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Has the Statute of Frauds been rendered nugatory?

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Summary

The Statute of Frauds and Perjuries 1677 s 4, which requires the terms of oral guarantees to be recorded in writing, has been imported and retained by certain overseas jurisdictions, including Western Australia. Along with this statutory requirement, the attendant issue of the extent to which equity may intervene to allow enforcement of an imperfect guarantee has been transplanted. Typified by the House of Lords decision in *Actionstrength Ltd v International Glass Engineering* [2003] UKHL 17; [2003] 2 AC 541, English courts have generally adopted a restrictive approach to equitable estoppel, particularly regarding the application of this doctrine to the Statute of Frauds. Since the landmark case of *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387 Australian courts have generally adopted a wider approach to equitable estoppel and one seemingly incompatible with English law in this regard. The recent case of *Tipperary Developments Pty Ltd v The State of Western Australia* [2009] WASCA 126 confirmed that equitable estoppel could specifically outflank the Statute of Frauds. This decision appears to widen the gap between the two conceptions of equitable estoppel still further, and raises the question whether the Statute of Frauds has been rendered nugatory in Western Australia, if not elsewhere. This note discusses *Tipperary Developments* and considers these possibilities.

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Background

Under the Statute of Frauds and Perjuries 1677 s 4, the terms of an oral guarantee must be recorded in writing and signed; otherwise it is unenforceable (*Leroux v Brown* (1852) 138 ER 1119). Law Reform (Statute of Frauds) Act 1962 (WA) s 2 directly imports this provision into the law of Western Australia. The Northern Territory, Queensland, Tasmania and Victoria have statutes with substantially the same effect, whereas the Australian Capital Territory, New South Wales and South Australia have repealed the Statute of Frauds and have no general formal requirements for guarantees. New Zealand recently parted company with the Statute of Frauds, and, with effect from 1 January 2008, guarantees must be made in writing, not merely recorded in a memorandum. (All Australian states and New Zealand have Statute of Frauds derived legislation requiring dealings with land to be recorded in writing.)

The Statute of Frauds has little relevance to consumers. First, specific legislative provisions, such as Credit Act 1984 (WA) s 136, may require guarantees relating to consumer credit contracts to be made in writing, and, second, it is standard banking practice to require a written guarantee. This practice has the effect of removing a guarantor’s common law protections from the contract (Grunfeld 1954) and helps protect the bank against equitable claims for undue influence or unconscionable bargain (see, eg, *Royal Bank of Scotland plc v Etridge (No 2)* [2001] UKHL 44; [2002] 2 AC 773). However, in a business context, oral guarantees, which do not comply with the Statute of Frauds, may be given – perhaps because the parties do not recognise these undertaking as being the same in law as a guarantee given to a bank. In such event, despite statutory non-compliance, the beneficiary of the guarantee may turn to equity for recourse.

Over the centuries, equity has developed two doctrines – part performance and estoppel – for engaging with parol contracts rendered imperfect by the Statute of Frauds and derivative legislation. (Williams 1932 at p 223 identifies part performance and prevention of exercising a sufficient writing as forms of equitable fraud. Rectification is also available for incompletely recorded contracts: see *Craddock Bros v Hunt* [1922] 2 Ch 809.) It is generally accepted that part performance is restricted in practice to dealings with land (*Maddison v Alderson* (1883) 8 App Cas 467), but equitable estoppel has broader application and potentially applies to imperfect guarantees. In *Actionstrength Ltd v International Glass Engineering* [2003] UKHL 17; [2003] 2 AC 541, the House of Lords declined to use equitable estoppel to enforce a

parol guarantee, partly, on the grounds that it would render Statute of Frauds s 4 nugatory. In contrast, the Court of Appeal of Western Australia in *Tipperary Developments Pty Ltd v The State of Western Australia* [2009] WASCA 126 has recently held that equitable estoppel can be relied upon to enforce a parol guarantee, notwithstanding the statutory requirement of a written memorandum. This note considers whether, after *Tipperary Developments*, the Statute of Frauds has indeed been rendered nugatory in Western Australia, if not elsewhere, and whether the presumed gap between English and Australian conceptions of equitable estoppel has widened further.

