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**Case Study 02**

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Promissory estoppel greatly helps a person for protecting his rights and legal benefits. It has 6 factors to be identified and the conclusion can be varies according to the way the parties rely on these factors. To advise the Clarks about their rights, this essay will notice that there was no contract between the Clarks and the Mahers and stated that the Clarks can rely on promissory estoppel to protect their rights. However, it also is recommendation that Mahers may argue there is no estoppel.

In contract law it allows for negotiation before the parties finally reach full agreement<sup>1</sup>. During negotiations, the parties may not intend to be bound until they signed a contract<sup>2</sup>. The Mahers' solicitors sent The Clarks' solicitor a draft agreement that the new premises should be ready for lease by 15 February 2005, this will be consider a negotiation period even The Clarks' has accepted that term. The Clarks' acceptance may not be considering an agreement because during negotiation period both parties are allowed to negotiate and introduce terms until they reach full agreement. It is the requirement of a valid contract that the acceptance of an offer is complete and unqualified with nothing further to be negotiated between the parties<sup>3</sup>.

One of the requirements for a contract to be valid was that there should be an intention to be legally bound in a contract<sup>4</sup>. During negotiations , The Mahers shows no intention to be bound as she didn't assign a final agreement to the Clarks. Therefore there are no contract between the Mahers and the Clarks.

For the Clarks to establish an equitable estoppel, he has to prove the following six tests for promissory estoppel<sup>5</sup>:

- The Clarks expect that there will be a legal relationship between them. As the fact that they had a draft agreement, amended documents and conversations between their solicitors, The Mahers cannot withdraw from the expected legal relationship.

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<sup>1</sup> Paul Latimer, *Australian Business Law* (2007), 288

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> *ibid*, 263

<sup>5</sup> *ibid*, 332-3.

- The Mahers has induced the Clarks to adopt the expected legal relationship that is the Clarks provided the new premises for the Mahers. In other words, The Mahers was responsible for the expectation.
- The Clarks acted on the expectation. In fact, the Clarks started the building work such as demolition and rebuilding in reliance on that the Mahers would lease the new premises in February 2005.
- The Mahers intended Clarks to so act. That means the Mahers knew that the Clarks' is going a head with the procedure of demolition and rebuilding work.
- The Clarks will suffer loss if the expectation is not fulfilled. That is to say, there will be a detriment for the Clark if the Mahers would not lease the new premises.
- The Mahers has not taken any steps to warn that he may not lease the new premises. In other words, the Mahers failed to intimate the probability that he may not lease and failed to act to avoid the detriment during these months.

Similar to *Waltons Stores (Interstate) Ltd v Maher* case<sup>6</sup>, Plaintiff assumed that amendments were acceptable to defendant so that the exchange of agreement or contract was only a formality. Furthermore, D intended that P should continue the work in reliance on that expectation. Secondly, during the procedure, D had to elect either to terminate the negotiations or allow P to continue. Thirdly, D's silence induced P to continue. Last, in the Clarks and the Mahers' circumstance, during a period of time of three and half months, the Mahers did not make any efforts to negotiate but letting Clarks to continue to rebuild; it was too late for the Mahers to reclaim the initial freedom to withdraw because the Clark would suffer loss as he might use the funds to do something more urgent than this deals with the Mahers.

On the other hand, the Clarks have to notice that the Mahers would argue that the Clarks do not have promissory estoppels case against the Mahers. The Mahers may claim that the Clarks are not disadvantage with the Mahers silent as the Mahers doesn't indicate any agreement. Promissory estoppel was established by Denning J in 1946 and it is an exception of consideration. Promissory estoppel is a legal principle,

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<sup>6</sup> *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387

which stops a person from turning back to his words. In some particular circumstances when he makes a promise<sup>7</sup>. For example, a person makes a promise to come to contract. This promise causes some disadvantages for his partner. If this person rejects this promise, the partner has a right to ask court to force him to fulfill a contract or pay damage because of promissory estoppel. There are 6 factors building up promissory estoppel, which are assumption, responsibility, reliance, intending to so act, detriment, and no action to warn that a person may not keep a promise<sup>8</sup>. For this reason, the Clarks should know that in this case, if the Mahers is successful to justify that there are no clearly detriment and assumption, there may not be promissory estoppel. The Mahers may argue that there is no disadvantage for the Clarks because demolition and rebuilding is to simply replace an old asset for new asset. That means it cannot be said that the Clarks got a detriment because the Mahers had a new premises as a result. Moreover, the Mahers may also state that there is no agreement or promise from him. This is because, according to the Mahers, they promised to come to contract in the case the new premises should be ready for lease by 15 February 2005 and they did not give any other promises. The Mahers' solicitor could not act on behalf for them with the contract because there were no formal instructions. The case *Horsman v Commissioner of Main Roads* may justify these situations. According to this case, the court held that P, the proprietor could not raise promissory estoppel because P was receiving rent and there was no detriment as a result<sup>9</sup>.

To conclude, the Clarks should argue that there was a promissory estoppel because The Mahers did nothing to warn them to stop demolition. However, The Clarks should know that The Mahers would argue that there was no clearly assumption and detriment and there was no promissory estoppel as a result.

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<sup>7</sup> *ibid*, 315.

<sup>8</sup> *ibid*, 326.

<sup>9</sup> *Horsman v Commissioner of Main Roads* [1999] FCA 1733.

## Bibliography

Paul Latimer, *Australian Business Law* (2007)

Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387

Horsman v Commissioner of Main Roads [1999] FCA 1733

## Comments

*Your arguments on the validity of the contract are quite good. The issue is whether there is any remedy in case there is no valid contract. You could have further discussed the applicability of the provisions of the Instruments Act or the Statute of Frauds. Normally deals of this kind are finalised by the exchange of contracts which had not happened. Clarks stated work at their own risk.*

*And also you have correctly identified that the given case involves the concept of promissory estoppel and the relevancy of Waltons case. Therefore, a remedy would be available under the law of equity.*

*The key point is that this can operate well outside an existing contract without any consideration and it can be used as a cause of action. Therefore, Mahers used this as a positive remedy in the absence of contract.*