

Estoppel

Construction Law Terms: A to Z

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E is for Estoppel

What is a Estoppel?

The term "estoppel" encompasses several legal doctrines which prevent a party from moving away from a statement or promise it has previously made to another. A typical scenario giving rise to an estoppel between two parties ('A' and 'B') is:

- A clear and unequivocal communication from 'A' as to a state of affairs, or a shared understanding between 'A' and 'B';
- 'A' must have intended that 'B' rely on its clear and unequivocal communication (or shared understanding);
- 'B' did reasonably rely on the clear and unequivocal communication (or shared understanding); and
- 'A' now seeks to resile from its clear and unequivocal communication (or shared understanding).

The following facts are an example of how this might arise:

- 'A' lends 'B' £100. 'B' is having difficulty raising money to pay back the full sum. 'A' says to 'B' that 'A' will agree to accept all that 'B' has (£75) to settle the debt.
- In reliance on 'A's statement, 'B' pays 'A' all that he has (£75).
- After 'B' has paid 'A' £75, 'A' demands 'B' pay the remaining £25 of the original debt.
- 'B' could argue at this point that 'A' is estopped from making its claim.

There are several different types of estoppel, but in terms of construction and engineering contracts, the following three types are the most common:

1. Estoppel by representation;
2. Promissory estoppel; and
3. Estoppel by convention.

It follows that, when pleading estoppel, a party should identify on which form of estoppel it is relying.

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Estoppel by representation

Estoppel by representation prevents a party ('A') from saying a set of facts or a situation is untrue when it previously represented to party 'B' that they were true. 'A' is estopped from doing so if its action caused 'B', believing those facts to be true, to take action to its detriment. This is useful for 'B' if he was misled out of court only for 'A' to deny it once in litigation/arbitration proceedings.

Whether or not the relevant representation was made and the meaning of that representation is interpreted through the ears of a reasonable listener and will only succeed if it is precise and unambiguous, or clear and unequivocal, in its meaning.¹

In addition:

- 'A' must knowingly communicate the representation to the receiving party ('B'), intending for 'B' to act on the representation (which is determined objectively);
- 'B' must show that:
 - (i) it understood the representation to be true, and changed its position in reliance on the representation; and
 - (ii) a reasonable person would have believed the representation to be true and that it was reasonable to rely on the representation as it did.

An example of this can be found in *Mears Ltd -v- Shoreline Housing Partnership Ltd*.² Shoreline appointed Mears to carry out repairs and maintenance work.

- Mears said that, in meetings in May 2009, the parties agreed Mears would be paid on the basis of "Composite Rates" and that Shoreline said there was no need to amend the contract (once concluded) to take account of those rates; the signed contract did not permit payment to Mears on the basis of Composite Rates and contained an "entire agreement" clause.
- Shoreline paid Mears on the basis of the Composite Rates for 13,605 jobs between July 2009 and January 2010.
- But, Mears subsequently deducted £300,000 from the amount claimed by Mears on the basis that Mears had wrongly claimed payment on the basis of the Composite Rates.
- Mears commenced proceedings, relying on both estoppel by convention and estoppel by representation as well as misrepresentation.
- Mr Justice Akenhead found that the evidence supported a shared understanding that the Composite Rates were to be the basis of Mears' charging and Shoreline's payments. Therefore, both estoppel by representation (based on the representations made at meetings in May 2009) and estoppel by convention (based on the payments made between July 2009 and January 2010) were made out.

Promissory Estoppel

Promissory estoppel prevents a party from insisting on its contractual rights in circumstances where it has previously promised or represented that it would not do so and it would be unconscionable or unjust to allow that party to insist on those rights.

A party seeking to establish a promissory estoppel must demonstrate:

- A pre-existing relationship between the parties;
- A clear and unequivocal promise or representation that the other party will not insist on its legal rights;
- That it changed its position in reliance on the promise; and
- That it would be unconscionable or unjust to allow the other party to renege on its promise (or representation) that it would not insist on its legal rights.

1. *Low -v- Bowerie* [1891] 3Ch 82
 2. [2015] EWHC 1396 (TCC)

The case of *PM Project Services Ltd -v- Dairy Crest Ltd*,³ arose after Dairy Crest appointed PM as a consultant in relation to construction of its new facilities at its factory in Cornwall.

- The works were delayed and the parties entered into a deed of variation under which PM would present an invoice for a balloon payment of approximately £800,000 on the earlier of (i) the date for completion of the works and (ii) 8 October 2015.
- By September 2015, it was clear that completion of the contractor's work was a way off. As a result, PM said that it would defer the presentation of its invoice for the balloon payment. The parties disagreed as to when the presentation of the invoice would be deferred to:
 - PM said the agreement was that it was to be deferred until the works had been completed;
 - Dairy Crest said the agreement was that it was to be deferred until three months after the works had been completed.
- In December 2015, PM issued an invoice for the balloon payment on the basis that the works were complete (which was disputed by Dairy Crest).
- Dairy Crest did not pay the invoice and PM brought a summary judgment application against Dairy Crest for that non-payment.
- The Court rejected PM's summary judgment application on the basis that Dairy Crest's defence had a reasonable prospect of success at trial.

Estoppel by convention

An estoppel by convention prevents a party from disputing the truth of an understanding of fact.

A party 'A' seeking to establish an estoppel by convention must demonstrate that:

- The parties ('A' and 'B') to a contract (or a course of dealing) have proceeded on a clear and unequivocal assumed state of facts or law;
- The assumed state of facts was shared by the parties (or made by one party and agreed to by the other) - there must have been some form of communication of the assumed state of facts between the parties (either by words or conduct);
- The other party ('B') intended for 'A' to rely on the assumption;
- 'A' relied on the assumed state of facts or law; and
- It would be unconscionable or unjust to allow 'B' to go back on the assumed state of facts or law.

The case of *Leeds City Council -v- Waco UK Ltd*⁴ is a good example of an estoppel by convention on a construction project. Waco's applications were consistently a few days later than the dates stipulated in the contract (most of the eleven pre-practical completion applications were late, with the average delay being about three days). The Court decided that, although there was no express agreement to vary the contract, there was a course of conduct - or a 'convention' - by which the employer's agent acting on behalf of Leeds City Council agreed to accept late applications. Consequently, Leeds City Council was estopped from arguing applications that were a few days late were out of time (although, ultimately, this didn't help Waco because the payment applications it was seeking to rely on were either (i) premature or (ii) later than a few days, and therefore outside the course of conduct of applications being permitted to be "a few days" late).

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3. [2016] EWHC 1235 (TCC)
4. [2015] EWHC 1400 (TCC)