The *Actionstrength* decision

The approach of English law to equitable estoppel and imperfect guarantees is demonstrated most clearly in *Actionstrength Ltd v International Glass Engineering* [2003] UKHL 17; [2003] 2 AC 541. This case arose in the context of a building project for which Actionstrength, a recruitment agency, supplied and paid workers for Inglen, the construction company. When Inglen, which later became insolvent, failed to pay Actionstrength, the client, Saint-Gobain, orally promised that if Actionstrength continued to provide labour, it would ensure payment of any amounts left owing by Inglen. The parties accepted Statute of Frauds s 4 applied to this oral agreement, but Actionstrength argued Saint-Gobain was estopped in equity from denying its liability. With some reluctance, the House of Lords upheld the Court of Appeal's dismissal of the estoppel plea on the basis that the promise or assurance given by Saint-Gobain was itself insufficient for an estoppel claim. Lord Walker said (at p 625):

> "The only assurance given to Actionstrength was the promise itself. In order to be estopped from invoking the Statute of Frauds there must be something more, such as some additional encouragement, inducement or assurance."

Without the presence of something more, "[t]he result would be to render nugatory a provision, which despite its age, Parliament has deliberately chosen to retain" (Lord Bingham at p 620). Although *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 was included in the list of "cases also referred to in list of authorities", cognisance was not taken of overseas precedent in *Actionstrength*.

The *Waltons Stores* decision

In *Waltons Stores*, Waltons, a retailer, negotiated with landowners, the Mahers, for a lease in terms of which the Mahers would demolish a building and construct a new one to Waltons' specifications. Under applicable New South Wales law an exchange of parts is required to create a binding agreement for a lease. Further, Conveyancing Act 1919 (NSW) s 54A, a derivative of the Statute of Frauds, provides that no action can be brought upon any contract for the disposition of an interest in land unless a written note or memorandum is signed by the party to be charged. No signed record of the agreement between Waltons and the Mahers was created and finalised parts were not exchanged. However, in November 1983, after the Mahers made it known that they would need to demolish the building and organise supplies before the Christmas shutdown of the construction industry, Waltons' solicitor indicated that the terms of the lease, which the Mahers had executed on their part, would be acceptable to his client. Soon afterwards, Waltons became aware that the demolition was proceeding. Early in January 1984, the Mahers began construction. Waltons' solicitor did not communicate with the Mahers' solicitor between 11 November 1983 and 19 January

1984 when the Mahers were advised that Waltons would not be concluding the contractual formalities. The building was about 40 percent completed at this time.

The High Court of Australia held that, although a binding agreement for a lease had not come into existence, Waltons was estopped from denying that it was bound. Brennan J (at pp 428-429) identified the following prerequisites before equitable estoppel could be claimed:

(1) The plaintiff assumes a particular legal relationship with the defendant exists (or expects it will exist)

(2) The defendant induces the plaintiff to adopt that assumption

(3) The plaintiff acts or abstains from acting in *reasonable* reliance on the assumption

(4) The defendant knows he would or intends him to rely on the assumption

(5) The plaintiff's action or inaction will occasion detriment if the assumption is not fulfilled

(6) The defendant fails to act to avoid the detriment whether by fulfilling the assumption or otherwise.

Explaining why Conveyancing Act 1919 (NSW) s 54A did not present an obstacle to the grant of equitable relief, Brennan J said (at pp 422-423):

> "The Statute of Frauds and similar provisions prescribing formalities affecting proof of contracts have never stood in the way of a decree to enforce a proprietary estoppel ... and, in principle, there is no reason why such provisions should apply when any other equity is created by estoppel. The action to enforce an equity created by estoppel is not brought 'upon any contract', for the equity arises out of the circumstances. This is not to say that there is an equity which precludes the application of the statute. It is to say that the statute has no application to the equity."

The "yawning gap"

In an influential article written in the wake of the *Actionstrength* decision, Robertson (2003 at p 188) suggested, a "yawning gap" had opened up between the Australian and English doctrines of equitable estoppel. Whereas *Waltons Stores* unequivocally established equitable estoppel as an independent, substantive source of rights – a so-called sword – *Actionstrength* limited promissory estoppel to the role of a shield, a preclusionary right, which may prevent a person from enforcing a legal right. It was also argued that, in Australia, a distinction is no longer drawn between promissory and proprietary estoppel; the different classes of estoppel of English law being joined in Australia under an overarching principle that equity may remedy unconscionable conduct.

