



# CLIENT INFORMATION BULLETIN

MACGILLIVRAYS

S O L I C I T O R S

## PARTIES BEWARE! ARE PRE-CONTRACTUAL COSTS RECOVERABLE?

**It's a common scenario: two parties enter into contract negotiations. One party begins preparatory work and incurs expenses. Negotiations fail, through no fault of either party and a binding contract is never formed. Is either party able to recover their expenses from the other?**

### CONTRACT LAW '101'

Considering no binding contract was ever in existence, then, in contract law, there is no basis for the recovery of expenses incurred. The traditional principle is that if there is no contract, then the losses should lie where they fall. Either party should be allowed to withdraw from negotiations without incurring liability, otherwise the process of freedom to contract would be restricted.

So, how is it possible for parties to recover pre-contractual costs? The answer lies in **equity**. The request for work to be done, or the expense to be incurred, might be a ground for a promissory estoppel if there is an aspect of unconscionability to the transaction.

### WHAT IS PROMISSORY ESTOPPEL?

Promissory estoppel ensures that promisors are stopped, or prevented from renegeing on their promises, where it would be unconscionable to allow them to do so<sup>1</sup>. Estoppel provides a way for promises to be legally binding even though there is no consideration<sup>2</sup>. The difference between contract and estoppel is that consideration is an essential part of a contract, however, no consideration is necessary for promissory estoppel.

The element of **unconscionability** is **critical** to estoppel. One party breaking a promise is not enough to prove that unconscionable conduct exists. Breaking a promise only becomes unconscionable conduct when (a) the person who received the promise has sufficiently relied on the promise from the person who gave the promise to his or her detriment, and (b) the person who gave the promise knows that they relied on his/her promise.

The person who received the promise must then be in a worse position than they would have been in if the promise, undertaking or assurance had never been made. Mere reliance is not enough. The reliance on the promise must be encouraged or generated by the person making the promise. Also, silence can support an estoppel if it reinforces or creates an assumption which, if not adhered to, causes detriment to the other party.

However, if the person who received the promise behaves in a way that is either unconscionable or reprehensible then the result is that unconscionability will not be established.

### THE BREAKTHROUGH AUSTRALIAN CASE

The High Court decision which brought promissory estoppel to Australia was the case of *Waltons Stores (Interstate) Ltd v Maher*<sup>3</sup>.

The Waltons had been negotiating with the Mahers to lease commercial property in Nowra (NSW) in late 1983. The Mahers proposed to demolish an old building on the site and to erect a new building.

<sup>1</sup> Stephen Graw, *An Introduction to the Law of Contract* (3rd ed, 1998) 97.

<sup>2</sup> Anonymous, "Promises binding in the absence of consideration - estoppel" (ANU Lecture).

<sup>3</sup> (1998) 164 CLR 387.

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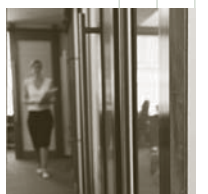
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Waltons' solicitor sent the Mahers' solicitor a draft Agreement for Lease with a form of Lease attached that required that the new building be completed by 15 January 1984.

On 7 November 1983, the Mahers' solicitor spoke to Waltons' solicitor pointing out that final agreement would have to be reached, "in the next day or two otherwise it will be impossible for the Mahers to complete" the rebuilding on time.

Waltons' solicitor then forwarded a fresh set of documents with a number of amendments. The covering letter stated that, whilst he had no formal instructions from Waltons, he believed that Waltons' approval would be forthcoming and that he would advise the following day if Waltons did not agree to any of the amendments.

On 11 November 1983, the Mahers' solicitor having heard nothing further, returned the documents duly signed "by way of exchange", indicating that the Mahers thought they had a contract.

The Mahers then proceeded with the demolition and rebuilding work, a fact made known to Waltons on 10 December 1983.

In the meantime, Waltons, which had been advised by its solicitor that contracts had not been exchanged and was reviewing its country operations, told its solicitor to "go slow" on the Mahers contract. Because of these instructions, Waltons' solicitor did not respond to Mahers' solicitor's letter of 11 November 1983 until 19 January 1984 when they informed the Mahers' solicitor that Waltons did not intend to proceed with the matter. The building work was then 40% completed.

The Mahers brought a case against Waltons arguing that they were estopped from denying that a contract existed.

The High Court held that the Mahers had been encouraged to believe that exchange was a mere formality and that the failure of Waltons' solicitor to get back to the Mahers' solicitor meant that the last minute amendments were acceptable and that the deal was going ahead. Consequently, it was unconscionable for Waltons not to proceed with the transaction with the knowledge that the Mahers were incurring considerable costs by proceeding with the construction of the building as if the contract was completed.

## REMEDIES AVAILABLE

Once promissory estoppel is successfully proven, the remedies which flow will aim to avoid the detriment caused by the person who has reneged on a promise. As such, the remedy is limited and is determined by the particular circumstances. In some cases this can be an award of damages. In extreme cases, such as the Waltons case, the only way to remove the detriment suffered by the Mahers as a result of their reliance on the assumption generated and encouraged by Waltons, was to hold the Waltons to the promise and enforce the assumed contract.

