)

Relevant facts

Mr and Mrs Maher owned commercial property in the business district of Nowra. Walton Stores (Interstate) Ltd’s lease of its existing premises in Nowra was due to expire in January 1984. In mid 1983, negotiations commenced between the Mahers and Waltons about the lease of the property by Waltons. To meet Waltons’ requirements, the Mahers proposed to demolish an old building on the property and erect a new one that met Waltons specifications. Waltons advised the Mahers that it required the new building to be completed by 15 January 1984. An agreement was subsequently reached for an extension of time to complete the work.

On 21 October 1983, the term of the lease and the rent having been agreed, the solicitors for Waltons sent the solicitors for the Mahers a draft agreement for lease. On 1 November 1983, the Mahers’ solicitor informed Waltons’ solicitor that the demolition of the building on the property had commenced and requested amendments to the agreement. On 9 November, the Mahers’ solicitor informed Waltons’ solicitor that the Mahers required the agreement to be concluded in the next day or two otherwise it would not be possible for the Mahers to complete the new building in time. Waltons’ solicitor orally advised the Mahers’ solicitor that he had verbal instructions from Waltons about the amendments the Mahers had sought and that he would get formal instructions. That night Waltons’ solicitor sent an updated agreement incorporating the amendments with a letter that confirmed that he believed formal instructions would be forthcoming and that he would let the Mahers’ solicitors know the following day if any amendments were not agreed to. On 11 November, the Mahers’ solicitors forwarded the amended deed executed by the Mahers to Waltons’ solicitors. Waltons decided that because of a new retailing policy, which they were in the process of formulating, it would not commit itself to leasing the Maher property, and instructed its solicitors to ‘go slow’.

In early January 1984, the Mahers commenced construction of the new building in accordance with the plans and specifications approved by Waltons.

On 19 January, Waltons’ solicitors advised the Mahers’ solicitors that Waltons did not intend to proceed with the lease.

The Mahers applied to the Supreme Court of New South Wales seeking (1) a declaration that a binding agreement existed and (2) specific performance of the agreement or damages. The judge at first instance decided in favour of the Mahers on the basis that Waltons was prevented from denying that a concluded contract by way of exchange had been created between the parties on the basis of common law estoppel by representation. Waltons was ordered to pay damages. Waltons appealed to the NSW Court of Appeal. That appeal was dismissed on the basis that Waltons was
prevented from denying the existence of a binding contract on the basis of common law estoppel based on omission to correct a mistake. Waltons appealed to the High Court.

Legal issue

Was Waltons estopped from denying the existence of a binding agreement that it would lease the property?

Decision

On 19 February 1988, the High Court (Mason CJ, Wilson, Brennan, Deane and Gaudron JJ) dismissed Waltons’ appeal. Although the Justices delivered separate decisions, with the exception of Mason CJ and Wilson J, they all decided that Waltons could not deny the existence of a binding agreement to lease the property even though no contract had been formally concluded. Rejecting the common law estoppels on which the judge at first instance and the NSW Court of Appeal had applied, the Court reached its decision on the basis of the equitable doctrine of promissory estoppel. None of the members of the High Court thought that any argument that a binding contract had been created by exchange was sustainable on the facts.

Chief Justice Mason and Justices Wilson and Brennan (Deane and Gaudron JJ dissenting) held that Maher had mistakenly assumed that an exchange of contracts would take place as a matter of course. Chief Justice Mason and Justice Wilson accepted that promissory estoppel could extend to promises as to future conduct. They noted that to that point in time promissory estoppel had been limited to situations where there was a pre-existing contractual relationship but stated that there was no reason in principle why the doctrine should not extend to a non-contractual promise. At 525 to 526 they said:

*The foregoing review of the doctrine of promissory estoppel indicates that the doctrine extends to the enforcement of voluntary promises on the footing that a departure from the basic assumptions underlying the transaction between the parties must be unconscionable. As failure to fulfil a promise does not of itself amount to unconscionable conduct, mere reliance on an executory promise to do something, resulting in the promisee changing his position or suffering detriment, does not bring promissory estoppel into play. Something more would be required ...*

*Was the appellant entitled to stand by in silence when it must have known that the respondents were proceeding on the assumption that they had an agreement and that completion of the exchange was a formality? The mere exercise of its legal right not to exchange contracts could not be said to amount to unconscionable conduct on the part of the appellant.*

Their Honours emphasised two facts: the urgency associated with the negotiation of the terms of the agreement to lease in light of the completion date, and the Mahers’ assumption that an exchange of contracts was a mere formality based on the events in early November. They then stated at 526:
It seems to us, in the light of these considerations, that the appellant was under an obligation to communicate with the respondents within a reasonable time after receiving the executed counterpart deed and certainly when it learnt on 10 December that demolition was proceeding. It had to choose whether to complete the contract or to warn the respondents that it had not yet decided upon the course it would take. It was not entitled simply to retain the counterpart deed executed by the respondents and do nothing ... The appellant’s inaction, in all the circumstances, constituted clear encouragement or inducement to the respondents to continue to act on the basis of the assumption which they had made. It was unconscionable for it, knowing that the respondents were exposing themselves to detriment by acting on the basis of a false assumption, to adopt a course of inaction which encouraged them in the course they had adopted. To express the point in the language of promissory estoppel the appellant is estopped in all the circumstances from retreating from its implied promise to complete the contract.

At 538-9, Justice Brennan sought to allay concerns that a general application of equitable estoppel would make non-contractual promises enforceable as contractual promises:

A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise. When these elements are present, equitable estoppel almost wears the appearance of contract, for the action or inaction of the promisee looks like consideration for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting. ...

But there are differences between a contract and an equity created by estoppel. A contractual obligation is created by the agreement of the parties; an equity created by estoppel may be imposed irrespective of any agreement by the party bound. A contractual obligation must be supported by consideration; an equity created by estoppel need not be supported by what is, strictly speaking, consideration. The measure of a contractual obligation depends on the terms of the contract and the circumstances to which it applies; the measure of an equity created by estoppel varies according to what is necessary to prevent detriment resulting from unconscionable conduct.

Significance

This case was the first time the High Court was required to specifically decide whether the doctrine of promissory estoppel applied in Australia.

The High Court also allowed the doctrine of promissory estoppel to be used as more than just a defence by enabling Maher to use it to enforce a non-contractual obligation. That is, the Court decided that promissory estoppel could be used as a ‘sword’ and not just as a ‘shield’.