Waltons Stores has been followed by superior courts in both Australia (see, eg, *Commonwealth of Australia v Verwayen* [1990] HCA 39; (1990) 170 CLR 394) and New Zealand (see, eg, *Krukziener v Hanover Finance Ltd* [2008] NZCA 187; (2008) 19 PRNZ 162 (CA)), but dissenting voices have been heard. For example, in *The Bell Group Ltd (In Liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 Owen J (at para [3456]) denied the existence of a single overarching doctrine of equitable estoppel in Australian law, notwithstanding "the best efforts of some members of the High Court in the 1980s and early 1990s". More specifically, in *Powercell Pty Ltd v*

Cuzeno Pty Ltd [2004] NSWCA 51, a unanimous decision of the New South Wales Court of Appeal, Giles JA said (at para [71]) the House of Lords decision in *Actionstrength* "is conclusive against the appellant", who claimed promissory estoppel in relation to an unsupported executory promise in the face of Conveyancing Act 1919 (NSW) s 54A. Rejecting Robertson's thesis, on which the appellant had mainly relied, Giles JA (at paras [76]-[77]) said "an estoppel can be a source of rights" but "[I]t does not follow that where the source of the rights is contractual, the statutory imperative of s 54A can be overcome by creation of an alternative source of rights." This is, then, in broad brushstroke, the judicial context in which *Tipperary Developments* would be decided.

The *Tipperary Developments* decision

Facts

Tipperary Developments v The State of Western Australia [2009] WASCA 126 is a postscript to the sordid chapter in Western Australian history when the State government maintained an unusually close and fiscally imprudent relationship with a coterie of wealthy speculators. (See Kennedy 1992 for the Royal Commission inquiry into the arrangements. The factual background to the case is given in paras [31]-[88] of the appeal, but *Tipperary Developments Pty Ltd v The State of Western Australia* [2006] WASC 137 [10]-[289], the report of the original trial, provides a fuller narrative.)
Rothwells, a merchant bank under the chairmanship of Laurie Connell, operated primarily in Western Australia and was considered critical by the State government to its economy. In a period of hectic economic growth and speculation, Rothwells accumulated a book of what would be described as "toxic debt" in contemporary parlance. Following the stock market crash of 1987 and a consequent run on Rothwells deposits, a rescue package was expeditiously arranged over the weekend of 24 and 25 October 1987. Government agencies, including the State Government Insurance Commission (SGIC) and the Government Employees Superannuation Board (GESB), had provided liquidity to Rothwells before the rescue attempt. Kevin Edwards was the Executive Director of the Department of Premier and Cabinet and Deputy Chairman of SGIC. Wyvern Rees was the chair of SGIC. Tony Lloyd, an Assistant Under-Treasurer and chair of GESB, became Rothwells' managing director on 1 January 1988.

On 22 October 1987, for A$30 million, SGIC bought 50 percent of a property trust, which held an interest in the land on which the historical Perth Technical School was situated, from a partnership comprising Connell and his wife. As agreed, the proceeds were deposited with Rothwells on 23 October 1987. Despite the rescue package, Rothwells continued to experience liquidity problems. In early November 1987, SGIC and GESB purchased certain downtown properties from companies in the Bell Group Ltd, including a further part of the Perth Technical School site. In addition, SGIC acquired the Bell Group's shareholding in mining conglomerate BHP. It was a condition of the Bell transactions that the vendors deposit $50 million with Rothwells. Further deposits of $50 million were each made by SGIC and GESB in January 1988.

In January 1988, SGIC and GESB sought purchase tenders for the Perth Technical School site. The preferred tenderer was a consortium comprising Tipperary Developments Pty Ltd and Consolidated Press Holdings Ltd (CPH). At a meeting on 16 March 1988 in Sydney, New South Wales, attended by representatives of the consortium, Edwards, Lloyd and Rees, the State imposed a separate condition on the

sale that the successful purchaser should deposit $50 million with Rothwells. The State, ostensibly represented by Edwards, also made a contractual offer of a guarantee at this meeting. As a result of the March oral agreement, Tipperary Developments made the deposit with Rothwells.