## WHAT YOU CAN DO

What **you** can learn from the above scenario, is that it may be in **your** interests to enter into a **Heads of Agreement** before entering into a contract. The Heads of Agreement would specify that each party will bear its own costs (including legal costs and any costs in relation to due diligence) and would also cover other important topics such as confidentiality and exclusivity periods.

The **Corporate & Business Services** team at MacGillivrays regularly works with clients on their contract options and available remedies. If you wish to discuss your negotiations or contracts, please contact our Corporate & Business Services Partners, John McGaw, Peter Dwyer or Tony Newton on 3221 4550.

BY MARIA CAPATI  
**Associate**  
**Corporate & Business Services**



# ON THE BUSES...

**MacGillivrays Corporate and Business Partner, Peter Dwyer, leads the way in the bus and transport industry.**

Peter and his team were recently involved in the acquisition of SunBus - one of the largest acquisitions in the history of the bus industry in Australia.

Peter Dwyer is recognised, not just in Queensland, but across Australia as one of the most knowledgeable lawyers in the transport bus industry with an unrivalled understanding of the intricacies and the nuances of dealing with a multitude of partners and conflicting priorities.

Peter has been specialising in the Bus Industry since the early 1990s. He was instrumental in the negotiations surrounding the deregulation of the Queensland Bus Industry in 1994. Since then he has led the negotiations surrounding the deregulation of the industry in NSW as well as advising clients in Tasmania and Victoria on Government reforms.

The NSW reforms covered the period 2004 to 2006 and Peter and his team settled 15 performance based contracts worth in excess of \$1.5 billion dollars. MacGillivrays represented both the bus owners and the New South Wales Bus and Coach Association (NSW BCA) in negotiations with the NSW Government.

The quality and professionalism of the service provided was recognised and acknowledged by the NSW Ministry of Transport (MoT) in 2006 with the Ministry recommending MacGillivrays, and Peter Dwyer in particular, as the 'preferred provider for legal services' for private bus operators in New South Wales. Peter's service to the bus industry was also publicly acknowledged when he was awarded "Supplier of the Year" by the New South Wales Bus Industry in the same year (2006).

As well as working actively in the area, Peter is involved at a more strategic level. In 2007 he attended the International Land Transport Conference, held at Hamilton Island and, in conjunction with executives of the NSW BCA, presented a paper on the impact of the introduction in New South Wales of performance based contracts on bus operators.

Peter's in-depth knowledge of the industry, combined with his expertise in the areas of arbitration, trade practice disputes, competition and market misuse, sale and acquisition of business, mediation of contract disputes, planning and environmental law and corporate law, (including share buy backs, joint ventures and shareholder agreements) mean that he is the first choice of bus business owners when they are faced with any legal or commercial issue.

# ABOUT US

## MACGILLIVRAYS APPOINTED BY PLANWEALTH

**MacGillivrays Solicitors has been engaged by PlanWealth Pty Ltd, one of Brisbane's leading financial planning firms.**

MacGillivrays is delighted to have been appointed to act as legal advisors for PlanWealth and looks forward to working closely with the principal of PlanWealth, Trevor Turner and his team.

Our Corporate and Business Services group will provide legal advice on Personal and Superannuation law as well as other personal and financial areas to PlanWealth and their clients. A testament to our growing level of expertise in these areas.

## MACGILLIVRAYS IS SEEING GREEN! ENVIRONMENTALLY SPEAKING...

**MacGillivrays has always been committed to a more sustainable future and to improving the social, economic and environmental well being of our community.**

This year MacGillivrays has appointed its first Environmental Officer, Ellen Dahl. Ellen is actively seeking input about what we can do to make our firm a "greener" one.

Here are some of our new "greener" practices that have been adopted:

- Turning off all staff computers and monitors before going home;
- Providing recycling bins for every staff member;
- The formation of car-pooling groups;
- Recycling "unwanted stationery" which has the added benefit of helping to reduce stationery costs and avoiding ordering excess stationery;
- Purchasing office paper with recycled content;
- Using double-sided copying and printing to minimise paper use; and
- Subscribing to online legal journals and looseleaf services - eliminating waste generated by printing, packaging and shipping.

Other Green office practices we are trialing include:

- Using free internet software which helps to reduce waste by replacing paper calendars, telephone message slips and sticky/post-it notes;
- Where possible utilising auto-filing PDF legal documents and electronically saving and emailing the document to files and clients without the need to print; and
- Transferring all paper office manuals, training guides and policies to our intranet as well as onto CDs which are given to new staff on their commencement. This helps to eliminate large quantities of paper and printing being wasted especially when updates to manuals are needed.

The firm is actively encouraging staff to think of greener ways travel to and from work. One such form is 'active transport' and includes walking to work or cycling. Both activities not only reduce greenhouse gas emissions but also have health benefits! Riding to work can improve overall health, save money on fuel, maintenance and depreciation costs. At MacGillivrays we have bike racks available in our car park along with showers for staff use.

If you have a "green" suggestion or would like us to adopt a specific green practise when communicating with you, please contact Ellen Dahl - (07) 3228 5283.