In the event, Rothwells proved beyond rescue, and provisional liquidators were appointed on 3 December 1988. Tipperary Developments received a liquidation distribution, but sought to make good its losses of around A$30 million by enforcing the oral guarantee provided by the State. Because the Statute of Frauds applies in Western Australia, the State argued, inter alia, that the guarantee was unenforceable, and, in response, Tipperary Developments argued the State was estopped in equity from denying its liability.

In the original trial, Murray ACJ held (at para [379]) that, following the House of Lords' decision in *Actionstrength*:

> " … the doctrine of estoppel cannot be applied so as to defeat the operation of s 4 of the Statute of Frauds, rendering unenforceable a promise by way of guarantee made orally, if, as in this case, there is no other element to the estoppel claimed than that the creditor has acted to its detriment on the basis of the guarantor's oral promise."

The issue whether New South Wales law, which has no formal requirements for guarantees, or Western Australian law should apply to the oral contract was raised, but this argument was not developed.

On appeal, the issue of applicable law was examined, and, following *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, the Statute of Frauds was found to be a substantive, rather than formal matter, and so Western Australian law applied. The issues of a written record and equitable estoppel, which would have been irrelevant under the law of New South Wales, therefore, became significant.

Decision

Based on the State officials' lack of authority, Wheeler, McLure and Newnes JJA unanimously rejected Tipperary Development's appeal, with Newnes JA fully concurring with McLure JA. However, Wheeler JA took a different view from his peers concerning the estoppel ground, and, like the court a quo, sought to reconcile *Actionstrength* with *Waltons Stores*, concluding (at para [24]):

> " … it appears to me that, applying by analogy the reasoning in *Waltons Stores*, an equitable estoppel of a kind which would preclude reliance on s 4 of the Statute of Frauds is established only if there is a representation which includes or involves a representation that an enforceable guarantee will be, or has been, given."

McLure JA, in contrast, did not seek to reconcile the operation of equitable estoppel in Australian and English law, and concluded (at para [145]) "there is majority support for the proposition that the *Statute of Frauds* does not stand in the way of enforcing an equitable estoppel claim". Following Brennan J in *Waltons Stores*, McLure J (at para [140]) said, first, equitable estoppel does not require a correspondence between the assumption and the conduct estopped – the latter is what is required to satisfy the equity to prevent unconscionable conduct – second, the equity is enforced, not a contract and therefore the Statute of Frauds does not apply. If

Tipperary Developments "establishes an equitable estoppel, it is entitled to relief notwithstanding failure to comply with Statute of Frauds s 4".

Discussion

The decision in *Tipperary Developments* highlights what may be described as reconciliatory and schismatic approaches to equitable estoppel among Australian jurists. The former seek to find similarities between English and Australian law in this regard, and the latter to draw a clear distinction between the two.

Reconciliatory approach

Both Murray AJA in the court a quo and Wheeler JA in the Court of Appeal (WA) followed *Actionstrength*, as did the Court of Appeal (NSW) in *Powercell*. To reconcile *Actionstrength* and *Waltons Stores* it must be accepted that the correct judgment in *Waltons Stores* is that of Mason CJ and Wilson J, who said (at p 406) something more than the failure to fulfil a promise is needed for equitable estoppel to apply.

It is not obvious why these judges should appear so willing to follow *Actionstrength*. In the light of Saint-Gobain's behaviour, Lord Bingham dismissed Actionstrength's appeal reluctantly and Lord Woolf "with regret" (at p 620). After *Waltons Stores* and *Verwayen*, Australian judges are not bound to make decisions they find similarly distasteful in comparable circumstances, and it is not immediately apparent why they might seek to limit their equitable reach in the face of unconscionable conduct. Indeed, in *Powercell*, Gray J (at para [80]) implied that no equitable remedy should be available to the beneficiary of an imperfect guarantee, arguing that part performance, rather than estoppel was the proper equitable response to an imperfect contract. Since this remedy is not available to the beneficiary of a parol guarantee, no equitable respite would be available.

Respect for the House of Lords is immanent in Australasian jurisprudence but the *Actionstrength* decision is not beyond critique. One leading commentator, for example, identifies the "strangeness of the reasoning in the case" (Furmston 2002 at p 111). Likewise, with regard to the something extra, Peel (2007 p 202) observes,

> " … it is a little difficult to see what might suffice. If the guarantor is required to represent expressly that it will not invoke the Statute, the parties' minds must surely be sufficiently aware of its requirements as to ensure that they are met".

Most pertinent, Furmston (2002 at p 111) notes the inconsistency of *Actionstrength* with, inter alia, Australian law, saying:

> "It is certainly possible to imagine a common law system of contract which would come to a different result on these facts. This would seem to be the case in both the United States and in Australia. Some five Australian cases were cited to the House of Lords but none of them is mentioned in any of the speeches."

Schismatic approach

Representing the schismatic approach, McLure J observed in *Tipperary Developments* (at para [132]) "English law of estoppel, particularly promissory and equitable estoppel, is narrower than Australian law". Further, she refutes the argument that the

Mason-Wilson something more in *Waltons Stores* is the same as the additional requirement of the House of Lords in *Actionstrength*, saying (at para [142]):

> "The 'something more' for Mason CJ and Wilson J was that the owner reasonably acted on the assumption, encouraged and induced by the company that exchange was a formality and, to the knowledge of the company, acted to their detriment by proceeding with costly work on site [Brennan's elements (2), (3) and (4)]."

McLure J (at para [144]) elicited strong support for the Brennan analysis as representing the majority position in *Waltons Stores* (*Giumelli v Giumelli* (1996) 17 WAR 159; *Riches v Hogben* [1986] 1 Qd R 315, *Collin v Holden* [1989] VR 510; *Agius v Sage* [1999] VSC 100) and persuasively distinguished *Powercell*, noting "the appellant in that case relied solely on a defensive equity and did not plead estoppel as a positive cause of action". In other words, if beneficiaries of imperfect guarantees restrict themselves to pleading equitable estoppel as a shield (a preclusionary doctrine), they will be frustrated by *Actionstrength*, but if they use it as a sword (a substantive doctrine), they will benefit from the more expansive principles of *Waltons Stores*. In the context of Australasian precedent, it is submitted that the schismatic approach captured in McLure J's reasoning is both more persuasive and attractive than the reconciliatory approach.

Conclusion

The commercial and legal value of retaining the rump of the Statute of Frauds is moot, but that is a matter for Parliament to decide. Notwithstanding plausible arguments against retention (see, eg, Law Commission (NZ) 1998), like the United Kingdom, Western Australia has kept the requirement for the terms of a parol guarantee to be recorded in writing. It is, however, the courts' decision to determine the extent to which equity will intervene to remedy injustice. As Lord Reid observed in *Steadman v Steadman* [1976] A.C. 536 (at p 540): "There is nothing about part performance in the Statute of Frauds. It is an invention of the Court of Chancery."

English dicta, such as *Crabb v Arun DC* [1976] Ch 179 (at p 193), have indicated the possibility of a move towards an Australian approach but, as Hanbury (2009, para 27–019, p 927) concludes, "recent decisions lie against the idea of "an overarching principle" which would blur the distinctions". In *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; [2009] 1 AC 453) Lord Walker of Gestingthorpe observed (at para [81]) "the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel". A gap does then exist between Australian and English doctrines of equitable estoppel and cannot be glossed over. *Tipperary Developments* confirms these differences and, in refuting reconciliatory opinions, perhaps widens the gap still further. Nevertheless, this does not imply a disregard either for business certainty or statutory law in Australia. The Statute of Frauds is not rendered nugatory by the *Tipperary Developments* decision. After *Waltons Stores* and the outflanking of Conveyancing Act 1919 (NSW) s 54A, all Statute of Frauds derived provisions were ostensibly vulnerable in Australia. Yet, in the event, there is nothing to suggest that any of the statutes have been compromised. The *Waltons Stores* doctrine is principled and justifiable: English courts might benefit from giving it greater cognisance.

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