COMMERCIAL LITIGATION    WORKPLACE HEALTH  
& SAFETY    MEDIATION    INTELLECTUAL PROPERTY  
LITIGATION    DEBT RECOVERY    PERSONAL INJURY  
BANKING    DEFAULT    CORPORATIONS    LAW  
CONTRACTUAL DISPUTES    SHAREHOLDERS ACTIONS  
PARTNERSHIP DISPUTES    PRODUCT LIABILITY  
INSOLVENCY    ENVIRONMENTAL LAW  
JUDICIAL REVIEW    TRADE PRACTICES

## LEGAL STAFF PROMOTIONS

**July 1 sees the following promotions taking effect:**

**CHRIS STUDACH** is appointed to Partnership. Chris becomes a Partner in Property Services in Brisbane.

**REX FRANICH** is promoted to Associate. Rex is in our Melbourne office and practices in the areas of Banking, Property and Litigation & Dispute Resolution.

**GORDON PERKINS** is promoted to Associate whilst retaining his position as Manager Legal and Compliance, Banking Services.

**HANNAH RIGGS** is promoted to Associate. Hannah practices in Litigation & Dispute Resolution Services.

**KANE JACOBSON** is promoted to Associate. Kane practices in Corporate and Business Services.

**MARIA CAPATI** is promoted to Associate. Maria practices in Corporate and Business Services.

**MARK ASKIN** is promoted to Associate. Mark practices in Property Services.

S U C C E S S F U L



# WHAT'S NEW?

## WORKPLACE FRAUD: PROPOSED TAX ALLOWANCES FOR AMOUNTS MISAPPROPRIATED BY AN EMPLOYEE OR AGENT.

**We are all familiar with the old saying that "only two certainties exist in life: death and taxes". For the employer, fraud in the workplace has become a third certainty. Workplace fraud is a significant problem. It is compounded by the fact that those committing the crime are persons whom employers have placed in positions of trust.**

Misappropriation of money in the workplace causes Australian businesses to lose billions of dollars every year.

On 20 March 2008, the *Tax Laws Amendment (2008 Measures No 2) Bill 2008* (Cth) was introduced to the House of Representatives. If enacted into legislation, the laws should bring some welcome changes for the Australian business person incurring losses from misappropriation.

Among other changes, the Bill proposes measures which would allow for amounts misappropriated by employees or agents to be claimed as tax deductions by employers. The Bill allows for limited situations such as where the loss is incurred by employers during the *disposal of a depreciating asset* or *capital gains tax (CGT) asset* because an employee or agent steals the proceeds.

The Bill does not propose deductions for all types of workplace fraud, but rather proposes amendments to the *Income Tax Assessment Act 1997* (ITAA) to:

- allow a deduction for amounts that have been misappropriated by an employee or agent regarding the disposal of a depreciating asset under the uniform capital allowances regime (Div 40 of ITAA 1997);
- recognise the amount misappropriated by an employee or agent if a CGT event occurs and the amount would have otherwise been counted in measuring the amount of a capital gain or capital loss;
- permit a taxpayer to claim a deduction as well as recognise the misappropriation under the CGT provisions where the asset has been used for a partial taxable purpose.

If the Bill is passed, the amendments would begin with the 2007/2008 year and apply to amounts misappropriated in 2007/2008 and later.

**If you would like any further information on this article or other taxation matters, please contact a member of the MacGillivrays Corporate & Business Services team.**

# THE LIGHTER SIDE

**Just in case you ever get these two environments mixed up, this should make things a little bit clearer<sup>4</sup>:**

## @ PRISON

You spend most of your time in a 10x10 cell.

You get three meals a day, fully paid for.

For good behaviour, you get time off.

The guard locks and unlocks all the doors for you.

You can watch TV and play games.

You get your own toilet.

They allow your family and friends to visit.

All expenses are paid by the taxpayers with no work required.

You spend most of your life inside bars wanting to get out.

You must deal with sadistic wardens.

## @ WORK

You spend most of your time in an 6x6 cubicle.

You get a break for one meal and you have to pay for it.

For good behaviour, you get more work.

You must carry a security card and open all the doors yourself.

You could get fired for watching TV and playing games (or fined for breaching the IT policy!)

You have to share the toilet with people who... well... we know what they do!

You aren't even supposed to speak to your family.

You must pay all your expenses to go to work, and they deduct taxes from your salary to pay for prisoners.

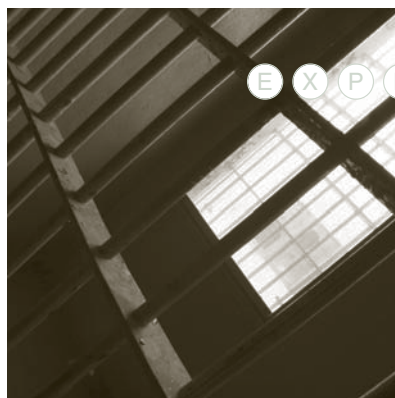
You spend most of your time wanting to get out and go inside bars.

They are called "managers".

BY RACHEL CONNORS  
Knowledge Manager



<sup>4</sup> Courtesy of an anonymous email author.  
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